Law Quadrangle Notes

THE UNIVERSITY OF MICHIGAN LAW SCHOOL VOLUME 30, NUMBER 3, SPRING, 1986

An Ongoing Tradition: International and Comparative Law at Michigan

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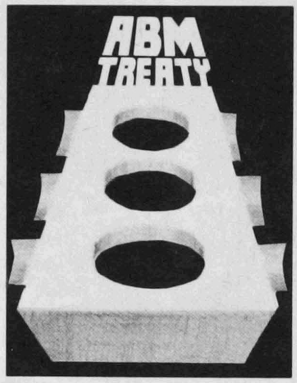
ARTICLES



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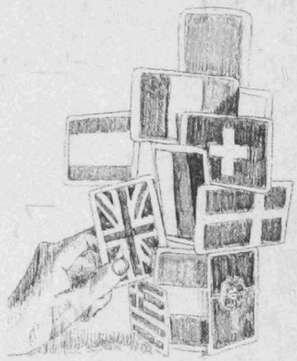
DEPARTMENTS



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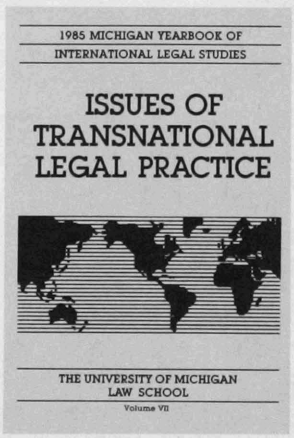
ON THE COVER: The Law School's first class of graduate students, in 1890, included **Takanosuke Iriye,** pictured on the upper left. Iriye went on to become a judge of the Appeals Court of Tokyo and Osaka. That same year, **Gisan (Hashimoto) Kasuya** received the LL.B. Kasuya later was elected to the House of Representatives of Japan's National Assembly, and served as its chairman. American **Elias Findley Johnson,** J.D., 1890, LL.M., 1891, served as justice of the Supreme Court of the Philippines during the first quarter of this century. **Manuel Teehankee,** of the Philippines, **Peter Van den Bossche,** of Belgium, and **Huijie Zhang,** of China, received the LL.M. in 1986.

Law Quadrangle Notes (USPS 983-460) is issued quarterly by the University of Michigan Law School. Second-class postage paid at Ann Arbor, Michigan. Office of publication: *Law Quadrangle Notes,* The University of Michigan, Ann Arbor, Michigan 48109-1215.
POSTMASTER, SEND FORM 3579 TO: Editor, *Law Quadrangle Notes,* Law School, The University of Michigan, Ann Arbor, Michigan 48109-1215.
Publications Chairman: Yale Kamisar, U-M Law School; **Editor:** Bonnie Brereton, U-M Law School; **Graphic Designer, Illustrator:** Jennifer Spoon, U-M Office of Development and Marketing Communication; **Production Editor:** Carol Hellman, U-M Office of Development and Marketing Communication. **Photo Credits:** All photos by Gregory Fox, except photo on p. 24, by Frank Murray, and photos on pages 1, 5, 18, 21, 22, 23, 25.



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An ongoing tradition

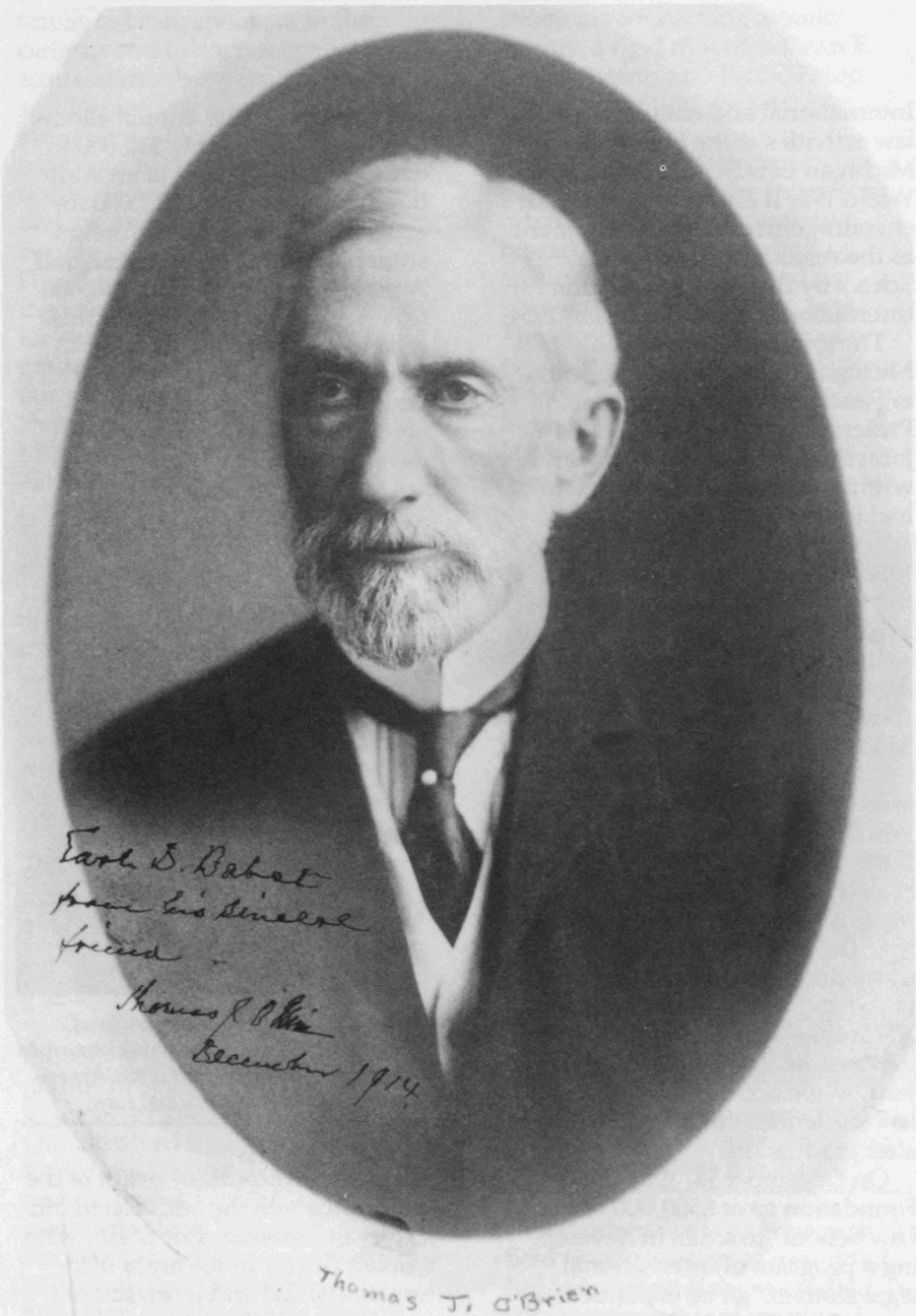
International and comparative law at Michigan

The cover of this issue of *Law Quadrangle Notes*, a photo collage of early and recent Law School alumni, reflects a vital tradition of international and comparative law studies at Michigan. It is a tradition that dates back to the 19th century, when nearly a dozen Japanese students came to Michigan to study law.

This tradition encompasses not only the many foreign alumni who have achieved positions of leadership in their home countries; it also includes hundreds of American graduates who have gone on to challenging careers in government, teaching, international law, and corporate practice.

It is a tradition reflected in the teaching and writing of William W. Bishop, Jr., Alfred F. Conard, Eric Stein, and the late Hessel Yntema, who were among the first to do extensive work in international and comparative law. It is a tradition that has been maintained by Whitmore Gray and John H. Jackson, who have fostered the careers of two generations of alumni. It is a tradition being carried on by the newest additions to the faculty—Leon E. Irish, Mathias Reimann, and Joseph H.H. Weiler—who have brought extensive transnational experience and diverse cross-cultural legal perspectives to the Law School.

The full extent of Michigan's commitment to international and comparative law cannot be easily encapsuled in one issue of *Law Quadrangle Notes*. The present issue, however, is an attempt to convey at least some suggestion of the scope of the Law School's active role in these areas of the law. ⊠



Thomas J. O'Brien, J.D. 1865, served as the American ambassador to Denmark, Japan, and Italy.

Getting a lift from Ford

Foundation grants promoted international and comparative law studies, 1954-1966

by William W. Bishop, Jr.

International and comparative law activities at the University of Michigan Law School in the post-World War II era were given great encouragement and development as the result of a grant to the School by the Ford Foundation for International Legal Studies in 1954.

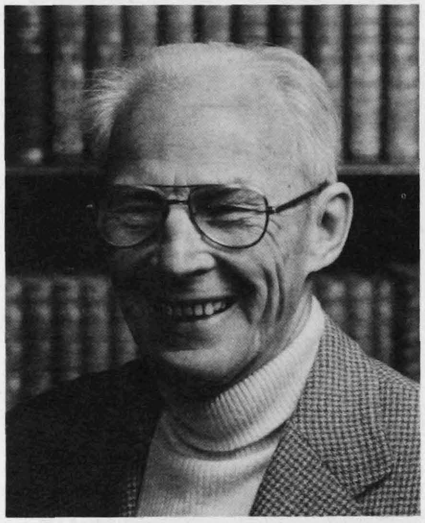
The grant acknowledged Michigan's commitment to teaching and research in these fields. Professors Hessel Yntema and John Dawson were teaching and writing in comparative law, while I had joined the faculty in 1948 to specialize in international law. In 1952, Professor Yntema was one of the founders of the *American Journal of Comparative Law*, and served as its editor-in-chief until his death. I was editor-in-chief of the *American Journal of International Law*, 1953-55 and 1962-70.

At the same time, student interest in the international area was strong. By 1954 about two-thirds of our graduates had taken at least one international or comparative law course before graduating. The Law Library was among the country's leaders in its international and foreign law collections. A number of foreign graduate students came to the Law School each year, while occasionally American law students went abroad to study after graduation.

On December 14, 1954 the Ford Foundation gave $500,000 to the Law School "to assist in developing a program of international legal studies," to be expanded at approximately $60,000 per year for ten years (including both income and principal). The annual allocation was to be roughly $10,000 to defray in part the cost of an additional professorship; $25,000 for graduate fellowships for foreign students coming to Michigan and Americans going abroad; $10,000 for research; and $15,000 for miscellaneous purposes such as travel, conferences, secretarial assistance, and cooperation among law schools in program development.

William W. Bishop, Jr. is the author of International Law: Cases and Materials *and a former editor-in-chief of the* American Journal of International Law.

The most important result of the grant value was the addition to our faculty of Professor Eric Stein, who worked chiefly in the areas of international law and international organization, becoming particularly well known for his work on the European Economic Communities. Also during the period of the Ford grants, the Law School added to its faculty Professor B.J. George, who served from 1952 to 1968 and developed our Japanese program; Professor Whitmore Gray in 1962, who has worked in Soviet law, European comparative law, and Asian law (particularly Chinese); and Professor John Jackson in 1966, who has taught and done research in international law, and in international trade and investment.



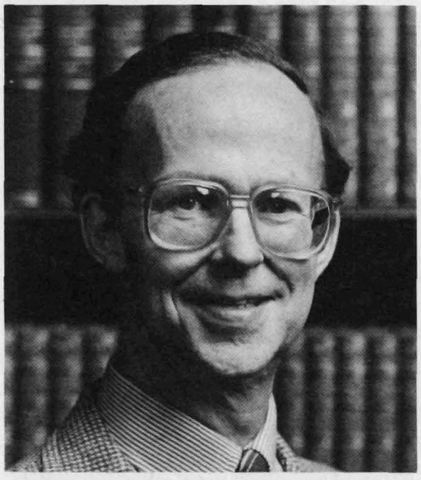
Alfred E. Conard served as chief editor of the American Journal of Comparative Law *from 1968 to 1971.*

The grant also allowed new courses and seminars to be added in the international and comparative areas. In 1954-55 the Law School offered only two courses and a seminar in comparative and/or international law. By 1961-62 the curriculum had expanded dramatically, to include international law, introduction to civil law, Soviet law, international organizations, law and institutions of the Atlantic area, international law seminar, international criminal seminar, comparative criminal procedure, comparative constitutional

law, comparative law of business associations, problems of federalism, tax problems of doing business abroad, and atomic energy seminar. There were also special courses for foreign students—survey of American law and constitutional law survey—and there was some international and comparative content in the courses in admiralty and conflict of laws.

An increasing number of young foreign law graduates came to Michigan for one or more years as graduate students, some under the Ford grant and others helped by Law School funds (Cook, Leckie, etc.), Fulbright grants, or other sources.

The grant also sowed the seed for numerous other programs and activities that contributed to a stimulating atmosphere in which to study international law. In the summer of 1955, the Law School held a six-day Institute on International Law and the United Nations, in which about 100 international law teachers, lawyers, and government officials, in addition to many students, took part. Comparative law questions were treated in other conferences at the Law School. Foreign law teachers were brought in to teach at Michigan for a semester or a year—a practice which has continued to the present time.



Whitmore Gray, a specialist in contract law, commercial arbitration, and comparative law, has a working knowledge of several languages, including Russian, Japanese, and Chinese.

The student International Law Society was formed, which continues to bring speakers to the campus and to encourage better acquaintance between American and foreign law students. Almost every year a team from Michigan has taken part in the Jessup International Law Moot Court Competition sponsored by the American Society of International Law. The Ford Foundation grants enabled the Law School to give fellowships for study abroad to a number of graduates each year. Michigan law graduates were also helped (especially through the efforts of Mrs. Mary Gomes of the staff) to get Fulbright, Rotary, and other scholarships for foreign study.

In 1961 the Ford Foundation made a new grant to the University of Michigan for various types of international studies, including $350,000 to the Law School to be used over a five-year period for several research projects. These included comparative studies in communist law, comparative business associations, comparative constitutional law, European institutions, insurance law, Japanese legal studies, law of emergent nations, and taxation. At the end of the five-year period there was also a small terminal grant.

The Law School also took part, during the period of the Ford grants, in several other projects financed by the Ford Foundation. One involved a cooperative effort by the law schools of Michigan and Columbia University to help modernize the University of Istanbul Law School. Several members of the Istanbul faculty were at Michigan for a time, and Prof. Conard taught at Istanbul in 1958-59. Another project involved Japanese law schools and resulted in Japanese lawyers and scholars coming to Michigan, and Prof. B.J. George of Michigan studying and teaching in Japan. In 1958 the Ford Foundation made still another grant for studies of international problems concerning atomic energy, a field in which Dean E. Blythe Stason and Profs. Estep, Pierce, and Stein were among the pioneers.

The 1961 grant, in particular, greatly broadened the interest in international and comparative research in their specialties by faculty members who had not previously worked in the area. Thus in 1964, the Law School reported to the Ford Foundation that the number of faculty teaching in international studies had increased from three in 1954 to eight.

Eric Stein is internationally respected for his work on the EEC, disarmament, and international business transactions.

Yet others were to engage in the field as circumstances permitted. Indeed, Robert Knauss studied the comparative and international problems of securities regulations.

A number of the faculty commenced investigations in Latin-American law. More recently, Beverley Pooley has taught a seminar in African law, and Christina Whitman in Chinese studies. A recent arrival to the faculty, Leon Irish, has taught a course in international law of the sea, and is working in the area of international tax problems.

A distinctive feature of Michigan's international legal studies program has been its integration into the ongoing work of the Law School. The professorial staff involved in international law courses continued to teach general law courses as well. Research efforts were translated effectively into curriculum additions, reaching sizeable numbers of students. The comparative method was increasingly accepted as a standard research tool: efforts were made to include within research projects in American law comparisons with foreign legal systems.

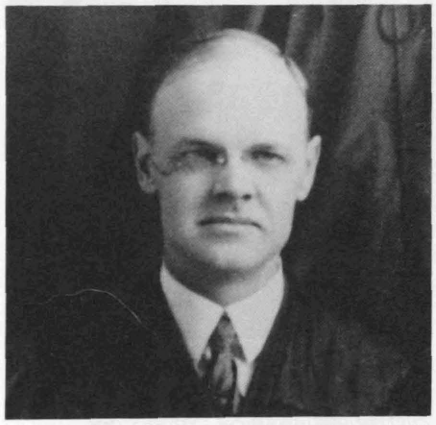
Among the objectives of the Law School's work in international legal studies has been preparation of its graduates for the foreign and international problems they will encounter in general practice and corporate work, especially in centers of foreign business or large populations of foreign extraction. Furthermore, some acquaintance with international legal studies is believed important from the standpoint of the responsibility of individual citizens, and especially lawyers, in connection with the molding of public opinion on international questions.

Beyond these goals, there was a fairly general belief that such studies broaden the lawyer's horizons, giving him or her the opportunity to see how other legal systems deal with problems. Examination of the nature, background, growth, concepts, and functioning of other legal systems helps the future lawyer to understand better our own legal system in context. It also suggests possible alternatives in dealing with problems, and may help in forming ideas of the possibilities and the limitations of law as a social institution.

The past few years have seen the retirement of Professors Bishop, Stein, and Conard. Work in the area continues, however, with Profs. Weiler and Reimann joining the ranks of our international and comparative law teachers. We have been fortunate in having a good group of visiting law professors in these fields as well. The Ford Foundation has ceased to "invest" in international legal studies, but the encouragement from its grants has contributed greatly to the present stature of the Law School. ◘

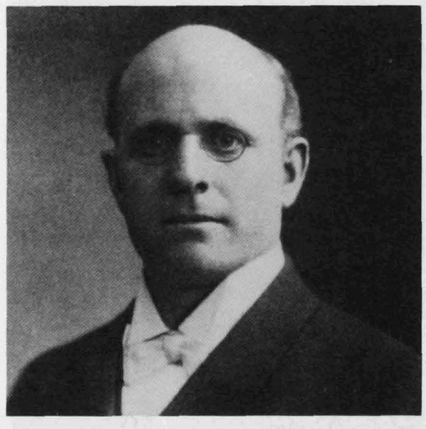
William W. Bishop, Jr. is the E.D. Dickinson University Professor Emeritus of Law at Michigan.

Early Michigan alumni made their marks on the international scene



George A. Malcolm, J.D. 1904, LL.D. 1956, served on the Supreme Court of the Philippines, 1917-1936, and was founding dean of the College of Law, University of the Philippines. In 1955, he was adopted as a son of the Philippines and granted honorary citizenship.

Charles H. Mahoney, J.D. 1911, was the first black to represent the U.S. in the United Nations.



Elias Finley Johnson, J.D. 1890, LL.M. 1891, was appointed to the Supreme Court of the Philippines in 1903. The Independent, *a Philippine newspaper, later saluted "his unfaltering energy, his spirit of justice, rectitude and integrity, and above all, ... his bigness of soul and heart."*

Counteracting provincialism

Yntema's founding of comparative law journal opened a new era in legal education

by Vera Bolgár

After the late Professor Hessel E. Yntema returned to the United States following several years abroad as a Rhodes Scholar, he was struck by the provincialism of American legal education. He devoted the rest of his career to broadening the outlook of American legal scholarship through his work in the field of comparative law.

The *American Journal of Comparative Law*, which he founded in 1952, was Yntema's lifelong dream. At the time of its founding, the odds were heavily against the publication of a periodical of its kind; comparative law was in its infancy, and the knowledge of foreign languages and foreign legal systems was negligible. The response to the *Journal*, however, was enthusiastic and heartwarming. Five years after the first issue appeared, there was no dearth of incoming manuscripts, and the number of participating law schools was steadily on the rise. Over the years the original 14 schools have grown to the present number of 58.

A further contributing factor to the *Journal*'s success was the fact that comparative law finally came to be regarded as a recognized methodology in the study of law. To a large extent, this was due to the increased exchange of teachers and students who, aided by Fulbright and other grants, were able to pursue their legal studies abroad and become acquainted with laws and legal values other than their own.

Indeed, many of the early contributions to the *Journal* came from the pens of foreign graduate students who studied in the United States, or American students who studied abroad. These contributors in the course of time became deans and professors of law in the United States, in Vienna, Paris, Saarbucken, or Utrecht; judges on the Supreme Court of Finland or the Court of Appeals of Belgium; or recognized practitioners all over the world.

Hessel E. Yntema

The first meeting of the editorial board was held at the University of Michigan in the fall of 1951. It was decided then that there should be established the American Association for the Comparative Study of Law. Its membership was to be made up by the participating law schools, and its purpose was to be the publication of the *American Journal of Comparative Law.* Hessel Yntema was named editor-in-chief, with the editorial offices in the University of Michigan Law School, and a staff of one. The members of the editorial board offered their assistance in the acquisition and selection of manuscripts, in contributing articles and book reviews of their own, and in helping Yntema in the performance of his editorial work.

Yntema himself translated into English the contributions of foreign scholars writing in French, German, Italian, and Spanish.

When Professor Yntema received an honorary doctor's degree from the University of Stockholm in 1957, the citation mentioned, in addition to his scholarly work, his contributions through the *Journal* in building a bridge of scholarship between the legal systems of the world. After his passing in 1966, the editor-in-chief became Professor Alfred F. Conard. In 1970, after Professor Conard's resignation, Professor John G. Fleming of the University of California-Berkeley, was elected editor-in-chief, with the editorial offices at the latter school. The *Journal* is now in its 34th volume of publication. ⊠

Dr. Vera Bolgár, research scholar at the Law School, was instrumental in setting up and organizing the Journal. *Her work, along with that of Professors Yntema, Conard, Gray, and Stein, has been recognized by membership in the International Academy of Comparative Law.*

Continental "imports" enrich Law School faculty

Reimann, Weiler carry on Michigan's tradition in comparative and international law

Seeking to maintain the high standards set by Michigan's pioneering professors in comparative and international law, the Law School conducted a wide search for qualified faculty to fill positions left vacant by recent retirements. This year Mathias W. Reimann and Joseph H.H. Weiler, specialists in various aspects of foreign legal systems, have joined the faculty, bringing with them fresh perspectives on the study of law. Both names are familiar to those associated with the Law School: Reimann is a former graduate student and research scholar; Weiler taught as a visiting professor during the 1983-84 school year.

