Vanderbilt Journal of Transnational Law

Volume 16
Issue 3 *Summer 1983*

Article 7

1983

Recent Decisions

Timothy J. Peaden

Charles S. Baugh

Marc W. Joseph

Melissa Q. Windham

RECENT DECISIONS

ANTITRUST—*Noerr-Pennington* EXTENDS IMMUNITY FROM SHERMAN ACT TO FOREIGN LITIGATION AND FOREIGN ACTS THAT RESULT IN ALLEGED ANTITRUST VIOLATIONS, *Coastal States Marketing, Inc. v. Hunt,* 694 F.2d 1358 (5th Cir. 1983).

I. FACTS AND HOLDING

Plaintiff,[1] an oil distributor alleged to have dealt in nationalized Libyan oil, brought suit in the District Court for the Southern District of Texas against the former owners of a Libyan oil concession[2] to recover damages for defendants' alleged violation of section 1 of the Sherman Act.[3] In particular, plaintiff asserted that defendants conspired to restrain trade in Sarir crude oil by initiating lawsuits[4] and publicity campaigns[5] concerning defen-

---

1. Coastal States Marketing, Inc. (hereinafter Coastal).

2. Nelson Bunker Hunt, the named defendant, was granted an oil concession by the Libyan Government in 1957. Coastal States Marketing, Inc. v. Hunt, 694 F.2d 1358, 1360 (5th Cir. 1983). He later assigned half of his interest in the concession to the BP Exploration Co. (Libya) Ltd. (hereinafter BP), a subsidiary of the British Petroleum Co., Ltd., and 12.5% of his interest to his brothers, Herbert and Lamar. *Id.* Libya nationalized BP's interest in 1971 and the Hunts' interest in 1973. *Id.*

3. 15 U.S.C. § 1 (1976). Section 1 of the Sherman Act states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Id.

4. In response to Libya's nationalization of the oil concession, the Hunts publicized their claim to the Sarir oil by mounting a worldwide effort to inform crude oil users of the claim. Following BP's lead, the Hunts sought to track shipments of Sarir crude. The Hunts also joined 21 of the 29 lawsuits that BP had initiated in various countries to claim title to the Sarir oil. *Coastal States Marketing,* 694 F.2d at 1360. The instant court noted that in one suit the Hunts

dants' claim to specified oil interests that were nationalized by Libya. According to plaintiff, the purpose and effect of defendants' conduct was to create a secondary boycott hindering plaintiff's marketing of its crude oil and intimidating potential customers and creditors.[6] At the close of plaintiff's case, the district court directed a verdict[7] for defendants, holding that the *Noerr*-

---

instigated a conversion action in Texas state court against Coastal, the present plaintiff. Drawing upon the same fact situation as that presented in the instant case, Coastal counterclaimed for the Hunts' allegedly tortious interference with Coastal's business relations. *Id.* at 1361. The trial court denied the claims of both parties, and the state court of appeals and the Supreme Court of Texas affirmed the decision. *See* Hunt v. Coastal States Producing Co., 570 S.W.2d 503 (Tex. Civ. App. 1978), *aff'd,* 583 S.W.2d 322 (Tex.) (three justices dissented in the Texas Supreme Court's opinion), *cert. denied,* 444 U.S. 992 (1979). Defendants also were involved in an attempt to attach the cargo of an oil tanker, the S/T *Hilda,* which was chartered by Coastal to transport Sarir crude oil to the east coast of the United States. The defendants, *inter alia,* instigated a federal court attachment proceeding against the *Hilda* claiming that the vessel carried expropriated Sarir crude. Coastal denied that the *Hilda* carried Sarir crude. The court dismissed the case for lack of jurisdiction. *See* Hunt v. A Cargo of Petroleum Prod. Laden on Steam Tanker Hilda, 378 F. Supp. 701 (E.D. Pa. 1974), *aff'd mem.,* 515 F.2d 506 (3d Cir.), *cert. denied,* 423 U.S. 869 (1975).