Mathias W. Reimann

Always looking for new challenges

When Mathias W. Reimann came to the Law School in 1982 as a foreign graduate student, he took both the faculty and the student body by surprise. The wiry young man with the big brush moustache spoke English like a native, claimed that law school was fun, took as many courses as he could, and surpassed his American counterparts in nearly every course.

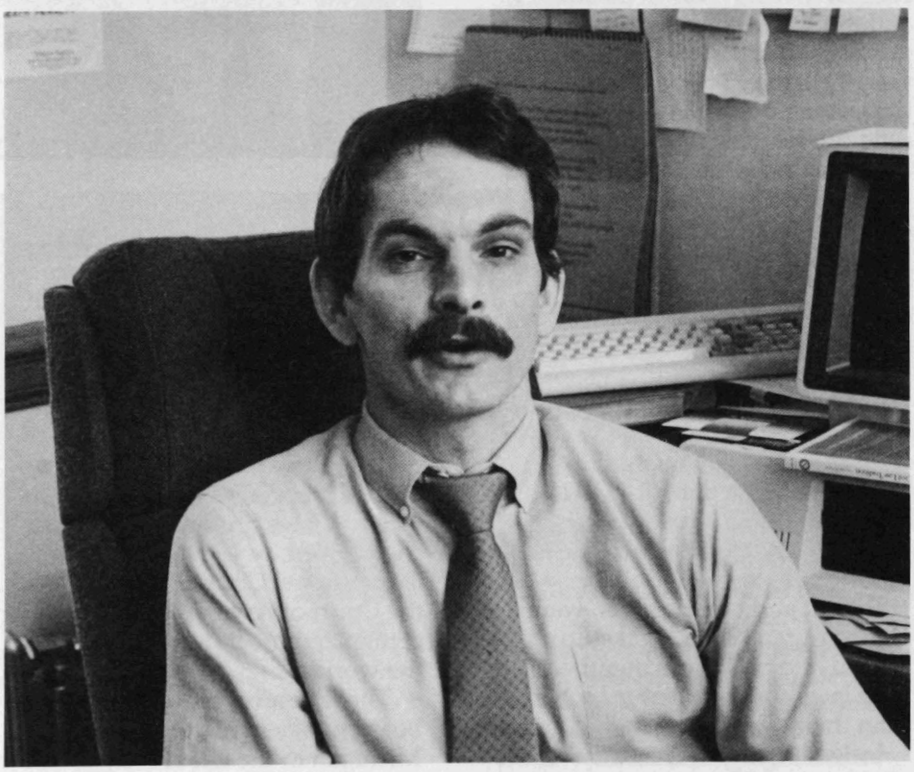
"Law school was at the same time more serious and more fun here," Reimann claims. I found the teachers to be engaging and innovative, and the exams much easier than those in Germany where they're given on a cumulative, comprehensive basis. European students are trained to think in an organized, analytical manner. I wanted to break out of that mold and so I deliberately tried to be chaotic in my writing, but still every teacher complimented me for being so organized."

Professor Christina Whitman remembers being impressed with Reimann's smooth transition to a foreign culture. Reimann attributes his easy adjustment in part to his previous visits to the U.S. In 1974 he had spent a summer traveling across the country by Greyhound Bus. In 1980, after completing an internship with a firm in Nashville required for his German law degree, he made a similar trip by motorcycle.

After completing the LL.M. with a 4.3 grade-point average, Reimann stayed on at Michigan as a research assistant to several professors. Part of Reimann's time was spent working with the late James Martin on his conflicts casebook.

Reimann taught at the University of Freiburg Law School (contracts and a seminar on comparative labor law) the following year, and then returned to the U-M in 1984 on a research scholarship. Shortly after Reimann arrived, Professor Martin became too ill to work, and Reimann was offered the chance to teach his course.

"I accepted the offer because it was a challenge," said the energetic Reimann, who has remained here since then, arriving in his office at seven a.m. each day to write and prepare for his classes.



Mathias W. Reimann

"It's enjoyable work," he says of his teaching, "particularly because you learn so much."

Reimann holds a J.U.D. (Doktor der Rechte) from the University of Freiburg Law School. His dissertation is a detailed description and analysis of the most spectacular political trial during the 1848/49 Revolution in the German state of Baden. The case involved two of the leaders of the Revolution, who were tried for high treason after attempting to overthrow the monarchy. The dissertation describes the events leading to the trial, the investigative procedure, the trial itself, and its aftermath and influence on the further course of the Revolution.

The trial is a milestone in the history of the German jury: it was the first jury trial in this most progressive of the German states. It took place at a time of radical change in the criminal law and in criminal procedure, during which the older continental tradition of inquisitorial process was finally succeeded by the more progressive English, French, and American ideas of accusatorial process before a lay jury.

The work was awarded a prize as the best dissertation of its year, and has since been published in book form in German.

Among Reimann's other works are a piece on the legality of political strikes in the U.S. and a forthcoming article on Oliver Wendell Holmes's "Common Law" and German legal science.

Reimann, who has been teaching torts, conflict of laws, comparative law, and a special comparative law seminar this year, explains that his main interest is in the comparison of legal cultures, especially the civil law tradition and the common law. "Contrary to the widespread belief that they have developed by and large independently," he said, "I think that there have been far-reaching mutual influences. My interest here is based on the belief that both legal cultures can learn an immense amount from each other. The common law can learn from the civil the virtues of a sound organizational approach to legal questions and the value of clearly defined concepts. The civil can learn from the common law the advantages of conscious social engineering, flexibility, and consciousness of political and economic implications of the law."

Reimann's plans also include working with Joseph Weiler to establish an integrated foreign and international law program at Michigan. They envision a program that would offer a variety of courses to students who want to go into international practice or who are just interested in matters beyond the American orbit.

Joseph H.H. Weiler

Prodigious writer, theoretical analyst, active pragmatist

Besides being a scholar of European and international law, Joseph H.H. Weiler is, in a certain sense, a citizen of the world. An Israeli, born in South Africa to parents of British and Russian origins, Weiler works in English, Hebrew, French, Italian, and "some German." He received his high school education in Jerusalem, and his university education in Britain, The Netherlands, and Italy. He earned a B.A. at Sussex, an LL.B. and LL. M. at Cambridge; a Diploma of International Law at The Hague Academy of International Law; and a Ph.D. in European Law at Florence.

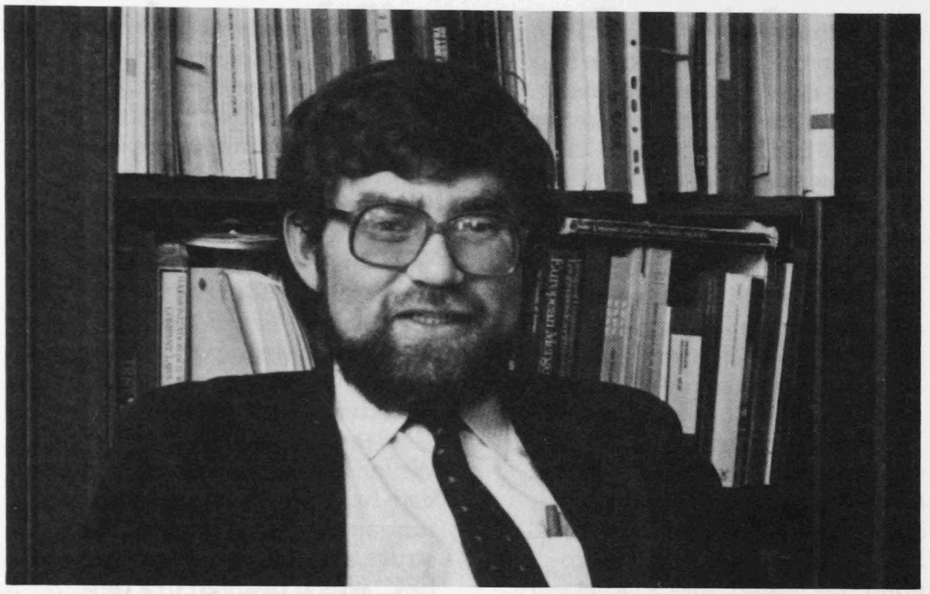
Weiler comes to the Law School from the European University Institute, where he was head of the law department and director of the European policy unit. The Institute, a creation of the Member States of the EEC (the European Economic Community or Common Market), is the highest research and post-graduate center for European studies in Europe.

An unassuming man with a short beard and a gentle smile, Weiler speaks reluctantly about his wide-ranging achievements. His sedentary physique and scholarly appearance belie the fact that he served as an Israeli tank officer for three years, an experience he discusses only when pressed by his incredulous colleagues.

In the area of scholarship, one of Weiler's most significant works to date has been an analysis of the fundamental legal and political structures and processes of the EEC, which resulted in a new working definition of the nature of "supranationalism."

Prior to Weiler's work, the study of the EEC was marred by a growing cleavage that had developed for almost two decades between political and legal analyses of the EEC and European integration. "Political scientists," he explains, "had chronicled what in their eyes was the demise of the supranational features of the Common Market and had abandoned the field of regional integration. By contrast, lawyers observing and analyzing the same entity during the same period (the 60's and 70's), albeit under a different perspective, emphasized the uniqueness of the European construct, going so far as to call it a pre-federal state. Contact between law and politics was a veritable dialogue of the deaf."

Beginning with a couple of widely discussed articles in the early 80's, Weiler identified and analyzed this disciplinary cleavage. He then constructed a unified theory which both accounted for these two diverging trends and linked them to each other, as well as into one coherent systematic analysis. These beginnings were then developed into a full-fledged



Joseph H.H. Weiler

monograph in Italian entitled *Il sistema communitario europeo* (The European Community System), published in early 1985 by Il Mulino in their "Frontiers of Science" series. The book has drawn considerable attention; versions in French and Spanish are in print and a German translation is pending. Weiler hopes to complete a final and definitive English version over the next two years.

Other monographical work includes a book about the much misunderstood European parliament, *The European Parliament and its Foreign Affairs Committees* (Cedam/Oceana) and a short monograph with the title *Israel and the Creation of a Palestinian State.*

In addition to individual scholarship, Weiler has been involved in some important collective projects of comparative analysis. Most important has been the design and co-direction, together with Professor Cappelletti (Florence and Stanford Law Schools) of a major research project involving over 30 scholars from Europe and the U.S. This project sought to examine some key issues in the process of European integration and compare them with the American experience. The project has now been published under the title *Integration Through Law: Europe and the American Federal Experience* (De Gruyter) as an eight-volume series with Weiler as a key contributor and one of the general editors.

Despite the theoretical and conceptual emphasis of his personal research, Weiler relishes the practical world of law. This is reflected in both his teaching and his writing. Among his other contributions, he has become a co-author of the supplement to the celebrated Stein, Hay, and Waelbroeck Casebook, *European Community Law and Institutions in Perspective.*

This same desire not to be completely esconsed in an academic ivory tower led him in 1984 to found and direct the European Policy Unit, an independently funded interdisciplinary think-tank engaged in policy studies concerning the European Community. Under his direction, this center has engaged in projects ranging from the prospective impact of SDI (Strategic Defense Initiative) on European economies to alternative policies for dealing with young female delinquents in European countries.

His fascination with the European Community and with the Arab-Israeli conflict led inevitably to an attempt to connect the two. He has co-authored a monograph with an Israeli colleague (Alain Greilsammer) examining the evolution of European foreign policy towards the conflict since the 1967 Middle East War. This book will appear shortly under the title *European Political Cooperation and the Arab-Israeli Conflict* (Westview).

Wishing to expand their enquiry further, Weiler and his Israeli collaborator convened a conference in Israel with scholars from Europe and the U.S. to examine the broader issues and to integrate the economic dimension into this complex. The resulting volume, *Europe and Israel: Troubled Neighbors*, will be published by the end of the year (Walter de Gruyter).

Weiler considers the invitation to teach at Michigan "a singular honor." He explains, "in the fields of European international and comparative law, Michigan has been something of a Mecca to Europeans. Its reputation in Europe is second to none. Although the geographical distance to Europe is enormous, the library and its resources make me feel as if I were in one of the best stocked European research centers. The architecture as well: gazing out of the leaded window in my office onto the beautiful quadrangle, I can imagine being anywhere in northern Europe. And yet, this is America with all its excitement, and Michigan Law School with its quiet commitment to serious scholarship. It is not surprising that some of my colleagues in Europe refer to Michigan as 'that monastery of learning.'" ⊠

Focus on students

Interviews with recent LL.M. recipients from abroad

The Law School awarded graduate degrees to foreign students as far back as 1890. That year, the LL.M. was awarded to two Japanese citizens, one of whom became a district judge in Osaka and Tokyo.

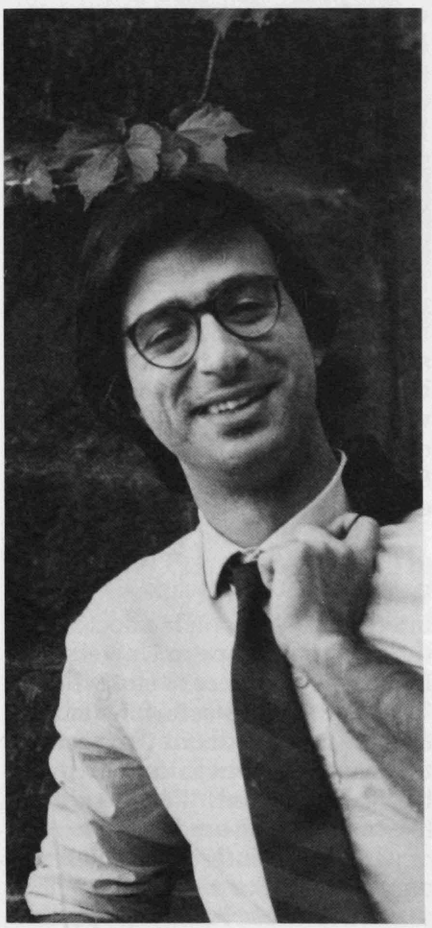
Since that time, foreign alumni have continued to rise to leadership positions in their home countries. At present, Law School alumni abroad are well-represented on courts, government cabinets, national legislatures, as well as in academia and business.

This year, 29 students from 13 countries studied for graduate degrees at the Law School. *LQN* talked with several of these students about their experiences in Ann Arbor and the perspectives they will take back with them to their home countries.

Carlo Garbarino, 26, is both an associate in the firm of Studio Legale Ukmar and a doctoral law student at the University of Genoa. Because his main professional and intellectual interests are in the areas of international taxation, the Law School held a natural attraction for him. In his two semesters at Michigan, his courses have included international law, international trade law, international taxation, international treaties, corporate finance, legal philosophy, and the use of logic in the law.

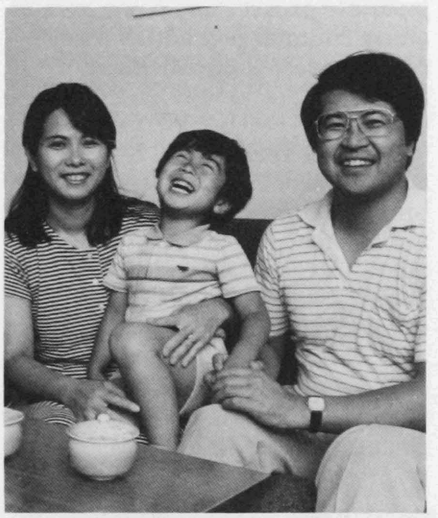
Garbarino recalls that his greatest adjustment initially was having to think in English. He was also struck by the difference between Americans and Europeans in their attitude toward the law. "Both the people and the law are much more flexible here," he said. "Case law is very fluid, and it's a real challenge to have to find connections between the cases. It's much more demanding to have to do this than to simply recall what someone said 20 years ago regarding principles of law. Knowing how to handle problems is as important as knowing the solutions. I intend to integrate the American method into my practice as well as my teaching."

Though Garbarino found Ann Arbor's climate "a bit cold for an Italian," he feels "that there are so many opportunities here, and it's possible to adapt the program to one's needs."



Carlo Garbarino

Yuichi Kusama, 32, a 1979 graduate of the University of Tokyo, has been an assistant judge in Tokyo District Court since completing the required program for judges at the Legal Training and Research Institute in 1982. In 1983, he received a two-year government scholarship to study abroad. Last year he studied at Harvard, where he earned an LL.M. degree. ("Harvard's admissions letter arrived first, so I accepted their offer," he explained diplomatically.)



Yuichi Kusama and family

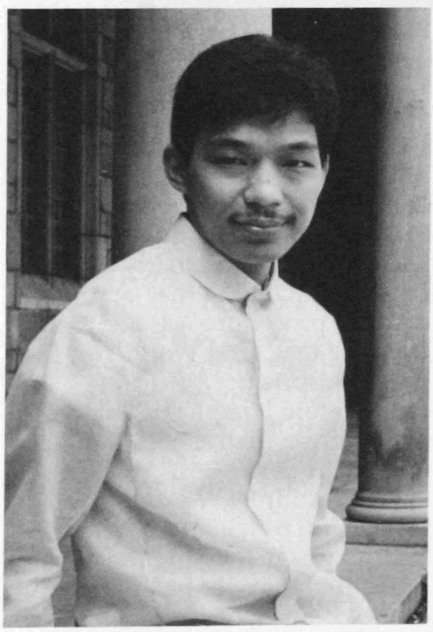
Kusama decided to spend his second year at Michigan, however, because of the strength and abundance of its criminal course offerings. "As a criminal judge, I find these courses particularly useful," he says, explaining that Japan's criminal procedure was adopted from the U.S. after World War II.

Not surprisingly, Kusama found Jerold Israel's criminal procedure course especially relevant to his profession. Yet he also enjoyed Andrew Watson's course on law and psychiatry. "When Dr. Watson was discussing the development of the ego, he invited my son to come in," he explained. (The boy, Hideo, was three-

and-a-half at the time.) "The class observed while Dr. Watson interviewed him and had him draw pictures and run about the room," Kusama explained.

A former American Field Service exchange student, Kusama made the linguistic and cultural adjustment to life in the U.S. relatively easily, as did his wife, who spent five years in this country as a girl. Studying in the United States, Kusama says, "has broadened my perspective on my work. It's also been valuable because so many Japanese prosecutors come here to study criminal procedure. They call themselves the Michigan Mafia."

Manuel Teehankee, 27, follows a long line of Filipino students brought to the Law School on a scholarship fund set up by alumnus Clyde Alton DeWitt. Teehankee, an associate with one of Manila's largest law firms, also worked as a part-time lecturer at Ateneo de Manila University before coming to the United States. "Most of the professors in our law school are also practitioners," he said. "It's hard to live on a teaching salary alone."



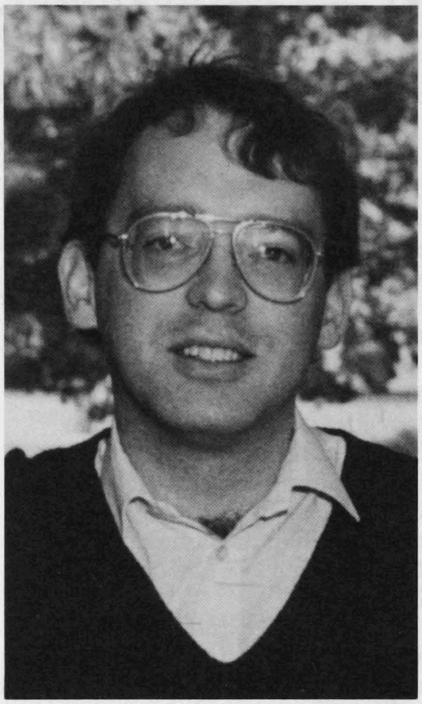
Manuel Teehankee

While he was at Michigan, Teehankee tried to take as many courses as he could dealing with international trade, one of the specialties of his law firm. His LL.M. paper concerns the problems faced by developing countries as a result of protectionist measures adopted by developed nations.

Teehankee does not regret having been in the United States rather than in Manila when his father, Justice Claudio Teehankee, administered the oath of office to Philippines President Corazon Aquino. "Even though I missed being home, I felt I was a part of it," he says. "I probably saw more on TV here than I would have in Manila and I experienced it from a different perspective. Also, I was able to share it with the Americans here who were interested."

One thing that amazed **Peter Van den Bossche** shortly after beginning school here last fall was how hard people work. "I was really impressed. I kept writing my professors in Europe that you still find people in the library at one o'clock in the morning. And I was also impressed with the level of the Michigan law students. Discussions in class were often extremely sophisticated."

Van den Bossche, 27, who came to the Law School on a William W. Cook Graduate Fellowship, interrupted work on his doctoral thesis at the European University Institute in Florence to study here for a year. "My reasons for coming basically revolve about the question of what I want to do with my life," he explained. "I would either like to pursue an academic career or work for an international relief organization. For either choice, it seemed it would be interesting to have some American experience in international law studies."



Peter Van den Bossche

A native of Belgium, Van den Bossche has a strong interest in international law, international trade law, European Community law, and Third World development. His doctoral thesis concerns the European Community's food aid policy toward developing countries.

"Essentially, I'm looking into the question of whether the Community, being an entity with limited, enumerated powers, has, in fact, the legal power under the Treaty of Rome, to give food aid. The other side of the coin is, what powers are left to the Member States in this field. Since food aid policy is really a borderline case, my study has become a search for the outer limits of European Community powers."

Van den Bossche has already had practical experience working on this question when he served a six-month internship with the European Commission. During

that time he also had the opportunity to come to the U.S. for two weeks under a State Department program. He was one of 15 young European Commission administrators brought here for an intensive first-hand introduction to American government and politics. "It was a very valuable experience," Van den Bossche recalls. "I learned a lot about the States—some very positive things, some less positive things, but basically I got to understand the American people and their government's policies much better."

When **Ling-Liang Zeng** graduated from high school in the midst of the Cultural Revolution, studying for a law degree was the farthest thing from his mind. Aside from the fact that most law schools in the country had been closed, Zeng, like other people his age, was expected to go out and work in the countryside for practical experience. After teaching at the local school in his assigned community for two years, Zeng was sent to Wuhan University to study English. "But the English we learned at that time was mostly political slogans, quotes from Chairman Mao, and some literature, like simplified versions of Shakespeare," Zeng recalls.

Nevertheless, with the ending of the Cultural Revolution and the reopening of universities, Zeng's command of English was sufficient to earn him a job teaching basic English grammar to law students at his alma mater. He soon became fascinated with the study of law, and by 1983, had earned a law degree himself. The following year he earned a graduate degree while teaching part-time at Wuhan University, where he will continue teaching when he returns.

Of the differences between China and the U.S., Zeng observes, "I appreciate the efficient administration here. In China, the relationship between the administration and the students is so formal. I also like the professors' way of teaching. They try to stir up the students to discuss things in class. When I go back, I'll have to break with tradition and try to teach this way."

Ling-Liang Zeng

Like Zeng, **Huijie Zhang** experienced an unexpected turn of events in her life as a result of the Cultural Revolution. A classical pianist who began studying music at the age of six, Zhang fulfilled her year's work in the countryside before joining the national arts troupe. From the age of 15 until the time she was 25, Zhang toured China, playing the musical accompaniment to revolutionary drama.

"It was Peking opera played on the piano, can you imagine?" she says with a laugh. "But people did come to watch because there was no other entertainment."

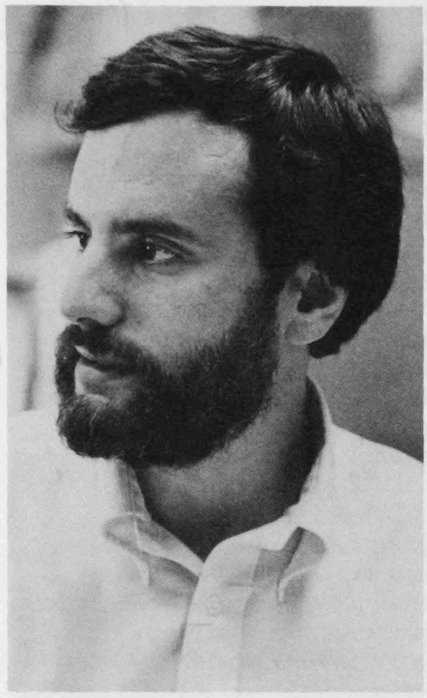
After the Cultural Revolution, Zhang entered the Chinese University of Political Science and Law, where she received her B.A. in law in 1984. She practiced law for a year with the International Investment and Trust Company in Peijing before entering graduate school at her alma mater. Last year she was selected by an educational committee to study in the U.S.

Zhang, who learned most of her English through self-study, acknowledges that she spent virtually all of her time studying while at the Law School. "I *lived* at Sub 2-91 this year," she said, referring to her carrel in the Library Addition. "I've worried a lot about my grades. But I've learned so much more this year than I could have at home. And the people have been very helpful." ⊠

Huijie Zhang

A well-crafted casebook

Aleinikoff & Martin's Immigration: Process and Policy



T. Alexander Aleinikoff

Immigration: Process and Policy, by T. Alexander Aleinikoff of the U-M and Professor David A. Martin of the University of Virginia Law School, recently received an award from the American Society of International Law for its high technical craftsmanship and its high utility to practicing lawyers and scholars. The awards committee stated, "As a vehicle for teaching immigration law, this casebook succeeds admirably not only at bringing some common sense clarity to a welter of technical complexity, but also at calling insightful attention to a heretofore much too neglected area of legal study that nevertheless impacts significantly upon people, institutions, and resources in everyday life."

The first widely used casebook on the subject, *Immigration: Process and Policy* (West Publishing Company, 1985) evolved out of teaching materials that Aleinikoff and Martin developed for their respective courses on immigration. Both authors entered the academic world after several years in government service in the early 1980s, Aleinikoff in the Justice Department, Martin in the State Department. The Cuban boatlift of 1980 brought them together, along with dozens of others from their departments to try to cope with that chaotic migration. That crisis, as well as other unprecedented immigration situations, convinced the authors of the subject's fascinations and of the need for careful and balanced study of long-term policy options.

In the book, Aleinikoff and Martin have sought to make the reader aware of the broader dimensions of the subject, without ignoring the nuts-and-bolts foundation that a budding practitioner in the field would find necessary.

The authors have also consciously tried to avoid the polarities that often beset the field. They note in their preface, "It is easy to develop sympathy for the individual alien involved in a particular case, and to strive to mold the legal doctrine to bring about a warm-hearted result for that person. Too many law review notes, and often judges as well, succumb to this temptation, neglecting to take adequate account of the long-term implications for an immigration system that must cope with millions of applications each year."

Without suggesting that the system should always prevail over warm-heartedness, Aleinikoff and Martin try to keep the reader aware of the larger perspective. The student is often asked to approach particular problems from different positions, for example, that of the commissioner of Immigration and Naturalization, the attorney general, or the Judiciary Committee of the House or Senate.

The emphasis of the book, however, is on theory and principles, not on practical applications. While the book gives helpful references throughout to those who want to know "how to," its real target is those who want to know "why" and "why not."

Excerpts follow from a book review in the *Michigan Law Review*, vol. 84.4, by Lynda Zengerle, J.D. '71, chairperson of the Committee on Immigration, Naturalization, and Aliens of the ABA Section of Administrative Law.

"The publication of this book makes me wish that I could return to the classroom and engage in the debate that the authors so clearly wish to provoke....

"By providing a framework of intellectual debate founded on insightful analysis of cases and statistics, as well as a careful selection of informative and well-written articles, the authors have made an important contribution to a potentially more reasoned and less reactive immigration bar. By encouraging students to think about the complex issues of admission to or exclusion from the United States and the ramifications of granting or withholding U.S. citizenship, Aleinikoff and Martin will also have produced a quantum leap in the number of well-informed citizens whose views could ultimately lead to the adoption of better immigration policy.

Law schools have long had the potential within their faculties to elevate the profession's understanding of immigration law and to attract students to a subject too-long dismissed as robotic and unimportant. With the publication of *Immigration: Process and Policy*, the tool to realize that potential is at hand." ◘

Ask John Jackson

He has the answers on international trade law

by George White

Editor's note: the following article appeared in the Detroit Free Press *business section earlier this year. It is reprinted in edited form with permission of the* Free Press.

When the phone rings in John Jackson's campus office, there's always a chance the White House is calling.

Then, again, it might be the U.S. State Department, the Treasury Department, the Department of Commerce, or a United Nations agency.

Jackson gets a lot of calls from Washington and around the world because of his expertise on international trade law. He's been considered for White House trade posts by the Johnson, Nixon, and Carter administrations. But Jackson, a 53-year-old lawyer, prefers to teach international trade law at the University of Michigan Law School—a post he has held since 1966.

Jackson's interest in international trade law developed at the University of California at Berkeley in the early 1960s.

"I decided that I liked the idea of teaching when I was a student in law school (at the U-M)," said Jackson. "Teaching gives me a chance to pursue my intellectual curiosities—not just the problem-solving that a client would pay for. It's a way to contribute to knowledge and policy."

Jackson, a native of Kansas City, MO, has made contributions to both. One of his books—*World Trade and the Law of GATT*—is the world's most respected treatise on trade law, said Gary Holmes, a White House aide in the U.S. Trade Representative's office. "It's a prized possession in our...office," Holmes said. "They call it the bible of international trade law."

John H. Jackson

When a technical question arises at a GATT (General Agreement on Tariff and Trade) gathering, the institution's members—delegates from the nations who observe and make international trade law—often seek answers in Jackson's book, said Michael Aho, another foreign trade expert.

Aho and Jackson advised the Senate Finance Committee on trade issues in November—for Jackson, the most recent of about a dozen Congressional appearances on legal trade issues. Aho, a senior economist at the New York City-based Council on Foreign Relations, said Jackson is renowned for his understanding of international trade law.

"John is one of a handful who have been most influential in studying and commenting on the international trading system," said Aho, a former legislative aide to New Jersey Sen. Bill Bradley, one of the Senate's trade experts. "He could do well working in other forums—like government or GATT—he's very esteemed."

Jackson is on the steering committee of the council's International Trade Project, an effort designed to identify and examine the world's most important international trade issues. He is also analyzing past U.S. trade negotiations and future negotiating options. The project, financed with a Ford Foundation grant, is being directed by Robert Stern, a U-M economics professor.

"He (Jackson) has a profound understanding of the background and the heart of issues," Stern said. "He has a very incisive mind which enables him to articulate essential points verbally and in writing. He's always filled with

ideas. He's not bashful about making his views known."

Another Jackson passion is computers. He creates his own programs and has a computer in his office and one at his home.

Jackson has enhanced his knowledge of trade law and trade issues by taking leaves from the U-M to work elsewhere.

"My approach to legal scholarship is very empirical," he explained. "It's important to be involved to make direct observations. That's why I spent a little time working in business, in government, and for GATT."

As general counsel to the White House special representative for trade in 1973 and 1974, Jackson served the government during a tumultuous time. He left in June, two months before Nixon resigned.

"The experience was enormously beneficial," said Jackson, who describes himself as an independent-minded Democrat. "It contributed a great deal to my teaching, and I was able to develop contacts that I maintain today."

Such contacts help "ensure that my research and writing are in touch with reality," Jackson said. The experience was also frustrating, he said. The Nixon administration was trying to get a mandate from Congress to negotiate a new trade agreement with other nations. The mandate normally comes in the form of a bill that outlines the major trade problems Congress wants solved.

Congress was reluctant to give Nixon a mandate because the shadow of the Watergate scandal loomed, Jackson said. It was given to Nixon's successor, President Ford, who negotiated a multinational GATT agreement that lasted until 1980.

Negotiations for another GATT agreement are expected to begin later this year. The Reagan administration has urged a new round of negotiations. Its agenda: fight protectionism, strengthen the world trading system, and liberalize and expand trade in goods and services. The Reagan administration, however, has not asked Congress for a mandate, Jackson said.

"Reagan needs a mandate from Congress," Jackson said. "The president can negotiate anything, but Congress must implement any agreement. Foreigners don't like to negotiate with the U.S. without a Congressional mandate." A new trade agreement is important to the Reagan administration because the nation has a trade deficit of about $150 billion—the highest in its history.

"The deficit means we are having trouble selling abroad," Jackson said, "and, that means a loss of jobs."

Among the U.S. products most affected by foreign competition are textiles, shoes, steel, machine tools, and two mainstays of the Michigan economy—agricultural products and automobiles.

Jackson generally opposes new protectionist measures in the United States because he believes they would block the entry of some cheaper foreign goods, and reduce the pressure on U.S. companies to become more competitive and efficient.

"Some auto executives have told me that they wouldn't have taken measures to become more efficient, if not for Japanese imports," said Jackson, who wants the government to try to knock down harmful trade barriers around the world through GATT negotiations.

Some trade barriers are hidden, Jackson said. For example, the French government requires all imported video cassette recorders to be handled at an understaffed office in a small French town—intentionally creating a bottleneck to slow the flow of imported VCRs into the French market. President Reagan also espouses a free trade philosophy, but the administration has not always been consistent in practice, Jackson said. For example, the Reagan administration negotiated the voluntary restraint agreement that set limits on Japanese auto imports. The restraints expired in March, but the Japanese government unilaterally set new limits. ⊠

JACKSON has the following views on other trade-related subjects:

On the Reagan administration's trade record: "It's pretty good...but in some areas they've deviated from the (free trade) policy.... Some industries are hurt by free trade. I think the government bears a responsibility to help the affected adjust. The administration hasn't realized the importance of this."

On Japanese trade policy: "The Japanese have several levels of trade barriers, but so does the U.S.... What the Japanese do goes on in other countries—including European nations.... If it were not for the (Japanese) trade surplus, people wouldn't be pointing the finger at Japan."

On American use of economic sanctions against countries: "It's very hard to make sanctions work unless you have international agreement and support.... The president feels that he must have some diplomatic tool.... We're stuck with that whether we like it or not."

Toward warmer climes

Francis Allen accepts new chair at University of Florida

When the brisk winds and falling leaves of autumn herald in the 1986-87 school year, Professor Francis A. Allen will not be at Michigan to begin his third decade at the Law School. After 20 years at Michigan, the Edson R. Sunderland Professor of Law will be settling into a new home and a newly created chair at the University of Florida Law School in Gainesville. The offer to teach at Florida represents for Allen an unexpected opportunity to become established professionally and socially in a community where he will eventually retire.

"My wife and I had been planning on retiring in the Sunbelt in a few years," he explained, sitting in his sunny office on the ninth floor of Legal Research amid stacks of law journals and packing boxes. "The winters here seem to get colder and colder as you grow older."

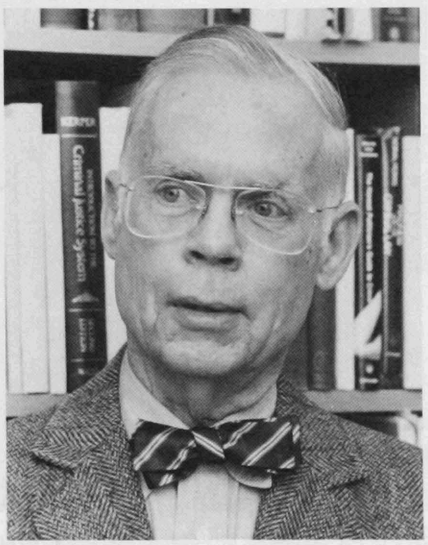
A graduate of Cornell College (Iowa) and the Northwestern University Law School, Allen has had a far-reaching effect on the field of law. As a teacher, he served on the faculties at Northwestern, Harvard, and Chicago before coming to Michigan.

In public affairs, Allen chaired the Citizens Advisory Committee of the Illinois Sex Offenders Commission and served as principal draftsman of the modern Illinois Criminal Code, which at the time of adoption was widely regarded as the most advanced in the United States. During the Kennedy administration, Allen served as chairman of the Committee on Poverty and the Administration of Federal Criminal Justice, and was the architect of the Federal Criminal Justice Act of 1964.

A greatly respected scholar and author, Allen has written in the fields of juvenile delinquency, criminal law, constitutional law, and family law. His works include 10 books and numerous articles.

When asked which aspect of his career had given him the most satisfaction, Allen replied, "It's difficult to say that any one has been more satisfying than any other. The things that give a person satisfaction change over the course of a career. The formula for a good life at a university is variety."

Allen also devoted five years as dean of the Law School, during one of the most tumultuous periods in academic history, 1966-1971. He recalls, "I've often said that I was dean for *15* years." Of Allen's leadership during this time, Dean Terrance Sandalow said, "Throughout those difficult years, he never fell victim to the reaction that overtook so many who shared his commitments. The assault upon the university and the values it represents cut very close to the core of Frank's deepest beliefs, but in responding to it, he did not forget that those engaged in the assault often had legitimate grievances. Frank brought to the deanship the same qualities that distinguish his teaching and scholarship—breadth of perspective, balance, and commitment to the values that make up the liberal tradition, most notably a profound respect for the worth of individuals."



Francis A. Allen

While today's students are obviously more conservative and goal-oriented than those 20 years ago, Allen feels that "they experience areas of unease not vastly different from those expressed more vociferously in the past. They're concerned about what financial success will do to them. They wonder if they'll become so involved with their clients, they'll lose the capacity to judge right from wrong."

Michigan's students are one of the things Allen will miss when he moves to Florida. "I'm going to miss people most," he said, "people on the faculty, students I was looking forward to having in class again, and friends in town. And, of course, both my wife and I will miss Ann Arbor. I can't think of a place north—or south—of the Mason-Dixon Line that has more amenities than Ann Arbor."

Yet, Allen is eager to get his new career under way. He points out, "the University of Florida has made as impressive a gain over the past 15 years as any school I know of. It will be very different from Michigan in that it will be less geographically diverse. But it has very high aspirations, and I'm convinced there will be some excellent students and that I can do some very worthwhile things there." ◘

Where are the pictures?

U-M's international law publication unique among student "yearbooks"

by Dean Menegas

The word "yearbook" evokes images of an oversized, slim volume filled with pictures and captions, memorializing the achievements and antics of callow youth. Uninitiated interviewers at the Law School are noticeably unimpressed by students proudly touting their *Yearbook* affiliation. Do you take pictures, they ask with a patient smile, or write captions? One exasperated staffer took to carrying a copy of the book with him to interviews to minimize confusion.

The annual, hardbound format of the *Michigan Yearbook of International Legal Studies* is unique among legal publications. Each volume provides comprehensive coverage of a single topic in international and comparative law. The first seven volumes have considered the following topics: international and comparative law aspects of antidumping law, corporate concentration, refugees, criminal procedure, communications, industrial policy, and transnational legal practice.

The concept of a student-edited publication to take advantage of the Law School's vast resources in international legal research was broached as early as 1972, when students submitted to the faculty a proposal for a series of "Michigan Essays in Transnational Legal Problems." The idea finally flowered in the spring of 1978, when an intrepid crew of students—many of whom were members of the International Law Society or the Jessup International Moot Court team—launched the *Yearbook* under the stewardship of a faculty committee led by Professor John Jackson. Says Jackson: "The students wanted a special-subject outlet for international studies. The faculty's primary consideration was the development of research, writing, and organizational skills."

The timing of Volume I, *Antidumping Law,* was "an absolute disaster," recalls editor-in-chief Steven Harris. Congress passed a new antidumping act just after editing was completed on the articles. Nevertheless, the book was a resounding success, selling almost 500 copies, a very respectable debut in legal publishing. The Department of Commerce bought 40 copies for its own use.

Each volume of the *Yearbook* contains as many as two dozen articles and student notes. Each also includes an extensive reference appendix. The breadth of

Two of the executive editors for 1986-87, Brian Rich (foreground) and Il Byun (background), got a head start this spring on the next volume of the Yearbook.

coverage allows a great degree of flexibility in the choice of authors: in addition to noted scholars, authors include leading legal practitioners, government officials, and officers of international organizations and private corporations. As many as three-fourths of each volume's authors are from abroad. The diversity of backgrounds provides for well-rounded presentations of complex issues. The *Yearbook* sometimes presents novel perspectives: lawyer and Minister of Petroleum and Mineral Resources for Saudi Arabia Sheik Ahmed Yamani discusses Islam and humanitarian law in Volume VII's look at transnational legal practices.

Yearbook editors control the shape of the book to a remarkable extent. Rather than wading through unsolicited manuscripts in search of publishable material, editors solicit contributions. They start with hours of research, first to determine the outline of the book and then to identify specific targets for solicitation. In most cases, editors study a potential author's previously-published work. Faculty recommendations are another important resource; a number of recent authors are former students of Professors Emeritus William Bishop and Eric Stein who have achieved recognition in their fields.

An integral facet of the *Yearbook*'s topical format is the detailed reference appendix. The annotated bibliography helps researchers determine a source's relevance without having to spend hours tracking it down. Many of the books listed are not mentioned in any of the volume's articles or notes. Country-by-country summaries of relevant laws provide another handy reference. Appendices are adapted to a specific volume's needs; some include treaties or annotated lists of cases.

The topical format adds to the *Yearbook*'s cohesiveness as an institution. Note writers can get assistance from a number of editorial board members, all of whom are familiar with the topic's basic concepts. Conversely, editors can use knowledge gained from one piece to help focus and steer the student author of another in a fruitful direction.

With the format's unique advantages come unique difficulties. The entire book must wait until the last piece is ready; a delay by one author, therefore, often throws off the whole production schedule. Furthermore, because of the book's intellectual cohesiveness, passing it along to a new staff is difficult.

Publisher and staff problems set production of Volume VI back almost a full year—not an uncommon occurrence in the world of legal publications, but an uncomfortably visible one for an annual journal. Determined both to publish the belated volume and to make up the lost year, however, Volume VII editor-in-chief Linda Elliott and her staff worked diligently to set the *Yearbook* back on track. Elliott's devotion led her to pass up a summer job offer and stay on a full extra year at the Law School to see the projects to completion. She graduated this spring on the heels of the publication of Volume VII.

Traditionally, all sources cited in footnotes must be checked for substantive accuracy, and must be put into proper form. Always a favorite of junior staff members from all law journals, this cite-checking presents the *Yearbook* with special difficulties. Recent years have brought citations to sources in Chinese, Japanese, Korean, Russian, Arabic, German, French, Spanish, and Portuguese. The *Yearbook* relies in the first instance on its tremendous in-house capabilities: collectively, the Volume VIII staffers read 11 languages. Foreign graduate students are frequently prevailed upon to translate sources from their native tongues. As a last resort, paid translators are used.