5. Defendants launched a publicity campaign which included an announcement by Nelson Bunker Hunt that concluded:

> The attention of all those who may be concerned with these developments, whether as purchasers or sellers of oil, oil products, or otherwise, is drawn to the continuance of Hunt's rights. It is Hunt's intention to assert those rights wherever and whenever necessary against those who would infringe them, including anyone dealing in or with oil extracted from the Sarir Field, its products or proceeds. This warning applies equally to dealings in or with so-called 'royalty oil' or 'cost crude oil' of which there is none. Legal title to all oil from Sarir Field and Concession 65 rests in BP Exploration Company (Libya) Ltd. and Nelson Bunker Hunt.

Coastal States Marketing, 694 F.2d at 1360 n.6.

6. *Id.* at 1361.

7. The directed verdict complicated the appeals court's assessment of the adequacy of the evidence presented by Coastal. In a "normal" case, the court noted, the defendant bears the onus of proving that its conduct falls within that conduct protected by immunity. Once entitlement to immunity is established, the burden then shifts back to the plaintiff to prove sham. Because the district court in this case directed a verdict for the defendants before they could deliver their case-in-chief, the court of appeals found that Coastal's burden to show sham was never triggered. Although it was aware of this "procedural irregularity," the court, nevertheless, found that the plaintiffs had vigorously and extensively argued the issue of the Hunts' intent. Therefore, the court determined that no prejudice to Coastal resulted from the irregularity. *Id.* at 1372 n.46.

Pennington doctrine of petitioning immunity protected their conduct from antitrust liability.[8] Plaintiff appealed, arguing that *Noerr-Pennington* did not protect defendants' conduct because the conduct amounted to a boycott.[9] Also, plaintiff maintained that because the *Noerr-Pennington* doctrine was grounded upon the constitutional right to petition the United States Government, the doctrine did not extend to the petitioning of a foreign government, a privilege not guaranteed by the United States Constitution.[10] Even assuming that extraterritorial extension of the doctrine was permissible, plaintiff contended that the doctrine did not protect defendants' publicity campaigns and threats to litigate[11] because these activities were not "part" of defendants' petitioning activities.[12] Plaintiff finally posited that regardless of whether the court was persuaded by the foregoing arguments, defendants' litigation was a sham[13] and that the real aim of defen-

---

8. The *Noerr-Pennington* doctrine protects from antitrust liability genuine attempts to incite government action. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961). Protected conduct includes not only lobbying and publicity campaigns but also extends to participation in judicial or administrative proceedings. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

9. *Coastal States Marketing,* 694 F.2d at 1364.

10. The court noted that Coastal failed to make this argument before the district court; however, the reasons of fairness and justice persuaded the court to address the issue. *Id.*

11. *See supra* note 5.

12. *Coastal States Marketing,* 694 F.2d at 1367.

13. Plaintiffs asserted this argument even though they made pretrial stipulations to the Hunts' good faith in bringing the lawsuits:

> 30. Shortly after June 11, 1973, Nelson Bunker Hunt, acting for himself and his two brothers, instituted an investigation the object of which was to identify persons or entities dealing in or suspected of dealing in or being interested in dealing in Sarir crude or its products. The purpose of such investigation was to assist Nelson Bunker Hunt in contacting such persons or entities to give notice of his claim to ownership of Sarir crude and its products, and to assist him in the filing and prosecution of litigation.
>
> 33. After June 11, 1973, Nelson Bunker Hunt, acting for himself and his two brothers, filed 21 lawsuits in various parts of the world. All such suits were filed jointly with the BP Exploration Company (Libya) Limited. The object of each such lawsuit was an attempt to establish ownership of Sarir crude and its products after the expropriation or nationalization.

Id. at 1362 n.13. Because of these stipulations to defendants' intentions in initiating litigation, the district court found that plaintiff was barred from showing the defendants' petitioning to be a sham. *Id.* at 1368.