Like all law journals, the *Yearbook* demands huge expenditures of time and energy. In spite of the necessary sacrifices, however, student interest in the *Yearbook* has increased steadily. Volume I registered 15 staffers—a strong show of support for an unproven enterprise. In April 1985, over 130 members of the Class of 1987 vied for the 27 positions on the Volume VIII staff. (As at the *Journal of Law Reform*, *Yearbook* staffers are chosen through a grade-blind writing competition. The outgoing editorial board selects its successors.)

The book has grown in size commensurately, from 14 pieces in the debut volume to a high of 23 in Volume VI. Throughout, the *Yearbook* has benefitted from the enthusiastic support of the Law School faculty. Professors Bishop, Conard, Gray, Jackson, and Stein have all been perennial members of the faculty advisory committee. Each year the book draws heavily on the special talents of specific faculty: Professor Thomas Kauper was instrumental in the success of Volume II (*Corporate Concentration*), while Professors Rebecca Eisenberg and Jessica Litman have lent their expertise to the current computer technology volume with its heavy emphasis on intellectual property.

At the ripe old age of eight, the *Yearbook* is leaving behind its growing pains and reaching maturity. New offices on Level 2 of the Law Library's underground addition and a battery of new locking carrels are only the outward sign of this coming-of-age. ◘

Dean Menegas, who served as editor-in-chief of the Yearbook, 1985-86, *will receive an M.A. in world politics and a J.D. in December, 1986.*

Taking roads less travelled

Bates Overseas Fellowships provide opportunity for cross-cultural legal experience

While thousands of law students and new graduates flocked to career-track jobs in big cities across the U.S. this summer, a small Michigan contingent headed abroad to pursue individualized legal studies in Europe, Asia, and Africa.

Due to the generosity of Helen Bates Van Thyne, the Law School has an endowment for assisting graduates or students who have had two or more years of law study to travel abroad for study or work experience. The Clara Belfield & Henry Bates Overseas Student Travel Fellowships allow recipients to pursue legal studies abroad (either independently or in a formal program) or to accept professional internships with international or government agencies, law firms, or institutions in foreign countries. This year seven students have received Bates Fellowships.

John P. Barker, '86, is studying conflict resolution and nuclear arms control by participating as a Fellow at the International Institute for Strategic Studies (IISS) in London. Enroute to London, Barker plans to travel from Sapporo, Japan to Moscow aboard the Trans-Siberian railroad.

Margaret Chon, '86, is spending three months as an intern with the World Health Organization in Geneva. She is concentrating on the problem of internal and external legal constraints of resource allocation in health care faced by selected countries.

Rebecca Ginsburg, '87, is working in southern India under the auspices of the Tamil Nadu State Legal Aid and Advice Board. As a summer volunteer, she is participating in actual mediation cases, training local villagers to act as mediators, and performing administrative duties.

Lawrence T. Gresser, '86, is spending eight weeks in Kenya studying its legal system, which includes both a written constitution and tribal customary law. Gresser's research is aimed at determining the extent to which the Kenyan legal system is unified.

Dmitri Iglitzin, '86, is living in Managua for 60 days this summer, analyzing the legal framework through which the Sandinistas currently run Nicaragua. His approach is to speak with members of the government, religious community, legal community, and others to find out how they perceive the existing situation and learn how they would like the Nicaraguan legal system structured.

Robert B. Jobe, '86, is spending three to six months studying the incidence and causes of human rights violations in Central America. His research is under the auspices of the Americas Watch Committee, an American-based organization, established in 1981 to study and report on the status of human rights in countries of the Western Hemisphere.

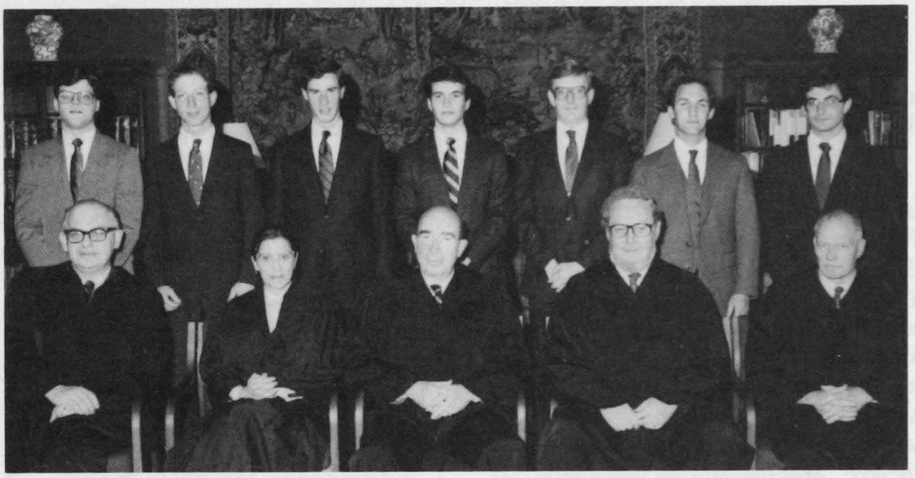
Daniel Wolf, '87, has been invited to work for a year with the Free Legal Assistance Group (FLAG), a legal aid society dedicated to the protection of human rights in the Philippines. His responsibilities include helping to prepare cases through research, writing motions and briefs, and gathering information.

Previous fellowship awards include support for a seven-month study of the international legal issues involved in water resources development in South Asia; a project on sex discrimination in employment in the European communities; externships with law offices in Hong Kong, Japan, and Peijing; and comparative legal study and teaching assistantships at universities throughout the world. ⊠

Jodie Wisniewski, J.D. '82, (right) one of the first recipients of a Bates Fellowship, travelled through mainland China after working with the firm of Lee & Li in Taipei, Taiwan. She is now working in New York with Graham & James, which has offices in Hong Kong, Peijing, and Singapore.

Something for everyone

Moot court and speakers address contemporary issues

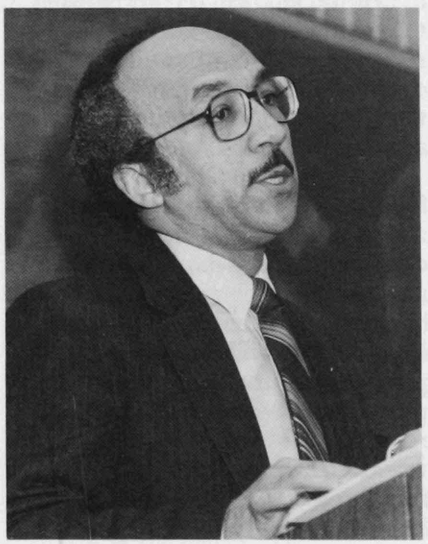


The 1986 Henry M. Campbell Moot Court

This year's Campbell Competition focused on the problem of obtaining compensation for persons who develop cancer from consuming a diet soft drink containing artificial sweetener. Andrew Klevorn and Martin Harris were awarded first place for oral argument, while the team of Thomas Bean and H. Kevin Haight received first place for the best brief. Finalists and judges shown above are (back row, left to right): Andrew Klevorn, Martin Harris, Creighton Magid, Paul Seyferth, H. Kevin Haight, Thomas Bean, David Medow; (front row, left to right): Dean Terrance Sandalow, Hon. Ruth Bader Ginsberg, Circuit Judge, U.S. Court of Appeals, D. C. Circuit; Hon. Wilfred Feinberg, Circuit Judge, U.S. Court of Appeals, 2nd Circuit; Hon. Robert Bork, Circuit Judge, U.S. Court of Appeals, D.C. Circuit; Professor James J. White.

T. Boone Pickens, chief executive officer of Mesa Oil Co., spoke on the accountability of management and the restructuring of corporate America.

The Hon. Harry T. Edwards, U.S. Court of Appeals for the District of Columbia (J.D. '65) spoke on "Alternative Dispute Resolution: the Newest Game in Town." Edwards warned against losing sight of the purpose of ADR and assuming that the mere establishment of ADR mechanisms is the end goal of the movement instead of a means to achieve greater justice.



"Religious Convictions and Lawmaking" was the subject of the 1986 Thomas M. Cooley lectures, given this year by R. Kent Greenawalt, the Cardozo Professor of Jurisprudence at Columbia University School of Law and former deputy solicitor general.

Success stories

Seven graduates talk about the role of international and comparative law studies in their careers

To what sorts of careers does a focus on international and comparative law lead? What roles do law school courses, activities, professors, and fellow graduates play in choosing a profession and finding a job in this field? *LQN* conducted a random survey of alumni now working in various areas of international law to find out what they had to say. Excerpts from their replies follow.

Eric Bergsten, J.D. '56, secretary, United Nations Commission on International Trade Law (UNCITRAL): "What was even more relevant to my present occupation than my program of study was the presence of large numbers of foreign students. The law became something more than the rule common to a number of American states.

"As the secretary of UNCITRAL, I am the head of a staff of 11 lawyers from different countries and legal systems who prepare the documentation and draft texts for the commission. We find relatively few persons who are qualified for this work. Not only must they be qualified technicians, a need common to many legal activities, but they must have an ability to understand enough of other legal systems to be able to create new legal instruments that can be assimilated into legal systems as diverse as those of the United States, France, Germany, and the Soviet Union, not to mention the legal systems that retain much of their pre-colonial non-Western heritage."

Bonnie Dixon, J.D. '81, associate in the corporate department of Mudge, Rose, Guthrie, Alexander & Ferdon in New York: "I worked for three years as a foreign trainee at a prestigeous Japanese law firm in Tokyo. The fluency in Japanese I acquired in my undergraduate work at the U-M permitted me to attend negotiations, conduct research, and otherwise work side by side with Japanese attorneys (about 80% of my work was conducted entirely in Japanese.)

"There is no course at Michigan which isn't somehow relevant to my career in New York. Some of the most useful courses were Professor Gray's seminars on Japanese law and comparative law; dealing with foreign clients requires that one become as much a teacher of comparative law as an attorney. Whit Gray is an important figure in my success. He recommended me to my Japanese employer and served as my mentor and advisor during his sabbatical in Tokyo, which coincided with my first year as a trainee in Tokyo.

"My advice to those who would follow in my footsteps? I would recommend Michigan's commercial law courses—banking, trade law, commerical transactions, bankruptcy. Persons seriously interested in an international practice will find sympathetic professors to guide them in special research—which brings me to our wonderful library. No single law firm in New York can offer the breadth of international materials available to Michigan researchers. What I once took for granted I now have to borrow from obscure libraries. I'm glad that I undertook some international research at Michigan so that I now know what to look for when I encounter a cross-border problem."

Claud Gingrich, J.D. '72, vice-president of L.A. Motley & Co.: "I took all the international trade and economics courses I could fit into my schedule. At the conclusion of my law studies, I consulted with Professor Stein and he directed me to a post-graduate course in Europe which was a big help in getting me started in the federal government when I returned.

"At the time I was at the U-M, it had the finest international law and trade law faculty in the U.S. —Professors Bishop, Stein, and Jackson. The information, people, and ideas I was exposed to were a tremendous help to me in deciding what I wanted to do. As I moved from one government job to another, I remained in close contact with Professor Jackson and continue to count on him for guidance. His expertise in this area is incomparable."

Thomas W. Hoya, J.D. '58, administrative law judge for the U.S. Department of Commerce: "My work chiefly concerns cases involving exports to communist countries. Law school taught me the fundamental skills for practicing law, which are as indispensable in international law as in any legal field. It also excited my interest in the world around me, which led eventually to my focusing on East-West trade, spending a year in Moscow, and writing a book on this trade. My three years in the Law Quadrangle included many friendships with students and faculty that were central to my education then, and that I still value today."

Robert Jillson, J.D. '61, managing partner of the Brussels office of Squire, Sanders & Dempsey: "A fellowship from the Law School for study and a clerkship in Paris during the year after graduation led directly to my present position. Eric Stein placed me as a *stagiaire* to the office of F.C. Jeantet, an *avocat* at the Cour d'Appel de Paris. Squire, Sanders and Dempsey retained Me. Jeantet to assist in an acquisition matter, and that led to my association with Squire, Sanders & Dempsey in Cleveland. Because of my experience in Paris, I was given opportunities to work on international matters, which have occupied substantially all of my time over the past 10 years or so. In 1982, I moved to Brussels and took up my present position."

Douglas B. Levene, J.D. '81, associate attorney at Cleary, Gottlieb, Steen & Hamilton, New York: "Following a clerkship with Chief Justice Berger, I went trekking in Ladakh and Thailand, stopping in Hong Kong on the way back to visit Robert Grieg, the Cleary, Gottlieb, Steen & Hamilton partner there. I ended up staying for over a year there, doing litigation with the firm.

"Law practice has a funny way of turning out differently than one plans or expects. In law school, I never imagined I would be litigating—I was sure I would be doing international corporate work. All one can hope for in law school is to learn how to think and write rigorously and to begin to acquire the habits of professional life. That seems to me as true for those interested in careers in international law as any other."

Paul McCarthy, J.D. '64, a partner with the law firm of Baker & Mackenzie in Chicago: "I took every international course offered at Michigan while I was a student. After graduating, I entered a program at the University of Chicago that included intensive study of French and a year's internship in Europe with the legal staff of the EEC. I later taught corporate law at Haile Sellassie I University in Ethiopia, and comparative law and Common Market law at Boston University.

"More than anything else, the kind of courses I took at Michigan helped me develop an appreciation of and a sensitivity to the different approaches of lawyers coming from different cultures. Although some differences are so great that they're immediately apparent, others are more subtle and less easy to detect at first. Without the background I obtained at Michigan, I would undoubtedly have fallen into the trap of assuming that lawyers think alike just because they share the same profession." ◘

West German alumni club formed

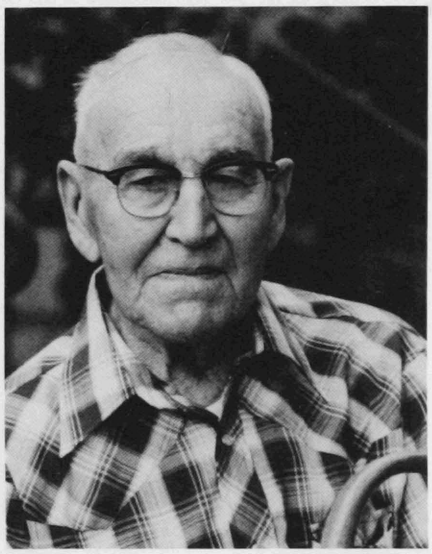
A University of Michigan Alumni Club was established in Saarbruecken, West Germany earlier this year. Its primary goal is to maintain contacts between German-speaking students of the U-M after their return to their home countries of Germany, Switzerland, and Austria.

The club's activities include encouragement of guest lectures by U-M professors at German universities, support of various student and scholar exchange programs between German universities and the U-M, social contacts between former Michigan students, and events to facilitate mutual understanding between German and American cultures. The group will also provide information about the University of Michigan to German-speaking students and will assist those who wish to apply for admission.

Those interested in contacting the club can do so by writing to:

The University of Michigan
Alumni Club of West Germany
c/o Professor R. Richter
Universitaet des Saarlandes
Bau 31
6600 Saarbruecken
FR Germany

Tel. 0681-302-3582



100 years young

The community of Hastings and the state of Michigan paid special tribute to **Chris Maichele** (J.D.'11) on the occasion of his 100th birthday last December. A document signed by Governor James Blanchard saluted Maichele for his longevity and for his devotion to farming, an occupation into which Maichele was born, and to which he returned, after several years as a practicing attorney in Grand Rapids.

Clerking at the Supreme Court

Three recent Law School graduates will be serving as U.S. Supreme Court clerks during the 1986-87 term.

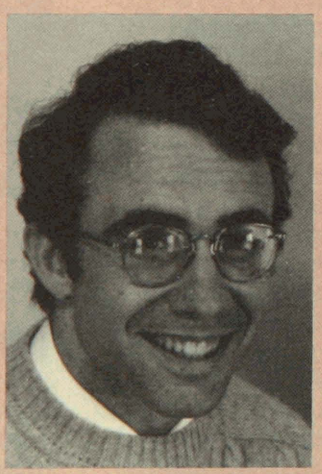
Ellen E. Deason, a 1985 graduate, is clerking with Justice Harry A. Blackmun. The editor-in-chief of volume 83 of the *Michigan Law Review*, Deason graduated magna cum laude, was elected to the Order of the Coif, and received the Henry M. Bates Memorial Scholarship and the Abram W. Sempliner Memorial Award. She clerked for the Hon. Harry T. Edwards during the 1985-86 term. Deason began her law studies after an earlier career as a marine biologist at the University of Rhode Island. She is a graduate of Carlton College in Minnesota (B.A.) and Oregon State University (M.A.).

Samuel J. Dimon, J.D. '85, is serving his second year as a clerk for Justice Byron R. White. Dimon came to the Law School after working as a construction field engineer for three years in Ann Arbor following a year as a social worker in Atlanta, GA. Dimon received numerous awards throughout his law school career, was on one of two winning teams in the 1984-85 Campbell Competition, and graduated summa cum laude. Dimon received his B.A. in English and French literature at Harvard College.

Leslie S. Gielow, is clerking for Justice Lewis F. Powell, Jr. She spent last year clerking for the Hon. Louis Oberdorfer, U.S. District Judge for the District of Columbia. Gielow graduated magna cum laude in 1985, after serving as executive note editor of the *Michigan Law Review.* She did her undergraduate work at Wesleyan University where she had a double major in the College of Letters and government.

A fourth Law School graduate, **Marie R. Deveney,** J.D. '84, is in the process of completing a term with Justice William J. Brennan. Deveney, who received the Grady Award for the highest standing in her graduating class, will join the Law School faculty this fall. The former curator of the U-M art history department's slide and photograph collection, Deveney received her M.A. in art history from the University of Michigan and her B.A. from the University of Missouri-Kansas City. ◘

Ellen E. Deason



Samuel J. Dimon

Leslie S. Gielow

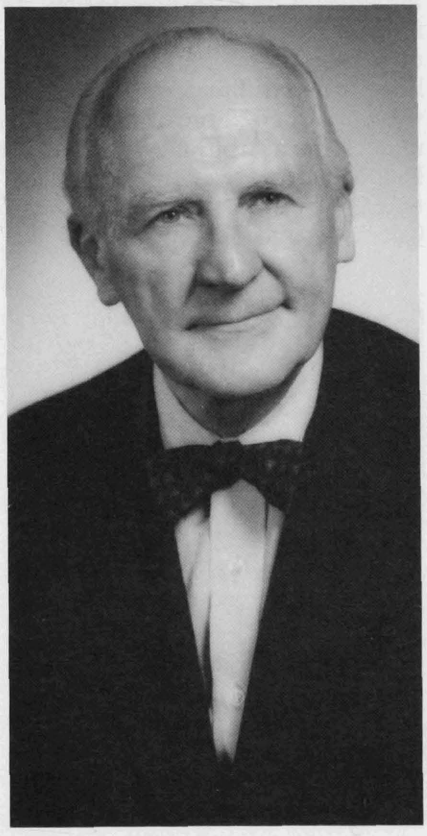
Marie R. Deveney

Judge Feikens takes senior status

Judge **John Feikens,** U.S. District Judge of the Eastern District of Michigan, took senior status earlier this year following a distinguished career as a trial lawyer and jurist. A 1941 graduate of the Law School, Judge Feikens was a highly successful practicing attorney with the Detroit firm of Dice Sweeney Sullivan & Feikens when he received an interim appointment as U.S. District Judge for the Eastern District of Michigan in 1960. His appointment expired the following year.

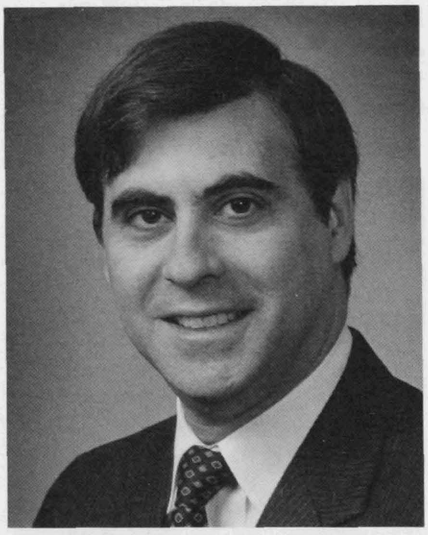
He returned to his legal practice until December, 1970, when he was appointed permanently to the judgeship. He became chief judge in October, 1979, and that year received an Honorary Doctor of Laws degree from the University of Detroit.

From 1963 until 1966, Judge Feikens served as the first co-chairman of the Michigan Civil Rights Commission under the current constitution. He was appointed to the Judicial Conference Committee on the Operation of the Jury System in 1977.



U-M grad heads Maine bar

Robert E. Hirshon, a member of the Portland firm of Drummond Woodsum Plimpton & McMahon, P.A., was recently elected president of the Maine State Bar Association. A Portland native, Hirshon earned both the B.A. ('70) and the J.D. ('73) from the University of Michigan.



In addition to his presidency of the Bar Association, Hirshon is past chair of its Continuing Legal Education Committee, past chair of the Breakwater School board of trustees, and at present, is on the zoning board of appeals in Cape Elizabeth, where he resides.

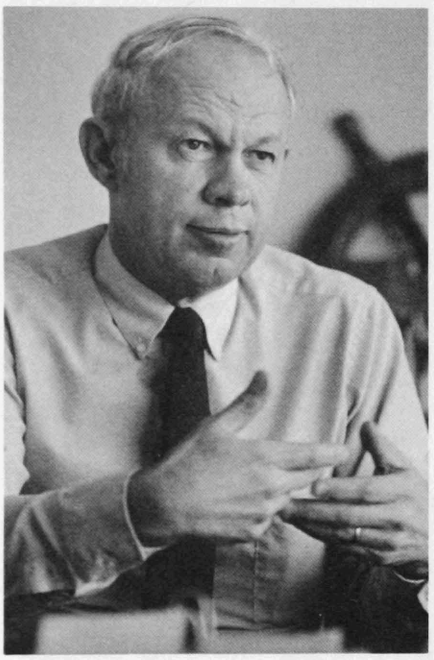
In the trial courts and tennis courts

Southfield attorney **Marissa W. Pollick** (J.D. '81) was recently among 10 women named to the Women's Athletics Hall of Honor at the U-M. Pollick, who plays competitive tennis at the national level and promotes tennis tournaments in the Detroit area, is among the initial group of inductees chosen for this distinction. Criteria include having been a four-year varsity letter winner in athletics and maintaining a cumulative grade-point average of 3.5 for eight consecutive semesters or a final grade-point of 3.7 or better. Pollick, who graduated summa cum laude in 1978, met all three requirements.

Now with the firm of Bonk, Pollick and Strote, specializing in commerial litigation and labor law, Pollick also manages and acts as agent for several professional women tennis players through her firm, MWP Sports, Inc.

Skippering a fleet of 40,000 on the Fourth

When 40,000 ships and sailing vessels converged on New York Harbor this past Fourth of July, the mastermind behind the operation was **Richard C. Young,** J.D. '60, who has practiced law in Denver for 25 years.



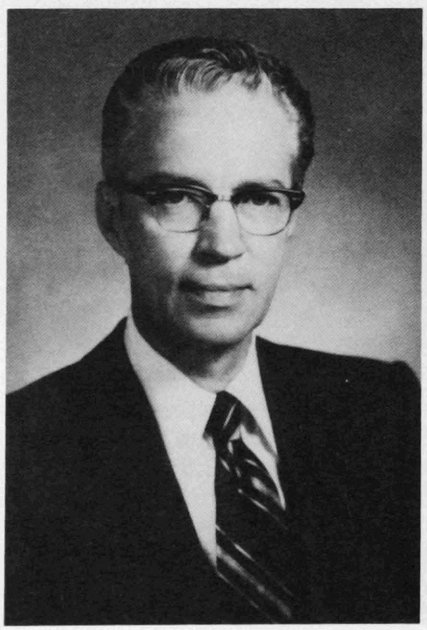
Operation Sail 1986, history's fifth international naval review, included the largest flotilla of sailing craft to assemble in modern history. Led by a contingent of 22 tall ships, the flotilla inaugurated three days of spectacular parades, performances, fireworks, displays, and music dedicated to the refurbished Statue of Liberty.

Young's role, as chairman of the international review committee, was to oversee the multifaceted aspects of the operation. These included handling security details, working out dock space, inviting foreign dignitaries, and scheduling Navy and Marine bands for various events.

A rear admiral in the Naval Reserve, Young served in the navy for four years and was an officer on the USS Maddox at the end of the Korean War. He also served as an instructor at the naval War College and has had three tours of duty as a commanding officer of various units.

Miller retires from OSBA

The Ohio State Bar Association has announced the July 1 retirement of **Joseph B. Miller,** who had served as executive director for 35 years. Miller, J.D. '48, had long been recognized by other bar leaders around the country for his leadership qualities. During his directorship, OSBA membership grew from 5,500 to nearly 18,000. In 1982 he received the National Association of Bar Executives' most prestigeous honor—the "Delegate Fred Award." In 1980, he was awarded the Ohio Bar Medal —OSBA's highest award for unusually meritorious service. ◘



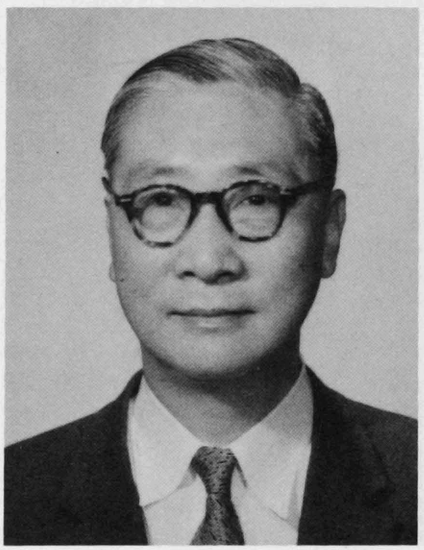
In memoriam

John C.H. Wu, J.D. '20, a distinguished scholar, statesman, philosopher, and leading cultural figure in the Chinese Nationalist Government, died on February 5 in Taipei, Taiwan. He was 87.

Born in Ningpo, Zhejiang, to a prominent banking family, he was known as Wu Ching-hsiung, taking the name of John after becoming a Christian.

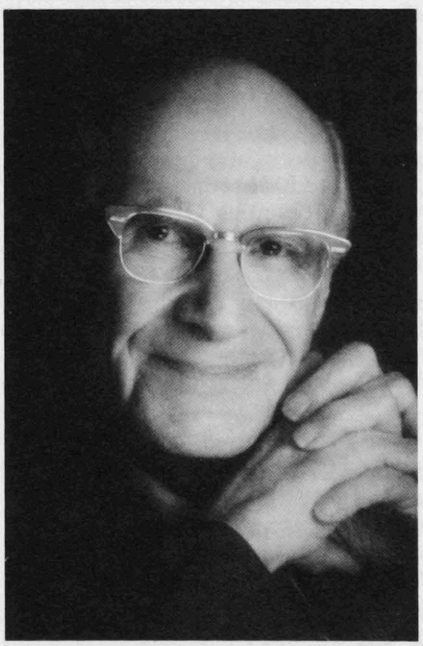
Wu did graduate work at the Sorbonne, the University of Berlin, and Harvard Law School. His professional career included teaching at the Comparative Law School of China, a judgeship, and private practice.

The principal author of the Nationalist Constitution adopted in 1946, Wu came to the United States with his family after the Communists came to power. In 1951 he assumed the post of professor at Seton Hall Law School, until his retirement in 1967, when he returned to Taiwan. In 1957, he was appointed judge of the Permanent court of Arbitration at The Hague by the president of the Nationalist Chinese Government, Generalissimo Chiang Kai-shek.



During his lifetime, Dr. Wu published well over 200 books and articles in Chinese and English. His writings included several essays on the philosophy of Justice Holmes, a Chinese translation of the New Testament, a number of books on jurisprudence and a poetical English version of the *Tao Te Ching* of Lao-tzu.

The Honorable **Irwin S. Moise,** former chief justice of the New Mexico Supreme Court, died in October, 1984. A 1928 graduate of the Law School, Justice Moise was in individual practice for many years before becoming a partner in the firm of Sutin, Thayer, & Browne, which he founded in 1946.



He served on the Supreme Court of New Mexico from 1959 through 1970, and was chief justice during his last year. After his retirement, Justice Moise returned to the firm and continued working there until 1984. ◘

Class notes

'33 Kenneth J. Logan is this year's recipient of the Distinguished Municipal Attorney Award, presented by the Michigan Municipal League. Logan has represented Downriver municipalities and school districts since 1938, and has been city attorney for Riverview since 1972.

Burton Marks, of Miami Beach, FL, is now engaged in portfolio management of securities.

'46 William T. Patrick, Jr. received the prestigeous Leonard F. Sain Esteemed Alumni Award at the University of Michigan's Reunion for Black Graduates last fall. The award is presented annually to "someone who has shown outstanding service and achievement in the field of human endeavor."

'48 Lawrence B. Lindemer, vice-president and general counsel of Consumers Power Company in Jackson, was elected to a one-year term as chairman of the 1.3 million-member AAA of Michigan by its board of directors. Lindemer was president of the U-M Alumni Association for the past two years and was a regent from 1968 to 1975. He served as a Michigan Supreme Court justice in 1975-76, was Michigan Republican state chairman in 1957-61, and a member of the Michigan House of Representatives from 1951 to 1952.

'52 Lawrence H. Johnson, of Hobbs, NM, was elected district judge in November, 1984, and began his six-year term January 1, 1985.

'53 John B. Bruff was appointed to the Macomb County Circuit Court by Michigan Governor James J. Blanchard.

'54 Marvin O. Young, a partner in the St. Louis law firm of Gallop, Johnson & Newman, has been elected to a one-year term as chairman of the board of trustees of Westminster College.

'59 Guido J. Casari, Jr. retired from the U.S. Air Force after nearly 26 years to accept a position as a California workers' compensation judge in San Bernadino.

'60 Robert G. Rhoads has been listed in the second, third, and fourth editions of *Who's Who in American Law*. After being general counsel for Southeastern Public Service Co., he is now practicing in Trenton and Philadelphia. In 1984, he was awarded the Legion of Honor by the executive committee of the Chapel of the Four Chaplains in Philadelphia for service to others regardless of race or creed.

'61 Charles A. DeGrandpre, a partner in the Manchester, N H law firm of McLane, Graf, Raulerson and Middleton, recently authored *Wills, Trusts and Gifts* for members of the New Hampshire Bar.

John B. Rapp was elected senior vice-president of the First of America Bank Corporation. Rapp administers the trust division, which is headquartered in Kalamazoo. It manages over $2.5 billion in assets and operates from seven affiliate bank locations.

Gerald F. Rosenblatt is now of counsel to the firm of Mason and Sloane in Santa Monica, CA, practicing entertainment law.

'63 L. Ray Bishop, of Ann Arbor, has been named to several committees of the American Bar Association Section of Economics of Law Practice.

Sandor M. Gelman, of West Bloomfield, MI, was appointed a member of the local government claims review board and elected chairman of the board.

'64 Casper O. Grathwohl was appointed a Berrien County Circuit Judge by Governor James J. Blanchard to fill the unexpired term of Judge William S. White, who resigned due to poor health. Judge White is also a graduate of the Law School.

Paul L. Leeds has announced the opening of his office in Chicago for the general practice of law.

'65 **Paul F. Dauer,** a new partner in Downey, Brand, Seymour & Rohwer in Sacramento as of January, 1985, was elected chair of the governing board of directors for the California Continuing Education of the Bar for 1985-86.

Faris Howrani, of Midland, MI, has qualified for a position on the president's forum of the Midland Mutual Life Insurance Co.

Lawrence J. Ross recently chaired a panel for the Federal Bar Association entitled "Tax Reform Proposals—Effects on Real Estate." Ross is a principal in the Washington, D.C., firm of Ross and Bogin, P.C., which is nationally known in the fields of taxation, legislative practice, government regulation, and real estate syndication.

Irwin Jay Deutch served on the faculty of the above panel, presenting the views of real estate developers and syndicators. Deutch is the chief executive officer of Century Pacific Investment Corporation, headquartered in Los Angeles, which is engaged in the development and syndication of real estate located throughout the United States.

'66 **F.S. Dickerson III** has been elected vice-president of Bethlehem Steel Corporation, while retaining his title of treasurer.

Terence Roche Murphy participated and presented a paper in a week-long Brisith Foreign and Commonwealth Office "Wilton Park Conference" in Sussex on "European High-Tech Industries." His subject was the international export controls debate concerning trade in strategic goods and technology. Murphy practices international trade and business law in the Washington office of the Los Angeles-based firm of Adams, Duque & Hazeltine.

Charles E. Patterson has become a partner with the firm of Lillick McHose & Charles in Los Angeles, CA.

'67 **Ahmed I. Bulbulia,** of Short Hills, NJ, teaches conflicts and corporations at Seaton Hall Law School.

James B. Fadim is a partner of Portes, Sharp, Herbst & Kravets, Ltd. of Chicago.

John J. Flynn, S.J.D., teaches antitrust and regulated industries at the University of Utah College of Law, in Salt Lake City.

Alan E. Harazin, of Chappaqua, NY, is vice-president of the New York Mets Baseball Club. One of his significant projects is negotiating player contracts.

Richard D. McLellan, of Lansing, has been re-elected as treasurer and a member of the executive committee of the Michigan State Chamber of Commerce.

Lelan McReynolds, of Nashville, TN, has begun his 16th year as a full-time minister in the United Church of Christ. Rev. McReynolds is also a chaplain in the Air Force Reserve where he was recently promoted to the rank of major.

Alan J. Polansky has moved from Cleveland, OH, to Charleston, SC, where he has opened several fast food restaurants named "Grandy's."

Judy Potter teaches evidence and trial practice at the University of Maine Law School, and is director of the legal aid clinic. She also practices criminal defense and labor law.

John R. Wilhelm, of Saginaw, MI, is teaching political science at Delta College.

'68 **David Callies,** professor of law at the University of Hawaii, has co-authored *Cases and Materials on Land Use*. The book was published by West in April of this year.

'69 **Robert M. Meisner** has become a regular columnist for the *Detroit News* on the subject of condominiums and related real estate matters appearing in the Homes Section of the Sunday News.

Richard B. Weil has become a partner in the New York City law firm of Schwartz & Schlacter.

'70 **Richard J. Erickson** has been serving as senior U.S. military attorney in Greece and as staff judge advocate, Hellenikon Air Force Base, Athens, Greece. He was recently selected as a resident fellow, Airpower Research Institute, Air War College, Maxwell Air Force Base, Alabama, beginning in July, 1986.

Robert J. Lewis has joined the Tobacco Institute, a Washington, D.C.-based association of U.S. cigarette manufacturers, as senior vice-president for federal relations.

Susan S. Westerman, who recently became a partner in the Ann Arbor law firm of Stein, Moran and Westerman, has been appointed chairperson of the Probate and Estate Planning Council of the State Bar of Michigan for the 1985-86 year.

'71 **Karl Adkins** was recently elected one of five bar councilors to the North Carolina State Bar Council. The bar council is an agency of the state which controls the discipline and disbarment of attorneys, and adopts rules of professional ethics and conduct.

Michael B. Evanoff, previously general counsel of Hyatt International Corporation, has been promoted to vice-president and general counsel of the firm.

'72 **Gershwin A. Drain** has been appointed judge of the 36th District Court, in Detroit. Drain joined the staff of the Federal Defender's Office in 1974, where he was a trial attorney until his appointment to the bench.

Gordon P. Shuler has begun his own practice, specializing primarily in litigation, and has become associated with the Columbus, OH, firm of Bell, Randazzo, & Bentine Co., L.P.A.

'73 **Robert H. Abrams** has been named interim dean of the Wayne State University Law School, in Detroit. A professor and member of the WSU Law School faculty since 1977, Abrams became associated dean in 1985.

Samuel L. Bufford was appointed by the Ninth Circuit Court of Appeals as a United States bankruptcy judge for the Central District of California, in Los Angeles.

Charles D. Daniel has joined Seidman & Seidman/BDO, the nation's 13th largest accounting firm, as a tax partner in its Rockville Centre office.

Robert L. Hetzler is now president and chief executive officer of Monitor Sugar Co. of Bay City, MI.

'74 **Eileen Cairns** has been named assistant vice-president of United

States Insurance Group, a Crum & Forster organization.

'75 **Susan Low Bloch** is an associate professor at Georgetown University Law Center, where she teaches federal courts, constitutional law, and communications law. She has also been appointed to the board of directors of the Institute for Public Representation, and is about to publish an article in the *Wisconsin Law Review* entitled "John Marshall's Misuse of History in *Marbury v. Madison.*"

Lamont E. Buffington has become an equity partner with the firm of Garan Lucow Miller Seward Cooper & Becker of Detroit, after five years with the firm.

Connye Y. Harper has joined the legal department of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, as an associate general counsel.

'76 **Ronald K. Henry** has become a member of the firm of Dickstein, Shapiro & Morin of Washington, D.C., and New York, practicing government contracts law.

James R. Peterson has joined the office of general counsel at Goldome FSB, the largest mutual savings bank in the U.S., in Buffalo.

'77 **David Cohen,** together with John Croll '81 (see below), is one of the founding partners of the law firm of Cohen, Fthenakis & Croll in Palo Alto, CA. Their practice provides counsel with respect to general business matters, corporate and securities laws, taxation, employee benefits, commercial litigation, computer law, and the export of products.

'78 **Gregory K. Need,** a partner in the Pontiac law firm of Booth Patterson Lee Karlstrom and Steckling has been elected president of the Michigan Jayees.

David G. Swenson, who joined the faculty of Baylor Law School in 1982 as an assistant professor, was promoted to associate professor in 1984, and to associate dean that same year.

'79 **Lori R. (Dickerman) Burns** was recently named assistant general counsel of the Options Clearing Corporation in Chicago.

John S. Vento has become a member of the law firm of Trenam, Simmons, Kemker, Scharf, Barkin, Frye & O'Neill, P.A., with full partnership status. He has also been selected for the fourth edition of *Who's Who in American Law.*

'80 **Penny P. Barto** (formerly Penelope A. Proctor) has become assistant vice-president and assistant general counsel at Riverside Methodist Hospital in Columbus, OH.

Robert M. Lange has become president of Empire Entertainment, a Los Angeles-based motion picture production and distribution company.

'81 **John D. Croll** is one of the founding partners of the law firm of Cohen, Fthenakis & Croll in Palo Alto, CA.

Richard S. Kolodny has been appointed vice-president and general counsel of American Protection Industries, Inc., of Los Angeles, CA.

Joel R. Maillie, recently discharged from the Army, where he was with the Judge Advocate General's Corps, is now working in the office of general counsel, Commodity Futures Trading Commission, Washington, D.C.

J.B. McCombs has recently received his LL.M. in taxation at New York University, and has secured a position as assistant professor at the University of Nebraska College of Law, beginning this fall.

Alumni Deaths

'14 **Guillermo M. Katigbak**

'15 **Charles W. Burton**

'16 **Clyde C. Rowan,** October 1, 1985
Fred J. Schroeder

'21 **Earl G. Dorfner,** December 26, 1985
John C.H. Wu, February 6, 1986, in Taipei, Taiwan

'23 **William E. Burby**

'24 **Robert Adams, Jr.,** July 31, 1985

'25 **Lloyd C. Carleton**

'26 **Richard Ford,** November 13, 1985, in Franklin, MI

'28 **Joseph F. Fordell**
James R. Golden
Irwin S. Moise, October 11, 1984
A.D.Ruegsegger, December 12, 1985, in Grosse Pointe, MI

'30 **John H. Hawkins,** March 29, 1985

'31 **Robert E. Farmer**
Harold J. Hand, January 5, 1984
Charles F. Scanlon, October 13, 1985

'32 **Clarence L. Becker,** November 4, 1984

'35 **Morris Weller,** September 11, 1985

'36 **Harold Love,** March 21, 1986, in Tucson, AZ

'37 **Frank H. Masters,** May 2, 1985
David Morris

'38 **Robert W. Dudley,** January 18, 1986
James W. Mehaffy, September 6, 1985
Robert E. Walker, July 25, 1985

'39 **Jack K. Pedigo,** June 21, 1985

'42 **Wilbur F. Denious, Jr.,** September 3, 1985

'47 **Robert J. Hodgson,** September 15, 1985
Raymond D. Munde, August 16, 1985
H. Clinton Tinker, October 16, 1985

'48 **Kenneth T. Colwell,** October 1, 1984
Robert A. O'Neil, March 3, 1985

'50 **Merritt R. Jones,** September 25, 1985

'51 **John S. Yates,** December 6, 1985, in New York City

'52 **Quentin R. Fulcher**
Peter J. Marutiak, September 11, 1985
Thomas J. Nichols, October 19, 1985

'69 **James A. Martin,** December 10, 1985, in Ann Arbor, MI
H. William Taylor, November 11 1985

'72 **Michael I. Garcia,** October 16, 1985

'79 **Edward J. Martineck,** December 17, 1985

SDI AND THE ABM TREATY: PROBLEMS OF NEGOTIATION AND INTERPRETATION

by Leon E. Irish

"For 13 years the [ABM] Treaty has been universally understood to mean what it says: that any ABM system based in space is out-lawed. Now the claim is that it means the opposite. . . . How can the plain meaning have been transformed? By an "interpretation" that ought to embarass the most brazen lawyer in town."
—Anthony Lewis
The New York Times
Oct. 14, 1985

"[I was] astonished by the rather large gap between what the [ABM] Treaty said and what was attributed to it."
—Philip Kunsberg
assistant deputy under-secretary of defense for policy
The Washington Post
Oct. 22, 1985

Celebrating the ABM Treaty. On October 3, 1985, six former Democratic and Republican Secretaries of Defense—Harold Brown, Clark M. Clifford, Melvin R. Laird, Robert S. McNamara, Elliot L. Richardson, and James R. Schlesinger—celebrated the thirteenth anniversary of the ABM Treaty—the treaty between the United States and the Soviet Union on the Limitation of Anti-Ballistic Missile Systems.[1] The ABM Treaty, signed in 1972, constitutes one of the two arms limitations agreements produced by the SALT I talks.[2] It remains the only bilateral arms control treaty in full force and effect between the two superpowers, and "it represents a very large measure of what we have to show for four decades of US-USSR arms control negotiations."[3] As part of the celebration, the six former Secretaries of Defense issued a statement:

> [W]e call upon the American and Soviet governments both to avoid actions that would undermine the ABM Treaty and to bring to an end any prior departures from the terms of the treaty . . . . We urge President Reagan and General Secretary Gorbachev to reach agreement in Geneva to negotiate new measures which would prevent further erosion of the treaty and assure its continued viability.[4]

Common understanding of the ABM Treaty. As commonly understood by leading national defense and arms control institutions and experts in the United States, the ABM Treaty generally bans the development, testing, and deployment of ABM systems and components, including those based on new technologies or physical principles and those that are sea-based, air-based, space-based, or mobile land-based.[5] In other words, while permitting research, the ABM Treaty bans the development, testing, and deployment of all existing and future anti-ballistic missile systems or components, not just those based on 1972 technologies, with an exception permitting development and testing at ABM test ranges of fixed land-based systems and components.