On appeal plaintiff argued that the district court misinterpreted the stipula-

dants' conduct was not to effect government action but to restrain trade in Sarir crude. Plaintiff concluded, therefore, that defendants were barred from protection by the sham exception to *Noerr*.[14] Defendants responded that because their actions were aimed solely at establishing their legal title to Sarir crude oil, the *Noerr-Pennington* doctrine immunized their conduct.[15] Defendants also counterclaimed for plaintiff's alleged conversion of Sarir crude oil.[16] On appeal to the United States Court of Appeals, Fifth Circuit, *affirmed. Held:* Immunity pursuant to the *Noerr-Pennington* doctrine protects good faith petitioning of domestic and foreign courts, regardless of the political character[17] of the government concerned, and stipulations as to the good faith

---

tions when it applied them to all of defendant's acts and did not limit them to the acts of investigation and initiating litigation. Next, even conceding the court's application of the stipulations, plaintiff argued that holding Coastal bound to the stipulations would work an injustice. Accordingly, plaintiff argued that the stipulations should be set aside. Finally, plaintiff argued that the stipulations notwithstanding, the facts still supported a finding of sham. *Id.*

14. *Id.* The plaintiff argued that defendants' conduct was a sham which was instituted for "ulterior" purposes. *Id.* at 1370. According to Coastal, the Hunts dropped their suits for title to Sarir crude after reaching a settlement with Libya. Coastal asserted that this indicated the suits were designed only to pressure the Libyans to settle. *Id.* at 1362 n.11. To prove this assertion Coastal presented a letter from a Hunt employee. The letter stated that the Hunts intended to litigate and concluded that it "is at least possible that the Libyans will reconsider their belief that they can market expropriated oil without serious impediment, in which case they may back-off their threat." *Id.* at 1362-63. Finally, Coastal noted that when asked whether his purpose in making threats and warnings was to destroy the market for Sarir crude Bunker responded, ". . . partially; I guess you would say. Actually we were requested by the State Department to do it, and they were anxious to protect the validity of these contracts and so that had something to do with it, with our actions." *Id.* at 1363 n.14.

15. *Id.* at 1362. Defendants asserted that their actions were taken solely to establish their legal claim to expropriated Sarir oil and its refined products. *Id.* at 1363. Furthermore, defendants argued that dismissal of the lawsuits following the settlement with Libya was prompted by advice from counsel. That advice suggested that in the present political climate the Hunts stood little chance for success. *Id.* at 1362 n.11.

16. The court of appeals upheld the district court's dismissal of this counterclaim on grounds of res judicata. *Id.* at 1373.

17. The court cited the opinion of Professor Areeda, an antitrust expert, and adopted his argument that the availability of immunity should not depend on whether the petitioned government is either representative or democratic because every government has the right to establish its own laws. *Id.* at 1367 n.29 (citing 1 P. AREEDA & D. TURNER, ANTITRUST LAWS ¶ 239, at 174-75 (1978)).

of an opposing party preclude a finding of sham conduct.

II. Legal Background

A. *Noerr-Pennington* Doctrine

The Sherman Act forbids the creation of any contract, agreement, or combination if its purpose or effect is to restrain trade.[18] Despite the broad reach of this prohibition, the *Noerr-Pennington* doctrine shields attempts to induce governmental action from antitrust liability[19] regardless of a party's anticompetitive intent or the effect of the conduct.[20] The purpose of the doctrine is to eliminate the conflict between the antitrust laws and the right to petition the government. The practical effect of the doctrine is to allow an individual or a group to engage in anticompetitive conduct by petitioning the government, without risking liability pursuant to the Sherman Act.[21] That individual or group is

---

18. *See* 15 U.S.C. § 1 (1976); *see also supra* note 3. Of course, if section 1 were read literally, it would prohibit "the entire body of private contract law." P. Areeda, Antitrust Analysis ¶ 346, at 439 (3d ed. 1981). Obviously, Congress did not intend this result. In fact, the legislative history makes it clear that Congress intended the courts to define and shape the contours of the Act. Two judicial approaches to antitrust analysis have developed. Certain acts, including pricefixing and other plainly anticompetitive conduct, invoke a per se presumption that the agreement is anticompetitive and hence violative of the Act. *Id.* ¶ 317, at 345. Other acts or agreements that have a lesser impact on competition have been analyzed by a "Rule of Reason." *Id.* ¶ 346, at 440. The method of inquiry, as derived from common law principles, nets the positive effect of a particular act on competition with the negative effect to determine whether the acts or agreements "were unreasonably restrictive of competitive conditions." Standard Oil Co. v. United States, 221 U.S. 1, 65 (1910).