The ABM Treaty and SDI. Thus read and applied, the ABM Treaty stands as a major obstacle to the Strategic Defense Initiative (SDI) program announced by


ABM
TREATY
USA

President Reagan on March 23, 1983. Put the other way around, the SDI program (sometimes called "Star Wars") poses a serious threat to the ABM Treaty. McGeorge Bundy, George F. Kennan, Robert S. McNamara, and Gerard S. Smith recently predicted that, "The Star Wars Program . . . will destroy the Anti-Ballistic Missile (ABM) Treaty, our most important arms control agreement."[6]

The SDI program would alter the strategic balance that has governed superpower relations for the past 40 years.

The president's hope. At the base of SDI lies President Reagan's vision of a new era of strategic weaponry and defense in which dramatic technological innovations would be harnessed to protect against the threat of a nuclear holocaust:

> What if free people could live secure in the knowledge that their security did not rest upon the threat of instant U.S. retaliation to deter a Soviet attack, that we could intercept and destroy strategic ballistic missiles before they reached our own soil or that of our allies?[7]

The SDI program would alter the strategic balance that has governed superpower relations for the past 40 years. Instead of a "balance of terror" under which nuclear attacks are deterred by the threat of massive retaliatory destruction, SDI supposedly would create a "defense in depth" or a "layered defense" in which defensive weapons, many of them based in space, would again be superior to offensive ones.

SDI. Using a combination of startling new technologies, an SDI weapons system would defend against possible intercontinental ballistic missiles launched by the Soviet Union by intercepting and destroying them when they are launched ("boost phase intercept"), while they are in flight ("midcourse intercept"), and before they strike their targets ("reentry phase intercept"). The new weapons and components involved in this exotic new defense system might include X-ray and chemical infrared lasers, particle beam weapons, kill assessment sensors, battle management computers, space-based, diffraction-limited mirrors, exo-atmospheric homing interceptors, and hypervelocity electromagnetic railguns, to mention only some of the possibilities.

SDI debate. Whether these technological innovations are possible, whether they would be sufficiently reliable, whether they would dangerously disrupt the stability of the present balance of power, whether vast resources should be spent on such programs, and whether SDI is a concealed attempt by the United States to use its technological superiority to establish a first strike capability against the USSR, are all issues that are being hotly debated. Few political and military issues have greater importance for the security and wellbeing of the world. At the heart of the SDI debate, however, there are also critically important lawyers' questions of treaty interpretation. For, if the ABM Treaty, which has unlimited duration, precludes all aspects of the SDI program except laboratory research, the other questions become largely moot—unless the United States is willing to take the politically unpalatable course of withdrawing from the only arms control agreement it has with the Soviet Union.[8]

Reinterpretation of the ABM Treaty. The day after the six former Secretaries of Defense celebrated the 13th anniversary of the ABM Treaty and called on the US and the USSR to "avoid actions that would undermine the ABM Treaty," the Special Arms Control Policy Group, chaired by then-National Security Advisor Robert C. McFarlane, met behind closed doors in Washington. At this meeting they adopted a "reinterpretation" of the ABM Treaty that would permit research, development, and testing of SDI weapons; only actual deployment would be banned.[9] Two days later, while appearing on "Meet the Press," McFarlane surprised the world by announcing that testing and development of ballistic missile defense weapons and components was "approved and authorized by the treaty" rather than prohibited.[10]

Policy compromise. A storm of protest and controversy erupted. Gerard C. Smith, the chief US negotiator of the ABM Treaty, denounced the new interpretation as erroneous and said it would make "a dead letter of the ABM Treaty.[11] The very next Friday, October 11th, President Reagan met privately with Secretary of Defense Caspar Weinberger, a strong supporter of the new interpretation, McFarlane, Kenneth Adelman, director of the Arms Control and Disarmament Agency, and Secretary of State George Shultz. After what was described as a "knock down, drag out meeting," during which Shultz backed his position with "a subtle threat of resignation," a modified view emerged: the new interpretation was adopted, but it would not be applied. In other words, the Reagan administration intended to operate under the former, restrictive interpretation of the ABM Treaty, under which only SDI research was permissible, even though it adopted the new, broad interpretation as legally correct and fully justified.[12]

Perle's wisdom. Assistant Secretary of Defense Richard N. Perle, whose office had originated the reinterpretation of the ABM Treaty, subsequently stated that the decision of the administration to abide by the restrictive interpretation was temporary.[13] Asked whether the Soviets would be within their rights to go ahead with research, testing, and development of exotic ABM weapons now that President Reagan had formally adopted the reinterpretation, Perle replied,

"That's correct."[14] In fact, according to the recently released Arms Control Impact Statement for 1986, the Reagan administration will resort to the broader interpretation now unless Congress approves the funds that have been requested for SDI.[15]

McFarlane surprised the world by announcing that testing and development of ballistic missile defense weapons and components was "approved and authorized by the treaty" rather than prohibited.

Russian reaction. The administration's curious "we can do it but we won't (for now)" approach did not put an end to the controversy. On October 19th Marshal Akhromeyev, the Soviet chief of the general staff and first deputy minister of defense, published an article in *Pravda*, which the Soviet Embassy had translated and published in *The Washington Post*. Marshal Akhromeyev called the US "reinterpretation" of the ABM Treaty "deliberate deceit:"

> Such "interpretations" of the ABM Treaty . . . . contradict reality. Article 5 of the treaty absolutely unambiguously bans the development, testing and deployment of ABM systems or components of space or mobile ground basing and, moreover, regardless of whether these systems are based on existing or "future" technologies.[16]

Negotiator's reaction. In testimony, first before the House and then before the Senate, John B. Rhinelander, the legal adviser to the US SALT I delegation and a principal in the drafting and negotiating of the

Rhinelander said, "If the administration sticks with it as the best legal interpretation of the treaty, then the administration has effectively repudiated the ABM Treaty as a legal instrument."

ABM Treaty, provided a step-by-step recreation of the negotiations on the key issue of "exotic systems," arguing strenuously that the Reagan reinterpretation is wrong: "If the administration sticks with it as the best legal interpretation of the treaty, then the administration has effectively repudiated the ABM Treaty as a legal instrument." Rhinelander argued that the reinterpretation leads to an absurd conclusion. In 1972 the USSR ballistic missile defense (BMD) capability lay principally in existing technology and its ability to produce and deploy such BMD weapons in large numbers. The US advantage lay in its potential to develop new BMD weapons based on other physical principles—so-called "exotic systems." It is absurd to think, argued Rhinelander, that the Russians agreed in 1972 to a perpetual ban on the development, testing, and deployment of BMD weapons based on current technology while leaving the US free not only to conduct SDI research but to develop and test BMD weapons based on such exotic technologies.[17]

Questions and problems. The remarkable "reinterpretation" of the ABM Treaty by the Reagan administration raises many troublesome questions. Some reasonable conjectures may be made by way of answering some of these questions. For example, was this reinterpretation reached and announced unilaterally by the United States instead of being pursued privately through the Standing Consultative Commission (SCC)? This commission was created under the

The remarkable "reinterpretation" of the ABM Treaty by the Reagan administration raises many troublesome questions.

ABM Treaty to deal with questions of interpretation and compliance and to consider possible amendments to the treaty in light of "possible changes in the strategic situation."[18] From what is available publicly, we know in fact that the Reagan administration has raised the SDI problem privately with the USSR.[19] The USSR, however, has continued to level strong public criticism at the SDI program. For example, First Secretary Gorbachev told the editors of *Time* that SDI was "the first stage of the project to develop a new ABM system prohibited under the treaty of 1972."[20] From these public denunciations it is reasonable to conclude that no progress has been made on the issue at the SCC or in the Geneva arms talks. The administration, or at least key members of it, apparently decided that it was necessary to have some information on the unilateral US reinterpretation available in the public domain.

Why now? Another key question arises from the fact that no SDI projects will be beyond the research state until the early 1990s.[21] If no question of violating the ABM Treaty would arise for half a decade, why was the question raised and pushed to a presidential decision in 1985? A plausible explanation presented itself when Secretary of Defense Weinberger's letter to President Reagan on arms control was leaked to the press just

prior to the 1985 Geneva Summit. There had been strong pressure on the president to agree at the summit meeting that the US would not take SDI beyond the research phase. In his letter, Secretary Weinberger urged President Reagan to reject "any agreement to limit the SDI program according to a narrow and, I believe, wrong interpretation of the ABM Treaty" because such an interpretation "would diminish significantly the prospects that we will succeed in bringing our search for a strategic defense to fruition."[22] In short, the Defense Department seems to have pushed hard now for the broader "reinterpretation" in order to head off an effort to reaffirm the narrower interpretation at the Geneva Summit.

How did this happen? Beyond these interesting political questions, however, and the enormously important impact that reinterpreting the ABM Treaty will have on national security and arms control policies, there are basic questions of negotiation and interpretation of agreements that fall squarely within the lawyer's province. Is it possible that a short agreement—only 16 articles and four printed pages—dealing with such vitally important subjects, an agreement that was negotiated for two and one-half years by leading diplomats, lawyers, and technical experts, could be unclear or ambiguous on such a key point? On the other hand, is it really believable that the United States government would cynically "gut" a major treaty with the Soviet Union by publicly adopting an interpretation of it that has no foundation?[23] And, if the treaty is not clear, how and why did that happen?

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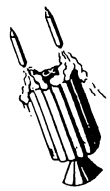
Sorting it out. On politically charged and hotly debated issues such as SDI and the ABM Treaty, there will never be a single view, and perhaps there is no single "truth." In this case the problem is exacerbated by the fact that the negotiating history is classified and thus wholly unavailable in the preparation of this article. The heart of this question lies in the language of the treaty itself, however, and that is fully available.[24] Further, in their testimony before Congress, John Rhinelander and Abraham Sofaer, the legal adviser to the State Department, have provided enough details of the way the treaty was negotiated and how they analyze it to permit a useful discussion of the key questions. In fact, to understand the core of the disputed issue—whether the Reagan administration's reinterpretation of the ABM Treaty to allow development and testing of SDI weapons is legitimate—it is necessary to examine only a few short provisions of the ABM Treaty.

The text. Article II(1) of the ABM Treaty provides that, "For purposes of this treaty an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of: (a) ABM interceptor missiles . . .; (b) ABM launchers . . .; and (c) ABM radars . . . ." Article II(2) makes it clear that ABM interceptor missiles, launchers, and radars are "components." Article V(1) of the treaty provides that, "Each Party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based."

The only question is whether the SDI weapons systems that are being considered constitute "ABM systems or components" within the meaning of Article II.



The core question. Although any lawyer would immediately begin to wonder what is encompassed by such key terms as "system," "develop," "test," and so forth, these issues have nothing to do with the core question. It is perfectly clear that Article V(1) bans the development, testing, and deployment of "ABM systems or components" in any sea, air, space, or mobile land-based mode. We also know that the SDI program is aimed at producing weapons that can "counter strategic ballistic missiles or their elements in flight trajectory" and that every variation of SDI receiving serious consideration involves placing some "components" in space. Accordingly, the only question is whether the SDI weapons systems that are being considered constitute "ABM systems or components" within the meaning of Article II. If so, then the development or testing of such systems or components is clearly forbidden by Article V(1).

Definitions that would have been clear. If Article II(1) had said that an ABM system was "any current system to counter strategic ballistic missiles, etc.," we would have no doubt that the term did not extend to BMD weapons based on physical principles or technologies not in use in 1972. If, on the other hand, Article II(1) had said that an ABM system was any system to counter strategic ballistic missiles, etc. "whether based on current or new physical principles or technologies," then we would have no doubt that new BMD weapons based on SDI technologies would be covered.

Ambiguity at the core. Article II(1) takes neither of these approaches. Instead, it defines an ABM system functionally ("a system to counter strategic ballistic missiles, etc.") and then adds the elusive phrase "currently consisting of." Since the functional definition would by itself embrace new as well as old systems,

[Article II (1)] defines an ABM system functionally ("a system to counter strategic ballistic missiles, etc.") and then adds the elusive phrase "currently consisting of."

does the "currently consisting of" phrase limit the treaty to ABM systems currently in use? Or does it merely indicate that the parties were aware that technologies were likely to change and that the functional definition was to extend to new technologies as they emerged, even though 1972 systems currently consisted only of certain kinds of missile interceptors, launchers, and radars?

Sofaer's gloss. Judge Sofaer, the legal advisor to the State Department, argues that Article II(1) "can more reasonably be read to mean that the systems contemplated by the treaty are those that serve the functions described *and* that currently consist of the listed components."[25] It is clear, however, that there is no "and" in the text, and to read one in means forcing a meaning on a text that is not clearly there, at least in the language of the treaty as such.

Negotiator's explanation. John Rhinelander states that the "currently consisting of" phrase was added at the insistence of the US negotiators in order to make clear that reference to ABM systems or components in the treaty were not limited to traditional technology.[26] Because other easily available language, such as that mentioned above or the traditional "including" phrase, would have made this point clear, while the natural meaning of the "currently consisting of" phrase does not, this explanation is not persuasive.

A balanced interpretation. The key phrase—"currently consisting of"—does not clearly limit the application of the main part of the definition, which is purely functional and broad enough to encompass either new or traditional technology. Accepting the ambiguity of the key phrase, considerable weight would be given to the perpetual nature of the ABM Treaty and the sweeping nature of its declared purpose to "achieve . . . the cessation of the nuclear arms race . . . and general and complete disarmament." As the Restatement reminds us, an international agreement is to be interpreted in good faith in accordance with the ordinary meaning of its terms and in light of its object and purpose.[27] A perpetual treaty intended to end the arms race could not achieve that purpose unless it dealt with both new and old technology. Accordingly, though the question would not be free from doubt, an unbiased analysis limited to the text of the treaty itself would probably favor the restrictive interpretation, that is, the interpretation of the ABM Treaty under which development and testing of both new and old BMD weapons that are sea, air, space, or mobile land-based are prohibited. This, of course, would not explain how a major treaty could be unclear on such a key point.

Agreed Statement D. The problem, however, does not stop here. In addition to the text of the treaty itself, which was signed by Brezhnev and Nixon, there are seven "Agreed Statements" that were agreed upon and initialed by the heads of the US and USSR delegations on the same day that the general secretary and the president signed the treaty. Agreed Statement D provides as follows:

> In order to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the treaty, the Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Article XIII and agreement in accordance with Article XIV of the treaty.

Interpreting superfluousness. At first reading this seems a startlingly superfluous provision. If, by virtue of the broad, functional definition of "an ABM system" in Article II(1), the treaty does embrace all ABM systems, whether based on new or traditional technology, and since Article V(1) bans the development, testing, or deployment of ABM systems or components, why would it be necessary to have an agreed statement that merely reiterates that ABM systems or components based on "other physical principles" may not be deployed (unless the parties agree to amendments to the treaty, as provided in Article XIV)?

Agreed Statement D seems to confirm that the "currently consisting of" phrase in Article II(1) restricts the definiton of ABM systems and components governed by the treaty to those based on traditional technology.

Giving meaning to Agreed Statement D. On the other hand, if the parties felt that Agreed Statement D was necessary in order for it to be clear that ABM systems based on new physical principles could not be deployed without amendment of the treaty, this would provide strong indication that the treaty itself does not extend to new technologies. In other words, Agreed Statement D seems to confirm that the "currently consisting of" phrase in Article II(1) restricts the definiton of ABM systems and components governed by the treaty to those based on traditional technology. This would mean that the Article V(1) ban on development, testing, and deployment of "ABM systems or components" does not extend to BMD weapons based on new technologies, such as SDI. If this were so, then SDI weapons would be limited only by the Agreed Statement D restriction on the deployment of systems and components based on other physical principles—development and testing of SDI weapons, as well as research, would be entirely permissible.

It is possible, of course, that the parties had different views....If this were the case—and apparently the classified record provides grounds for thinking that it was — then the most that either party could be held to under the agreement would be the minimum to which they had mutually agreed.

The Agreed Statements are more agreements than statements. Nor can Agreed Statement D be dismissed on the ground that it is merely interpretative of treaty provisions and hence its redundancy can be ignored. By its terms, Agreed Statement D comprises a separate agreement between the parties. Moreover, though two of the seven Agreed Statements to the ABM Treaty seem largely to elaborate on treaty provisions, the others seem clearly to create new substantive agreements between the parties.[28] It is possible, of course, that the parties had different views. The US might have regarded Agreed Statement D as merely interpretative, because it somehow usefully explained treaty provisions that (in the understanding of US negotiators) dealt with ABM systems based on other physical principles. The Soviets, however, might have regarded Agreed Statement D as an additional agreement between the parties, for in their view the treaty did not deal with such new systems. If this were the case—and apparently the classified record provides grounds for thinking that it was[29]—then the most that either party could be held to under the agreement would be the minimum to which they had mutually agreed.[30] Here the minimum mutual agreement would seem to be that ABM systems and components based on other physical principles could not be deployed without consultation and amendment of the treaty.

The administration's view. This analysis seems to coincide with that taken by Judge Sofaer and appears to be the approach that lies at the base of the administration's "reinterpretation" of the treaty.[31] In order to avoid a conclusion that Agreed Statement D is entirely superfluous, the administration reads the Article V(1) prohibition on development, testing, and deployment as being limited only to BMD weapons based on 1972 technologies. Under Agreed Statement D, the parties separately agreed that new technologies such as SDI would be banned from deployment, but not with respect to development and testing. There is considerable force to this view.

Article V and fixed land-based systems. There are at least two more turns to the story, however, one relating to the provisions of the treaty itself and the other a US negotiator's explanation of how the text came to be as it is. Article V(1) bans development, testing, and deployment of ABM systems and components that are sea, air, space, or mobile land-based. It does not deal with fixed land-based ABM systems. They are dealt with in Article III, which deals only with deployment: "Each Party undertakes not to deploy ABM systems or their components except that . . ." each Party is allowed one limited ABM system around its capital city and one around an ICBM silo base.[32]

Without Agreed Statement D, the natural interpretation of the text would favor the conclusion that the treaty reaches both new and old technology.

The treaty summarized. Since the only ABM systems that may be deployed under Article III are limited fixed land-based systems, since Article V(1) prohibits development, testing, or deployment of sea, air, space, or mobile land-based ABM systems, and since the treaty is silent on research, the net result under the ABM Treaty is that (1) all ABM research is permitted, (2) development and testing at ABM test ranges is also permitted for fixed land-based ABM systems,[33] but they may not be deployed, and (3) development, testing, and deployment are prohibited for sea, air, space, and mobile land-based ABM systems. Although not entirely straightforward, the text of the treaty clearly says this much. The key question left open by the text of the treaty is that discussed above: does the definition of "an ABM system" include new as well as traditional technology? Again, without Agreed Statement D, the

natural interpretation of the text would favor the conclusion that the treaty reaches both new and old technology.

Fitting the pieces together. Now, consider again the language of Agreed Statement D. By its express terms, it was included only "in order to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the treaty . . . ." Yet, Article III bans deployment of all "ABM systems or their components." If the treaty definition of "ABM system" in Article II extended to new systems as well as traditional ones, it would be wholly unnecessary and redundant for Agreed Statement D to state that ABM systems based on "other physical principles" cannot be deployed unless the parties agree to amend the treaty to permit such deployment. The matter is made even more confusing because, other than the precatory reference to Article III in the initial clause of Agreed Statement D, that statement seems addressed to ABM systems based on new physical principles generally, whether fixed land-based (such systems are the only real subject of Article III; deployment of all other ABM systems is prohibited in Article V(1)), sea-based, air-based, space-based, or mobile land-based.[34]

There is no question that the treaty is at least confusing and ambiguous on the core question of whether it applies only to traditional ABM systems.

Keeping the exotic fixed land-based option open. From the account given by a key US negotiator, it appears that the question of "exotic systems" was not part of the initial negotiations but was inserted by the US after the drafting had progressed considerably. Soviet drafts, however, had prohibited "space-based" ABM systems, as did the US drafts. Although the US government was divided for some time with respect to "exotic systems," and in fact tabled its first draft on the subject with the key article omitted, the US Joint Chiefs of Staff were adamant about preserving the option to develop and test fixed land-based laser weapons. The US government adopted this position and advocated a ban on development, testing, and deployment in all other modes. This view was ultimately accepted by the Russians and explains the somewhat odd relationship between the texts of Article III (explicitly prohibiting all but the most limited deployment of land-based ABM systems and implicitly permitting development and testing as well as research with respect to fixed land-based systems) and Article V(1) (explicitly banning development, testing, and deployment of sea, air, space, and mobile land-based ABM systems and implicitly permitting all research).[35]

Was there agreement that "exotics" were covered? Although the US position eventually prevailed, John Rhinelander points out that "the Soviets initially balked at discussing, let alone agreeing to any limitations on 'exotic systems.'"[36] The two delegations established a working group that proceeded ad referendum—that is, without instructions but on the basis that their work product would be taken back to their delegations and governments for approval or rejection. Although the working group apparently reached agreement "that current Article V(1) covered 'current' as well as 'exotic' technologies,"[37] it was only later that (i) the phrase "currently consisting of" was added to Article II(1) and that (ii) Agreed Statement D was negotiated by the parties. US negotiators are said to have sought the addition of the "currently consisting of" phrase in order "to make clear that references to ABM systems or components in the treaty were not limited to 'traditional' technology."[38] This explanation is hard to accept, however, for without this phrase the functional part of the definition would have more clearly covered new technologies than does present Article II(1), and other phrases, such as "including," would have had a less restrictive flavor.

The Russians' "exotic" resistance. Paradoxically, despite the US advantage in new technologies, it was the US that sought, and the USSR that resisted, a ban on exotic weapons. Furthermore, both before and after the working group agreed that the treaty covered new as well as current technology, the Soviets refused to accept an "other devices" provision proposed by the US to the effect that "Each party undertakes not to deploy ABM systems using devices other than ABM interceptor missiles, ABM launchers, or ABM radars to perform the functions of these components."[39] If the treaty language truly reached new as well as old technologies, there would have been no need for an explicit ban on "other [new] devices," and such language would have been superfluous. Moreover, as a key US negotiator points out, the Soviets balked at this language for the specific reason that they wanted no provisions dealing with "exotics,"[40] an objection they would not have had if they had previously agreed that all new as well as traditional ABM systems were banned. Thus, surprisingly, the conclusion that seems more clearly substantiated by the sequence of the negotiations is not that the parties agreed that the text extended to new technologies, but that the Soviets rejected the ad referendum position of the working group that the new technologies were covered.

The source of Agreed Statement D. Although the Soviets rejected the "other devices" language proposed by the US, either for the text of the treaty or as an Agreed Statement, they proposed language that eventually became Agreed Statement D. It was the US, not the Soviets, that insisted upon the insertion of the initial clause that references Agreed Statement D

only to Article III. John Rhinelander's explanation of Agreed Statement D seems inconsistent. He states that, although it "refers to, and interprets Article III only," the references to other physical principles and components capable of substituting for traditional ABM components "are equally applicable to Article V(1)."[41] He agrees that "the language admittedly could be clearer," but admits that the US never sought an Agreed Statement confirming that Article V(1) covered "exotic systems."[42]

Drawing conclusions. What conclusions can be drawn from this long and rather complicated examination of the ABM Treaty? There is no question that the treaty is at least confusing and ambiguous on the core question of whether it applies only to traditional ABM systems. The text of the treaty, when read in light of its stated object and purpose and without reference to Agreed Statement D, would on balance lead to the conclusion that ABM systems based on new technologies are covered by the treaty.

In short, far from being clearly wrong, the Reagan administration's reinterpretation of the ABM Treaty seems in fact to be the more plausible interpretation, based upon the whole text and the available, unclassified record.

Once that language is carefully reexamined in light of Agreed Statement D, however, the balance shifts. Further, the negotiating history supplied by John Rhinelander in fact seems more strongly to support the interpretation he opposes than it does the restrictive interpretation for which he offers it. Although it is certainly correct to state that Agreed Statement D did not amend the treaty,[43] it is equally clear that a treaty is to be interpreted in light of any agreement relating to it that is made by the parties in connection with the conclusion of the treaty.[44] On the basis of this principle, and the established principle that all related parts of an agreement must be read together to give meaning and consistency to the whole, analysis based on the entire text and the public record militates in favor of a conclusion that the ABM Treaty prohibits deployment but not research, development, or testing of space-based BMD weapons based on new physical principles, such as SDI weapons.[45]

In short, far from being clearly wrong, the Reagan administration's reinterpretation of the ABM Treaty seems in fact to be the more plausible interpretation, based upon the whole text and the available, unclassified record. This conclusion, of course, does not provide the answer to more ultimate questions, such as whether SDI weapons will work, whether enormous sums should be spent to create them, and whether the pursuit of such weapons will enhance or jeopardize the prospects for peace. Whatever the answers may be to these larger questions of how best to seek security in a world of increasingly exotic weapons, however, it is best to begin the analysis with a clear-eyed and realistic understanding of what the ABM Treaty does and does not prohibit.

FOOTNOTES

[1]Press Release, National Campaign to Save the ABM Treaty (Oct. 3, 1985).

[2]The Interim Agreement on Strategic Offensive Arms, which was signed by General Secretary Brezhnev and President Nixon in Moscow on the same day, froze the levels of strategic ballistic launchers for a period of five years. The official texts and negotiating histories of the ABM Treaty, the Interim Agreement, and other treaties relevant to arms control can be found in U.S. Arms Control and Disarmament Agency, Arms Control and Disarmament Agreements (1982).

[3]Chayes, "The ABM Treaty and the Strategic Defense Initiative," 5 Pace L. Rev. 735, 737 (1985).

[4]Press Release, supra note 1.

[5]See, e.g., each of the Arms Control Impact Statements prepared for the Committees on Foreign Affairs and Foreign Relations of the House of Representatives and the Senate for fiscal years 1979-1985; Office of Technology Assessment, Ballistic Missile Defense Technologies 10 (1985); Department of Defense, Report to Congress on the Strategic Initiative, App. B (1985); Furniss, "President Reagan's Strategic Defense Initiative," 16 Toledo L. Rev. 149, 150 (1984); Scowcroft, "Understanding the U.S. Strategic Arsenal," in Nuclear Arms: Ethics, Strategy, Politics 65, 82-83 (R.J. Woolsey ed. 1984); Slocomb, "Arms Control: Prospects," Id. at 133, 136; Kerr, "Implications of Anti-Satellite Weapons for ABM Issues," in Space Weapons—The Arms Control Dilemma 107, 108 (Jasani ed. 1984).

[6]Bundy, Kennan, McNamara & Smith, "The President's Choice: Star Wars or Arms Control," 63 For. Aff. 265, 273 (1985).

[7]President Reagan's March 23, 1983 speech.

[8]Under Article XV of the ABM Treaty, either party may withdraw on six months' notice accompanied by a statement "that extraordinary events related to the subject matter of this treaty have jeopardized its supreme interests." For obvious political reasons, neither side would want to be seen to be withdrawing from the ABM Treaty. It has been reported, however, that President Reagan has decided to continue converting B-52 bombers to carry cruise missiles even though doing so will place the US in violation of the overall limits of the unratified but heretofore complied with SALT II agreement by December 1986. Time, May 19, 1986, at 18.

[9]The Washington Post, Oct. 22, 1985, at A10.

[10]Id.

[11]Id.

[12]The Washington Post, Oct. 17, 1985, at A4.

[13]Id.

[14]Id.

[15]The New York Times, May 19, 1986, at 1.

[16]The Washington Post, Oct. 25, 1985, at A24.

[17]Statement of John B. Rhinelander on "Exotic Systems and the ABM Treaty," before the House Foreign Affairs Subcommittee on Arms Control, International Security, and Science, Oct. 22, 1985; Statement of John B. Rhinelander on "Exotic Systems and the ABM Treaty" before the Subcommittee on Strategic and Theatre Nuclear Forces of the Senate Committee on Armed Services, November 21, 1985 (hereinafter "Rhinelander Senate Statement").

[18]Art. XIII, ABM Treaty.

[19]E.g., Nitze, "SDI and the ABM Treaty," FPI Policy Study Group Papers 21, 24 (Aug. 1985).

[20]Time, p. 24 (Sept. 9, 1985).

[21]See Furniss, "SDI Myths and Realities," 16 Toledo L. Rev. 149, 151 (1984). Lt. Gen. Abramson, the Director of the Defense Department's Strategic Defense Initiative Organization, testified to a Senate Armed Services Subcommittee that the first decisions to go beyond research will probably have to be made in 1991. The Washington Post, Nov. 18, 1985, at A1.

[22]The New York Times, Nov. 16, 1985, at 7.

[23]If the reinterpretation was so groundless as to amount to an abrogation of the treaty, the question would then arise whether the president acting alone, through "reinterpretation" or otherwise, has the power to terminate a treaty without the advice and consent of the Senate, a question that is currently confused and unsettled. See Goldwater v. Carter, 444 U.S. 996 (1979).

[24]The ABM Treaty was signed in both English and Russian, with both languages being equally authentic. No effort has been made here to analyze the Russian text.

[25]Sofaer, "The ABM Treaty and the SDI Program," U.S. Dept. of State Bureau of Public Affairs, Current Policy No. 755 at 2 (reprint of statement by Abraham D. Sofaer before the Subcommittee on Arms Control, International Security, and Science of the House Foreign Affairs Committee on Oct. 22, 1985 (hereinafter the "Sofaer House Statement").

[26]Rhinelander Senate Statement at 8, 18.

[27]ALI Restatement of the Foreign Relations Law of the United States (Revised), Tentative Draft No. 6, Vol. 2 & 325 (April 12, 1985).

[28]Agreed Statements B and F seem largely interpretative, the former specifying the agreed potential of the smaller phased-array ABM radar mentioned in Article III(b)(3) and the latter clarifying that large space-tracking and verification radars are not ABM radars under the treaty. Agreed Statement A, however, grandfathered certain radars around Moscow that otherwise would have been subject to the treaty limits, Agreed Statement C added the requirement that the two fixed land-based ABM systems that could be deployed had to be at least 1300 kilometers apart, Agreed Statement E extended the Article V(2) limit on one missile per ABM launcher to limit each ABM interceptor missile to one independently guided warhead, and Agreed Statement G extended the Article IX ban on transferring ABM systems or components to other states to prohibit transfers of technical descriptions or blueprints for such systems.

[29]"[T]he record reflects that they [the US negotiators] failed to obtain the ban they sought and that we could never have enforced such a ban against the Soviets. Treaties, like other agreements, are enforceable only to the extent they create mutual rights and duties." Sofaer House Statement at 3.

[30]Unless, perhaps, the terms of the treaty so clearly imposed a broader agreement that the actual, sincere belief of the parties was not reasonable. In other words, when the language of an agreement is clear beyond any cavil or doubt, the parties will not be heard to say that it meant something else. In light of the textual ambiguity of the ABM Treaty, this is clearly not the case here.

[31]Sofaer House Statement at 2-3.

[32]Under a 1974 Protocol the parties agreed to limit themselves to only one of these two options. The Soviets have chosen to maintain the Galosh ABM system around Moscow. The United States opted for an ABM system around the ICBM base near Grand Forks, North Dakota, but deactivated it in 1976.

[33]Subject to certain limits set out in Article IV.

[34]If the introductory clause of Agreed Statement D were read to limit it to fixed land-based ABM systems the deployment of which is restricted by Article III, it might be possible to construct an argument under which Agreed Statement D limits the term "ABM systems" in Article III to traditional technologies, while Articles II and V use it in the expansive sense to include both new and traditional technologies, with the result that Article V(1) would ban the development and testing of space-based new technologies such as SDI. Such an interpretation, however, seems too strained and fanciful to attract serious consideration unless there is a solid basis for it in the classified record.

[35]See G. Smith, Doubletalk: The Story of SALT I 263-65 (1980); J. Newhouse, Cold Dawn: The Story of SALT 230-31, 237 (1973).

[36]Rhinelander Senate Statement at 16.

[37]Id. at 17.

[38]Id. at 18.

[39]Id. at 19; see C. Smith, Doubletalk: The Story of SALT I 265, 343-44 (1980).

[40]Rhinelander Senate Statement at 19.

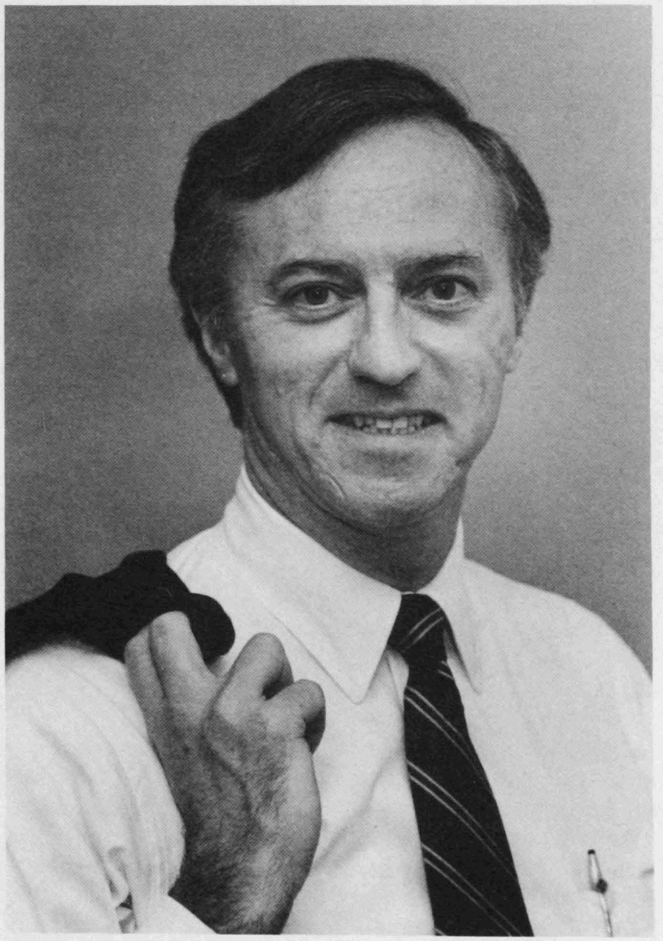
[41]Id. at 20.

[42]Id. at 20, 21.

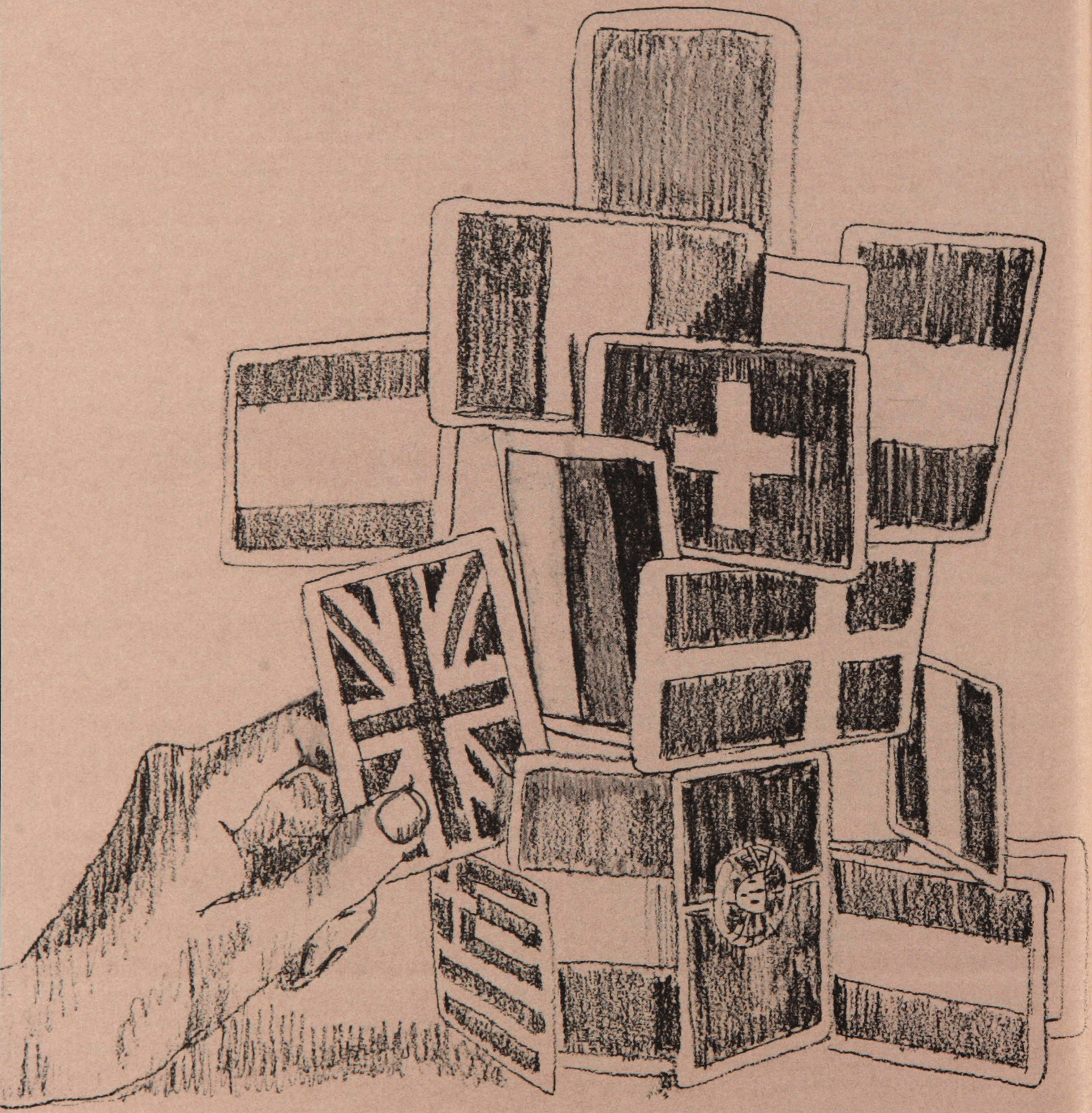
[43]Id. at 20.

[44]See Vienna Convention on the Law of Treaties, Article 31(2)(a) (1969).

[45]Nor do the parties seem to have consistently interpreted the ABM Treaty to ban development and testing of BMD weapons based on new technologies. The Soviets seem not to have spoken publicly on the subject until recently, see Rhinelander Senate Statement at 3 and note 16 supra, and the Americans seem, despite a recent coalescence of views behind the Rhinelander interpretation, historically to have held divergent positions, with much support originally for the broader interpretation. See "Analysis of U.S. Post Negotiation Public Statements Interpreting the ABM's Treaty Application to Future Systems," pp. 2-9, prepared by the Office of the Legal Adviser, Department of State (Oct. 29, 1985); but see Rhinelander, Responses to Additional Questions for Hearings before the House Foreign Affairs Subcommittee on Arms Control, International Security, and Science 16.30 (Jan. 2, 1986). The official US text and history of the ABM Treaty has always favored the broader interpretation. See U.S. Arms Disarmament Agreements: Texts and Histories of Negotiations 138 (1982).



Leon E. Irish, a Michigan alumnus (J.D. '64) and Oxford University graduate, joined the faculty last fall, after practicing federal tax law with Caplin & Drysdale, Chartered, in Washington, D.C., for 17 years.



Joseph H.H. Weiler

Alternatives to Withdrawal from an International Organization: THE CASE OF THE EEC

Abbreviated adaptation of a study prepared for the Nathan Feinberg Festschrift (20 Israel Law Review *282 (1986))*

International lawyers are accustomed to a measure of skepticism regarding their discipline. The absence in the international legal order of a centralized legislator, compulsory adjudicator and, in particular, a law enforcement agency all lead to a measure of disbelief in the reality of international law.

One of the classical debates on this theme concerns the right of States, as members of an international organization, to withdraw unilaterally from the organization, thereby eschewing their obligations to their fellow members.

The problem arises because of a common practice of omitting withdrawal clauses from the constituent treaties of many international organizations—as if not wishing to mar the marriage with talk about divorce.

The prevailing view is that there exists no presumption in favor of the right of unilateral withdrawal, and that withdrawal is therefore permitted only if it is expressly provided for or can be inferred by implication from the constitutent document of the organization. For example, in several cases States which withdrew unilaterally were held liable for continued membership fees.

Despite the merits of this conclusion, it poses two extra-legal problems. In the first place, one may simply ask: "So what?" Will a State determined to withdraw from an international organization really be impressed by the feeble international legal prohibition? Second, and more important, the practice of withdrawal has diminished considerably. Much more common, and troubling, is the practice of States to remain members of the organization while evading their obligations in one way or another.

In dealing with this issue, instead of discussing international organizations in general, I shall concentrate exclusively on the European Economic Community (EEC). An entity defying a precise conceptual categorization, the EEC, in its internal structure and process, straddles the line between an international organization and a quasi-federation. Thus, the issues encapsuled in the problem of unilateral withdrawal offer different, more complex, and highly interesting perspectives of transnational practice and doctrine.

Withdrawal from an international organization, whether unilateral or negotiated, is a drastic step. It is not taken lightly, and it indicates that a State has been unable to express its voice adequately in the organization. In many cases, especially for smaller States, withdrawal carries many penalties. Generally, the withdrawing State will not only lose whatever direct benefits accrue from membership, but will also lose a forum from which to influence the behavior of others. It is not surprising therefore, that withdrawal, unilateral or negotiated, is relatively rare and adopted as a "last straw" measure.

The drastic nature of withdrawal, especially unilateral withdrawal, leads instead for a search by what we may now call "recalcitrant Member States" for other techniques to avoid unpalatable consequences of membership. Naturally, recalcitrance occurs once a Member State has failed to convince its partners by the normal decisional processes of the organization.

In the EEC it is possible to identify, in addition to the threat of withdrawal, three other such techniques:

—inactive membership, whereby a Member State retains formal membership but withdraws from any active participation in the life of the organization;

—overactive membership, whereby a Member State retains full membership but seeks to use this mem-

bership to obstruct (illicitly) the internal processes in such a way as to avoid the consequences of unpalatable policies;
—selective membership, whereby a Member State retains membership but seeks to avoid the fulfillment of the unpalatable obligations by simply disregarding them.

I shall analyze in turn each of the four techniques with particular regard to the legal constraints on such behavior.

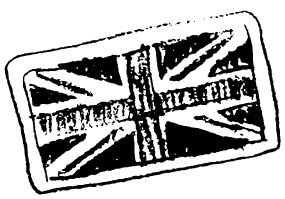
1. Unilateral Withdrawal

Unlike the Treaty of Paris, which established the European Coal and Steel Community (ECSC) for a limited duration of 50 years, the Treaty of Rome, establishing the EEC, was in the language of Article 240 "concluded for an unlimited period."

Given the language of Article 240, must we deduce that, absent any contrary indication to be derived from the interpretation of the treaty, unilateral withdrawal would be prohibited? I shall first treat this formal legal question and then offer some political observations. In principle, the relevance of the formal legal analysis of the right to unilateral withdrawal from the EEC is very limited.