19. The effect of the *Noerr-Pennington* doctrine is to immunize conduct that otherwise would violate the antitrust laws. *Coastal States Marketing*, 694 F.2d at 1359 n.1; *see also supra* note 3 (provisions of the Sherman Act). "Conduct unprotected by *Noerr* does not necessarily" violate antitrust provisions and create liability because the conduct itself must "constitute an antitrust violation." Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrines*, 45 U. Chi. L. Rev. 80, 82 (1977).

20. Immunity pursuant to the doctrine is attained even if the conduct is part of a broader scheme of antitrust violations. UMW v. Pennington, 381 U.S. 657, 670 (1965); *see infra* notes 32-35 and accompanying text.

21. Unfortunately, the scope of the actions permitted by the exemption has been difficult to determine. As one commentator observed:

> Private anticompetitive ends may be sought, for example, by lobbying the legislature to enact a statute, petitioning the executive to enforce a law in

free to petition the government even if the primary benefit expected results from bringing the suit rather than from the potential results of the suit.

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[22] the Supreme Court began developing petitioning immunity. In that case the Court pointed out that the Sherman Act did not apply to antitrust violations resulting from valid government action.[23] The Court then reasoned that efforts to provoke this government action should be immune as well, even though these efforts would otherwise violate the antitrust laws.[24] The Court noted two related considerations in support of this conclusion. First, activities traditionally condemned[25] by the Sherman Act were essentially dissimilar to the activities of genuine petitioning[26] that included joint lobbying efforts to pass legis-

---

a certain manner, opposing the grant of a license by an administrative body to a competitor, bringing a lawsuit against a competitor to reduce competition, or urging a governmental unit not to purchase the goods of a competitor. Moreover, the methods employed by private parties to influence governmental action may not be limited to truthful dissemination of information but may also include deliberate misrepresentations, illegal campaign contributions, threats, extortion or bribery.

Fischel, *supra* note 19, at 80-81.

22. 365 U.S. 127 (1961).

23. In Parker v. Brown, 317 U.S. 341 (1943) (the Director of Agriculture for California implemented a planned market program for raisins which restricted competition among growers and raised prices), the Court laid the foundation for *Noerr* and its progeny by ruling that a state created monopoly did not violate the Sherman Act despite its restraint on trade. *Id.* at 341. Extending the logic of *Parker*, the *Noerr* Court reasoned that if governmental acts in restraint of trade were not forbidden under the antitrust laws, antitrust liability would not attach merely upon anticompetitive attempts to gain such governmental action. *Noerr*, 365 U.S. at 136.

24. *Noerr*, 365 U.S. at 136. Referring to the immunity created in *Parker*, Justice Black wrote: "We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Id.*

25. The Court noted examples of condemned activities, including price fixing, group boycotts, and market-division agreements. *Id.*

26. *Id.* at 136. Despite the Court's emphasis on this consideration, there are problems with this argument. First, the statement is contrary to established precedent. The Court previously stated that the form of antitrust activity or combinations could not protect "an otherwise anticompetitive act." United States v. American Tobacco Co., 221 U.S. 106, 181 (1911). Also, in Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965), the Court actually ap-

lation or compel law enforcement. According to the Court, this dissimilarity reflects a fundamental congressional intent not to apply the Sherman Act to genuine efforts to petition the government.[27] Second, the Court found that application of the Act to petitioning activities would not only impair[28] the proper functioning of a representative democracy but also would raise important constitutional questions.[29] Therefore, despite the antitrust violations allegedly committed by the defendants in *Noerr,* the Court held that their behavior was immune from antitrust liability because the conduct was a necessary by-product of the privilege to petition the government.[30] The Court, however, cautioned that for immunity to attach, the efforts to secure government action must be genuine and not a mere sham to cover "what is actually noth-

---

plied the antitrust laws to use of the court system for anticompetitive ends, *id.* at 178, although arguably this conduct is "essentially dissimilar" from traditional antitrust violations which include boycotting and price fixing.

27. *Noerr,* 365 U.S. at 137. According to the Court, failure to recognize this dissimilarity would "impute to the Sherman Act a purpose to regulate not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." *Id.*

28. The Court stated:

> In the first place, such a holding would substantially impair the power of government to take actions through its legislature and executive branches that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.

Id. at 137. Of the arguments advanced in *Noerr,* representative democracy has had the greatest staying power, *see California Motor,* 404 U.S. at 510, although some commentators contend that it simply restates the Court's "essential dissimilarity" argument. *See, e.g.,* Fischel, *supra* note 19, at 83-84.

29. Although the Court's opinion was couched in terms of the first amendment right to petition, the Court expressly refused to address any constitutional question. The Court noted that "[t]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Noerr,* 365 U.S. at 138. Indeed, according to the Court, "[t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so." *Id.* at 139. Even so, the Court declared in a footnote that it was unnecessary to decide whether the railroad's activities were protected by the first amendment. *Id.* at 132 n.6.

30. *Noerr,* 365 U.S. at 138. By creating such a broad based exemption, the court was able to avoid constitutional rulings and still protect the fundamental interests concerned.

ing more than an attempt to interfere directly with the business relationships of a competitor."[31]

In *UMW v. Pennington*,[32] the Supreme Court relied on *Noerr* to hold that certain large coal mine operators did not violate the Sherman Act when they attempted to eliminate smaller competitors by persuading the Secretary of Labor to restrict coal purchases by the TVA. Reversing the court of appeals, the Supreme Court held that the conduct of the mine operators was immune in accordance with *Noerr*, even though the larger miners intended thereby to eliminate competition.[33] The Court's decision thus announced that *Noerr* immunizes a broad range of conduct and suggested that *Noerr* immunity protects the petitioning of governmental agencies[34] along with attempts to influence legislative and executive action.[35]

The Court next addressed *Noerr* immunity in *California Motor Transport Co. v. Trucking Unlimited*[36] and confirmed the implication in *Pennington* that petitioning immunity extends to all

---

31. *Id.* at 144. The Court's exception to immunity for bad faith petitioning, referred to as the "sham exception," formed the core of the 1972 holding in California Motor Transp. v. Trucking Unlimited, 404 U.S. 508 (1972). *See generally infra* notes 68-91 and accompanying text.

32. 381 U.S. 657 (1965).

33. *Id.* at 669. The court of appeals determined that *Noerr* applied only to conduct "unaccompanied by a purpose or intent to further a conspiracy to violate a statute. It is the illegal purpose or intent inherent in the conduct which vitiates the conduct which would otherwise be legal." *Pennington*, 325 F.2d at 817.

34. Despite *Pennington*, many courts continued to interpret *Noerr* as applicable only to political or policy making bodies. According to this reasoning, attempts to influence adjudicatory bodies and administrative agencies were not within the scope of *Noerr* immunity. *See, e.g.*, George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970) (influencing of governmental architectural standards).

35. Many courts interpreted *Noerr* to limit immunity to the lobbying of political bodies, the policy making organs. This limitation gained credibility in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962). In that case the court implied that immunity under *Noerr* covered only political activity, not commercial activity. *Id.* at 707-08. In UMW v. Pennington, 381 U.S. 657 (1965), the Court held that efforts to influence the Secretary of Labor and the TVA were not forbidden by the Sherman Act and thus arguably expanded *Noerr* protection to the influencing of public officials. *Id.* at 670.

36. 404 U.S. 508 (1972). In *California Motor*, a group of highway carriers allegedly agreed to institute litigation that opposed the granting of permits to other carriers. As intended, the result blocked the access of other carriers to the courts. *Id.* at 509.

branches of the government,[37] including the courts and administrative agencies.[38] More importantly, the Court described *Noerr* immunity as an attempt to resolve the conflict between the operation of the antitrust laws and the right to petition and established that in areas of conflict *Noerr* immunity took constitutional precedence.[39] Thus, the Court recognized the inherent tension between the need to enforce antitrust laws and the constitutional right of a party to advocate its position before the government.[40] Justice Douglas, writing for a majority of the Court, stated that "[t]he right of access [to the courts] is indeed but one aspect of the right of petitioning"; therefore, denial of access "would be destructive of rights of association and petition."[41] In *Noerr* the

---

37. *Id.* at 510-11.

38. As one commentator phrased it, the Court in *California Motor* firmly rejected this political "body" argument, which was "relegated to the trashcan of history by *Pennington.*" Note, *The Quagmire Thickens: A Post-California Motor View of the Antitrust and Constitutional Ramification of Petitioning the Government,* 42 U. CINN. L. REV. 281, 287-88 (1973) [hereinafter cited as *The Quagmire*]. Referring to the representative democracy and right to petition arguments posed in *Noerr,* the Court stated that "[t]he same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to the courts, the third branch of Government. Certainly, the right to petition extends to all departments of the Government." *California Motor,* 404 U.S. at 510.