How then should one interpret the delphic Article 240? It should be remembered that the *travaux* of the Treaty of Rome have not been published and cannot therefore be used as an aid in interpretation. To be sure, the failed European Political Community, on the ashes of which the EEC Treaty was drafted, contained yet a stronger term: it was to be "indissoluble." Arguing *a-contrario*, it could be said that all that Article 240 EEC intended to convey was that the EEC was not to be limited in time (unlike the ECSC, for example, which is so limited); rather, the intention was that it be perpetual. However, it is doubtful how legitimate reliance on the European Political Community may be, and the absence of *travaux* indicate that in interpretation, more weight should be given to the text and the *economie* of the treaty rather than to an attempt to divine the intention of the original framers from extraneous sources.

Withdrawal, unilateral or negotiated, is relatively rare and adopted as a "last straw" measure.



Regarding textual and contextual argument, the objective of indicating that the treaty was concluded for an unlimited period would have been achieved by silence. Normally, a treaty does not automatically expire unless a duration is explicitly or implicitly provided. If then Article 240 EEC is to receive a non-superfluous meaning, it must be that it is a non-withdrawal clause.

The Court of Justice of the European Community, which is the supreme judicial body charged with interpreting the Treaty of Rome, has not had occasion to give a direct response to this question. Its *dicta* in *Commission v. France* are, however, highly suggestive:

> The Member States agreed to establish a Community of unlimited duration, having permanent institutions vested with real powers, stemming from a limitation of authority or a transfer of powers from the States to that Community.
>
> ...
>
> Power thus conferred could not, therefore, be withdrawn from the Community, nor could the objectives with which such powers are concerned be restored to the field of authority of the member States alone, except by virtue of an express provision of the Treaty.
>
> ...
>
> To admit that the whole of Chapter VI [of the Euratom Treaty which for our purposes might be equated with the EEC] lapsed without any new provisions simultaneously coming into force would amount to accepting a break in continuity in a sphere where the Treaty, particularly by Article 2, has prescribed the pursuit of a common policy.

The judgment is not conclusive, but it indicates the preference of the Court for the interpretation restricting rather than enlarging the options for unilateral Member State action.

As mentioned above, the legal argument, fascinating or otherwise, is of little political relevance. In the first place, even though at least one Member State, the United Kingdom, seriously entertained withdrawal plans, and even conducted in 1975 an internal referendum one choice of which was exit, the passing years and the ever increasing economic and political enmeshment of the Member States reduce the feasibility of such an option.

Secondly, for that very same factor of high enmeshment, it would from a practical point of view be highly unlikely that a Member State could withdraw by a simple deposit of an instrument of withdrawal. The legal regime of the EEC extends deep into the commercial and other activities of individuals and undertakings within the Member States. A non-negotiated withdrawal could create such a level of legal and economic uncertainty as to be damaging to the withdrawing State's own interests.

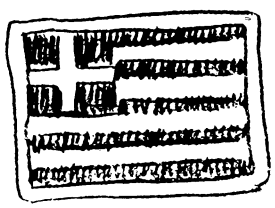
It would be safe, therefore, to make two politico-legal predictions. First, if a Member State were to decide that withdrawal would be in its best interests, it is unlikely that other Member States would use legal means to try to prevent such withdrawal. Such a decision would be greeted with regret or relief, but it

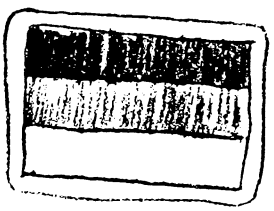
would be accepted. Second, it is unlikely that the withdrawing Member State would attempt to use such political license to withdraw abruptly. As the case of Greenland's withdrawal illustrates, there would probably be protracted negotiations with a view to a mutually satisfactory exit regime.

In conclusion, then, from both the legal and political points of view in the EEC, the issue of unilateral withdrawal is not critical.

2. Inactive Membership

Let us assume that a Member State of the EEC is faced with an intra-organizational problem which it is unable to resolve through the normal decision making mechanisms. If indeed the political reality of the EEC is such that unilateral withdrawal is an unlikely option for solving membership problems, Member States may resort to other "techniques."





A Member State unhappy with the prospective direction of a Community policy will use its membership rights to block an unfavorable outcome and will then rely on the failure of the Community to adopt a policy in order to take unilateral action.

The first would be the classical "inactive membership." This has happened once in the life of the Community in the famous, (or, as some would put it, infamous) crisis of the mid-1960s. In that instance, France withdrew from active participation in the European institutions, practicing the so-called "empty chair" policy.

France consciously used inactive membership as a means of applying pressure on her partners. There was no question of withdrawal. The technique eventually succeeded when a solution was found in the legally dubious Luxembourg Accord of 1966. Under this treaty, the six partners formally "agreed to disagree," but de-facto introduced the right of each Member State to assert a veto on Community decisions which contradicted a self-defined vital national interest.

From the legal point of view we may confine ourselves to two brief observations. First, during the period of inactive membership there was no question that France remained bound by all her treaty obligations in matters concerning the operation of the Common Market. There could be no question of trying to disengage from the standstill on the introduction of new customs or quantitative restrictions on imported goods and the like. Inactive membership simply meant that France would not participate in the on-going decision-making activity. Also, strictly speaking, if Community bodies in the absence of a French representative were to adopt binding measures, these measures *would be binding* on France. (In principle, this is no different from other international organizations. As mentioned above, the membership fees of inactive members continue to accrue.) Politically this would be unwise and indeed the other Member States sought a political resolution to the crisis.

Second, doubts may be expressed about the legality *within the Community context* of the very practice of inactive membership.

Article 5 of the Treaty of Rome provides:

> Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.

The provision is reminiscent of the duty of "federal loyalty" developed in the Federal Republic of Germany. There can be little question that the French action was a step which could jeopardize the attainment of the objectives of the treaty. In principle, France could have been "sued" by the Commission of the European Community under Article 169 of the treaty or by one or more other Member States under Article 171 EEC. Once again, politics and good sense prevailed. Such a legal action would only have exacerbated the situation and plunged the Community into an even deeper political crisis.

3. Overactive Membership

In order to introduce the rather inelegant term "overactive membership," recourse might be had to the famous definition of *Chutzpah*. The epitome of *Chutzpah* is illustrated by the case of the child who kills both his or her parents. When brought to justice, the youngster throws himself/herself before the Bench and pleads, "Mercy, I am an orphan."

This "technique" is much closer than the previous ones to the day-to-day political reality of the Community. By this technique, a Member State unhappy with the prospective direction of a Community policy will use its membership rights to block an unfavorable outcome and will then rely on the failure of the Community to adopt a policy in order to take unilateral action.

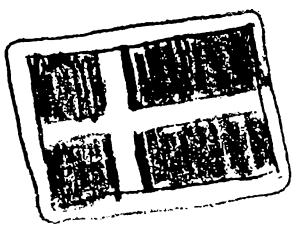
I shall illustrate this technique and the legal and political issues involved therein by reference to one paradigmatic case study, the case of *Commission v. United Kingdom*.

Article 102 of the Act of Accession (regulating all matters concerning the accession in 1973 to the EEC of Britain, Ireland, and Denmark) provides that

> [f]rom the sixth year after Accession at the latest, the Council [of Ministers of the EEC], acting on a proposal from the Commission [of the EEC], shall determine conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea.

This apparently dry and technical provision was of great political and economic moment. In principle, for the purposes of fishing, both national fishing grounds, including the 200-mile Exclusive Economic Zone, were to be considered Community fishing grounds with no discrimination among fishermen of the various Member States. The introduction of a common conservation policy was a crucial step towards the eventual elaboration of a more general common fisheries policy to be achieved by the end of 1982.

The avenues of inactive membership and overactive membership may yield very poor results to the recalcitrant partner.



Until the deadline specified in Article 102 AA, Member States could impose their own conservation measures restricting fishing, subject only to some international obligations and a provisional Community regime. The Community fear was that Member States could use this license to impose restrictions which would indirectly, at least, favor their own fishermen.

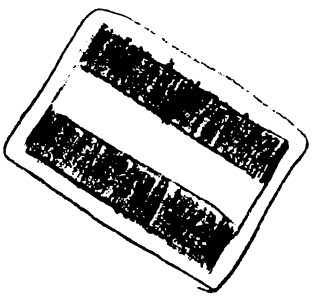
The Commission of the European Community duly made its proposals for common conservation measures at the beginning of 1979. Council, which is composed of the governmental representatives of the Member States, was unable to reach a common accord and adopted a further series of interim measures.

The United Kingdom informed the Commission that, in the light of this failure, and in order to protect its fishing grounds, it intended to introduce a series of unilateral conservation measures. These measures were in most respects very similar to those proposed by the Commission. The Commission indicated that it would need time to study these measures. The U.K. nonetheless brought the measures into force as of July 1, 1979.

In the language of the judgment:

> [t]he criticisms made by the Commission are based on the consideration that measures of this type cannot be effectively adopted except for the whole of the Community, that the Council would have been in a position to adopt them in the form intended by the Treaty *if the United Kingdom had not itself blocked the decision-making process* in the Council and that by unilaterally adopting the measures in question the United Kingdom has encroached upon the powers which belong in their entirety, as from 1 January 1979, to the Community [emphasis added].

The recalcitrant Member State might be tempted by one further option: simply disregard those provisions of Community law which are not to its liking while continuing its membership.



This, then, was the situation upon which the Court was called to adjudicate. The British "orphan," in the face of a policy which was not to its liking, had not attempted to withdraw from the Community, nor even to "sulk" with an empty chair and "inactive membership." Instead, it *actively* sought to *inactivate* the Community process and thus pave the way for continued unilateral action.

The European Court of Justice was on the horns of a real dilemma. Let us review the options:

Option 1: In the face of the imperative language of Article 102 of the Treaty of Accession, it could simply hold that until such time as the Council could reach agreement on a regime of common conservation measures, no Member State could introduce unilateral measures. The advantage of such a ruling would be to provide the Member States in the Council with an incentive to "hurry up" and reach a common accord.

This, however, would be a dangerous path to take. The notoriously tortuous Community decision-making process could mean further lengthy delays. If it were not Britain, it could well be some other Member State which would, at the last minute, introduce objections. In the meantime, one of two things would take place: either, in the absence of adequate conservation measures, the fishing grounds would become depleted to the detriment of all concerned; or, one or more of the Member States would simply rebel at this last prospect and be pushed towards an open defiance of Community law. The latter possibility is an extremely rare occurrence which, indeed, at that time had never happened.

Option 2: The Court of Justice could rule that, given the failure of the Council to reach agreement and given

further the objective need of introducing conservation measures, Member States would be allowed to adopt unilateral provisions.

This would be an equally dangerous path to tread. Such a ruling would remove any incentive from the Member States to achieve agreement on common policies since in every field there will always be at least one partner which would prefer the unilateral way. *"Chutzpah"* would be judicially sanctioned.

The Court's eventual judgment was truly Solomonic.

In the first place it confirmed that

> since the expiration ... of the transitional period laid down by Article 102 [AA], power to adopt, as part of the common fisheries policy, measures relating to the conservation of the resources of the sea has belonged fully and definitively to the Community.

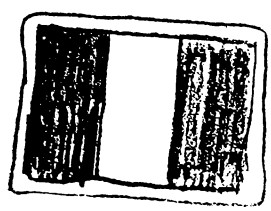
Then, while taking notice of the failure of the Council of Ministers to act on the proposal of the Commission, the Court further stressed that

> the transfer to the Community of powers in this matter being total and definitive, such a failure to act could not in any case restore to the Member States the power and freedom to act unilaterally in this field.

However, the Court recognized that it would not be acceptable to make it

> entirely impossible for the Member States to amend existing [national, or interim Community] conservation measures in case of need owing to the development of the relevant biological and technological facts in this sphere.

Generally, in public international law, the most effective sanction is the fear of reciprocal reprisals.



How then to square the circle? The Court proceeded to hold that

> [b]efore adopting such measures the Member State concerned is required to seek the approval of the Commission, which must be consulted at all stages of the procedure.

This decision achieves the best of all worlds. It gives a way to ensure that fishing grounds should not become depleted; it preserves the Community interest represented by the Commission; and it provides an incentive for the Member States in the Council to adopt a definitive policy. Under the ruling of the Court, absent such a Council policy, each Member State would have to abide by the rulings of the Commission. By contrast, the Council itself may introduce amendments to the proposals of the Commission.

This is not the place to analyze expansively and critically the reasoning which allowed the Court to arrive at this decision. It is sufficient for present purposes to cite again from the judgment one cornerstone of the Court's rationale:

> According to Article 5 of the Treaty, Member States are required to take all appropriate measures to facilitate the achievement of the Community's task and to abstain from any measure which might jeopardize the attainment of the objectives of the Treaty. This provision imposes on the Member States special duties of action and abstention in a situation in which the Commission, in order to meet urgent needs of conservation, has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted Community action.
>
> ...
>
> As this is a field reserved to the powers of the Community, within which Member States may henceforth act only as trustees of the common interest, a Member State cannot therefore, in the absence of appropriate action on the part of the Council, bring into force any interim conservation measures which may be required...except as part of a process of collaboration with the Commission....

It would seem therefore not only that the EEC Member States are precluded from unilateral withdrawal, but also that the avenues of inactive membership and overactive membership may yield very poor results to the recalcitrant partner. There can be little question that membership in the EEC is very onerous indeed.

4. Selective Membership

The recalcitrant Member State might be tempted by one further option: simply disregard those provisions of Community law which are not to its liking while continuing its membership. Indeed, this is an option which is fairly common in current international life; the notorious weaknesses of international enforcement mechanisms render this option particularly attractive. Generally, in public international law, the most effective sanction is the fear of reciprocal reprisals. For example, a State not according another State the benefits of certain rules of the law of the sea might find itself denied the same benefits. This type of sanction is unavailable within the Common Market. A differentiated regime of countervailing measures among the Member States in the face of alleged or real violations would have two serious consequences. It would

destroy the basic idea of creating a common market place of production factors, and it would also penalize innocent individuals who are among the main beneficiaries of the Common Market. In this respect, a system of reprisals by one or more Member States faced with another partner's failure to fulfill obligations would be as unthinkable as it would be for states in the U.S. to introduce countervailing measures against each other.

What responses then has the EEC developed to deal with the recalcitrant Member State practicing "selective membership"? The EEC has charted a course which goes well beyond any similar experience in other international organizations and which makes it extremely difficult for the Member State to adopt the technique of selective membership. For this the Community relies on its system of judicial review.

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The hierarchy of norms within the EEC is typical of a non-unitary system. The higher law of the Community is of course the treaty itself. Neither Community organs nor Member States may violate the treaty in their legislative and administrative actions. The Community, however, also has extensive legislative capacity whereby the Council of Ministers, on a proposal by the commission, may promulgate regulations, directives, and decisions. These measures, thousands of which have been promulgated over the last three decades, are binding in law and are *supreme* over conflicting Member States' law.

Not surprisingly then, the Community features a double-limbed system of judicial review which operates on two levels. Two sets of legislative acts and administrative measures are subject to judicial review: 1.) the measures of the Community itself (acts of the Council and Commission) which are reviewable for conformity with the treaties; and, 2.) acts of the Member States which are reviewed for their conformity with Community law and policy, including the above-mentioned secondary legislation.

In the context of our discussion of attempts by Member States to practice selective membership by disregarding those obligations which are not to their liking, the effectiveness of the second set of measures assumes critical importance. I shall focus here, then, only on that aspect of judicial review.

Both the Commission of the EEC and individual Member States may, in accordance with Articles 169-172 EEC, bring an action against a Member State for failure to fulfill its obligations under the treaty. In general, failure to fulfill an obligation may take the form of inaction in implementing a Community obligation or enacting a national measure contrary to Community obligations. The very existence of a non-optional and *exclusive* judicial forum for adjudicating these types of disputes places the Community above many international organizations. The role of the Commission is even more special. As noted by one commentator:

> [u]nder traditional international law, the enforcement of treaty obligations is a matter settled amongst the Contracting Parties themselves. Article 169, in contrast, enables an independent community body, the Commission, to invoke the compulsory jurisdiction of the European Court against a defaulting Member State.

At the same time, the "intergovernmental" character of this procedure and the consequent limitations on its efficacy are clear enough. Four weaknesses are particularly glaring.

i.) The political nature of the procedure. In the first place, the decision of the Commission and/or a Member State to bring an action against an alleged violation by another Member State will often be influenced by other (extraneous) political considerations. The Commission might decide that it does not wish to threaten delicate on-going negotiations and Member States might not wish to precipitate an international crisis. Moreover, the Commission, as required by the infringement procedure, will strive to reach a friendly settlement with the infringing Member State. This settlement might not fully remedy the infringement legally. Finally, the Commission might be particularly reluctant to bring an action against a violation committed by a national judicial decision.

ii.) The problem of monitoring Member State infringements. Given the vast number of Community measures, it is simply impossible for the Commission to keep tabs on all practices of the Member States with a view to scrutiny and possible judicial action.

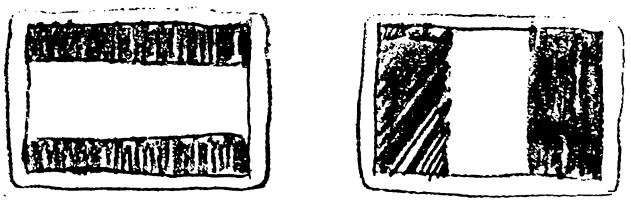
iii.) The appropriateness of Article 169 for small violations. It is unrealistic to expect the Commission to put the entire legal machinery into full swing in the face of minor violations. Article 169 would seem more appropriate for dealing with flagrant violations of some political consequence.

iv.) The lack of real enforcement. In most cases, either the prospect or actual commencement of infringement proceedings is sufficient to terminate a violation, and even more so, an actual judgment by the Court condemning the violation. These judgments, however, are merely declaratory. There is no army to enforce them nor any real sanction in the event that a judgment is disregarded. The record of compliance with decisions of the Court by Member States is remarkable. But there are several instances when judgments were disregarded which highlight this weakness.

These weaknesses are, to an extent, remedied by judicial review which takes place *within the judicial system of the Member States in collaboration with the European Court of Justice.* Article 177 EEC provides *inter alia* that when a question concerning the interpretation of the treaty is raised before a national court, the latter may—and if it is a court against whose decision there is no further judicial remedy then it must—suspend the national proceedings. It may then make a request for a preliminary ruling on the correct interpretation of the treaty to the European Court of Justice in Luxembourg. Once this ruling is made, it is remitted back to the national court which will give, on the basis of the ruling, the decision in the case before it. The national courts and the European Court are integrated thus into a unitary system of judicial review.

The European Court and national courts have made good use of this procedure. On its face, the purpose of Article 177 is simply to ensure uniform interpretation of Community law throughout the Member States. However, very often the factual situation in which Article 177 comes into play is when an individual litigant pleads in the national court that a rule or measure or national practice should not be applied because it violates the Community obligations of the Member State. The attempts of Member States to practice selective membership by disregarding their obligations thus come regularly to be adjudicated before their own national courts. On remission to the European Court, the latter renders its interpretation of Community law within the factual context of the case before it. Theoretically a division exists whereby the European Court may not itself rule on the *application* of Community law. But as one scholar (Rasmussen) notes:

> It is no secret, however, that in practice, when making preliminary rulings the Court has often transgressed the theoretical borderline...it provides the national judge with an answer in which questions of law and of fact are sufficiently interwoven as to leave the national judge with only little discretion and flexibility in making his final decision.



A Member State should not be allowed to practice the *alternative techniques* for avoiding obligations. If a Member State cannot accept these obligations, it is better that it be allowed to withdraw, even unilaterally.

What is important, indeed crucial, in the procedure, is the fact that *it is the national court which renders the final judgment.* The main result of this procedure is the binding effect and enforcement value which such a decision has on a Member State—coming from its own courts—as opposed to a similar decision handed down in declaratory fashion by the European Court under the previously discussed 169 procedure.

This takes care of the most dramatic weakness of that procedure, the ability of a Member State, *in extremis*, to disregard the strictures of the European Court. Under the 177 procedure this is not possible. A Member State—in our Western democracies—cannot disobey *its own courts.*

The other weaknesses of the 169 procedure are also remedied to some extent: individual litigants are usually not politically motivated in bringing their actions; small as well as big violations come to be adjudicated; and in terms of monitoring, the Community citizen becomes merely a decentralized agent for monitoring compliance by Member States with their treaty obligations.

Conclusions

This analysis of the European Community system has shown that the reluctant Member State wishing to practice any of the three avoidance techniques—inactive membership, overactive membership and selective membership, as an alternative to withdrawal, faces in the Community serious legal and political constraints for such behavior.

We may now return to our point of departure—the legality of unilateral withdrawal—and re-examine it as a matter of policy rather than in strict legal terms. Underlying the classical analysis was the notion of the universal international organization. In such organizations the very fact of large and pluralistic membership has a high value in itself. The truncated and diminishing membership of the League of Nations remains a valid experience till this day. Even if States disregard some of their membership obligations, it is probably still worthwhile for the international community as a whole to retain as wide a membership as possible in the universal organization.

This is not the case in an organization such as the EEC. The EEC could not function, and its very basic objectives would be irreparably compromised, if Member States could retain their membership and yet systematically avoid their many and day-to-day obligations. In these circumstances, we come to a conclusion which overturns accepted wisdom of international law. The conclusion must be that a Member State should not be allowed to practice the *alternative techniques* for avoiding obligations. If a Member State cannot accept these obligations, it is better that it be allowed to withdraw, even unilaterally.

A profile of Professor Weiler appears on pages 7-8.

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