39. 404 U.S. at 510-11.

40. *See* Fischel, *supra* note 19, at 81. The author asserts that the "antitrust laws established by the *Noerr-Pennington* line of cases is properly limited to activity protected by the constitutional right to petition." *Id.* In Note, *Corporate Lobbyists Abroad: The Extra-territorial Application of Noerr-Pennington Antitrust Immunity,* 51 CALIF. L. REV. 1254, 1258 n.31 (1973) [hereinafter cited as *Corporate Lobbyists*], the author asserts that although not officially overruled, *Noerr's* focus on the proper interpretation of the Sherman Act was "virtually abandoned" in *California Motor* in favor of an emphasis on the essential first amendment protection afforded the individual or group trying to influence governmental decisionmaking. *Id.; see also* Handler, *Twenty-Five Years of Antitrust,* 73 COLUM. L. REV. 415, 434-35 (1973) (author stated that the Court's direct reliance in *California Motor* on the first amendment elevated "*Noerr* to the status of a constitutional principle").

41. *California Motor,* 404 U.S. at 510. The lower courts have applied *Noerr* inconsistently. *Compare In re* Airport Car Rental Antitrust Litig., 474 F. Supp. 1072, 1084 (N.D. Cal. 1979) (*Noerr* doctrine represents a first amendment limitation on the scope of the Sherman Act), *with* International Travel Arrangers, Inc. v. Western Airlines, Inc., 623 F.2d 1255, 1267 n.14 (8th Cir. 1980), *cert. denied,* 449 U.S. 1063 (1981) (Sherman Act does not reach conduct protected by the right of petition).

Court described the right to petition and the need for representative democracy as indicative of congressional intent not to extend Sherman Act liability to petitioning the government, but in *California Motor* Douglas' opinion went even further and pointed to these considerations as the very grounds for *Noerr* immunity.[42] Since *California Motor,* the Supreme Court has not discussed the rationales of the doctrine, and because the characterization of immunity has no effect on the outcome of a typical case, the lower courts have split over whether the doctrine is grounded exclusively in the Constitution. The instant case presents the Court with the question of whether *Noerr-Pennington* immunity is limited to the first amendment right of petition, and is therefore a wholly domestic doctrine, or whether the immunity is a broader exemption based upon a construction of the Sherman Act.

B. Foreign Application of the *Noerr-Pennington* Doctrine

The Supreme Court has not directly addressed the issue of whether the act of petitioning a foreign government is protected from antitrust liability,[43] but the extraterritorial reach of the Sherman Act has been established by a long line of cases.[44] In *American Banana Co. v. United Fruit Co.*[45] the Supreme Court unanimously held that "acts causing damage . . . outside the jurisdiction of the United States are characterized as lawful or un-

---

42. *California Motor,* 404 U.S. at 510-11. The right to petition the government secures the right to inform the government of individual needs. *The Quagmire, supra* note 38, at 287. Also, the right to petition specifically guarantees the right of the individual to secure governmental aid for himself. *Id.* at 287-88. Thus, the right to petition the government is the right to seek a competitive advantage from the government because an economic benefit for one person is necessarily an economic detriment for another person. In essence the *Noerr-Pennington* doctrine, therefore, seeks to lessen the inherent conflict between the Sherman Act and the "right to seek" competitive advantages from the government through petitioning.

43. *See infra* text accompanying notes 44-57.

44. *See* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); United States v. Sisal Sales Corp., 274 U.S. 268 (1927); United States v. American Tobacco Co., 221 U.S. 106 (1910); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1977); United States v. Watchmakers of Switz. Information Center, Inc., 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962), *order modified,* 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y.).

45. 213 U.S. 347 (1909).

lawful wholly by the law of the country where the act is done."[46] This holding implied that actions of foreign governments and attempts to procure these actions were beyond the purview of the United States antitrust laws.[47] The Court, however, rejected this implication in *United States v. Sisal Sales Corp.*[48] In that case the Court held that defendants who attempted to influence the passage of foreign legislation and thereby monopolize or restrain United States trade were not immune from liability.[49] The Court distinguished *American Banana* from *Sisal* by pointing out the absence of a substantial effect on United States commerce in *American Banana.*[50] As the Court observed in *Sisal:*

> The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties. True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws.[51]

The *Sisal* decision left open the possibility that a defendant in an antitrust suit would not be immune from the antitrust laws when the allegedly violative acts consisted of efforts to procure government action.[52] In *Noerr,* however, the Supreme Court closed this possibility by deciding that genuine petitioning of the government, at least in the United States, would be immune from anti-

---

46. *Id.* at 356-57.

47. *Id.* at 355-59. Justice Holmes authored the famous opinion and explained:

> [t]hat it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act.

Id. at 358.

48. 274 U.S. 268, 274-76 (1927). Whether the Congress intended the Sherman Act to apply to foreign conduct is uncertain. *See generally* J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD (2d ed. 1981).

49. *Sisal,* 274 U.S. at 276.

50. *Id.* at 275-76.

51. *Id.* at 276.

52. Graziano, *Foreign Governmental Compulsion as a Defense in United States Antitrust Law,* 7 VA. J. INT'L L. 100, 130 (1967).

trust liability.[53] The Court did not resolve whether immunity extended to the petitioning of a foreign government. The Supreme Court first discussed the doctrine's applicability to foreign petitioning in *Continental Ore Co. v. Union Carbide & Carbon Corp.*[54] In that case the Court found the doctrine inapplicable because defendants' conduct was not directed at influencing the Canadian Government.[55] Nevertheless, the Court's consideration and rejection of *Noerr* immunity on the ground that the conduct of respondents in *Continental Ore* was "wholly dissimilar" to that of defendants in *Noerr* indicate that the Court assumed extension of the doctrine to contacts with foreign governments.[56] Even so, the precedential value of *Continental Ore* on the issue of foreign petitioning is doubtful.[57]

In *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*,[58] the only decision directly on point, the Court held that the *Noerr* doctrine did not extend immunity to the successful petitioning of a Middle Eastern government for favorable anticompetitive legislation.[59] In the Court's view, representative democracy and the constitutional right to petition carried little "if indeed any" applicability to communications with Middle Eastern governments.[60] In fact, most commentators agree that constitutional protections do not extend to foreign activities.[61] If the basis of *Noerr* is indeed a constitutional one, then immunity under *Noerr-Pennington* does not extend beyond the domestic sphere.[62] Yet, even

---

53. *See supra* note 30 and accompanying text.

54. 370 U.S. 690 (1962).

55. *Id.* at 707-08.

56. As one commentator stated: "[I]f the Court . . . believed . . . *Noerr* was not applicable to a foreign government . . . [it] probably would have said so." Davis, *Solicitation of Anticompetitive Action from Foreign Governments: Should the Noerr-Pennington Doctrine Apply to Communications with Foreign Sovereigns?*, 11 GA. J. INT'L & COMP. L. 83, 110 (1981).

57. *Id.*

58. 331 F. Supp. 92 (C.D. Cal.), *aff'd on other grounds*, 461 F.2d 1261 (9th Cir. 1971) (per curiam), *cert. denied*, 409 U.S. 950 (1972).

59. 331 F. Supp. at 108.

60. *Id.*

61. *See* Fischel, *supra* note 19, at 120-21; McManis, *Questionable Corporate Payments Abroad: An Antitrust Approach*, 86 YALE L.J. 215, 240 (1976); *Corporate Lobbyists, supra* note 40, at 1275-77. *Contra* Davis, *supra* note 56, at 399.

62. Nevertheless, numerous authorities have asserted that the doctrine should be extended on grounds of foreign comity. *See, e.g.*, Davis, *supra* note 56, at 429.

though the Court in *Occidental Petroleum* rejected *Noerr* immunity for the petitioning of a foreign government, the Court found that the Act of State doctrine protected the defendants' conduct.[63] The Act of State doctrine generally protects only government action, but the Court accepted this defense despite the separate claim based solely on defendants' petitioning and not on the government's act.[64] The Court ruled that consideration of this separate claim would require it to "sit in judgment" of a sovereign state.[65] Thus, even though the Court acknowledged general

---

63. The Supreme Court set forth the classic statement of the Act of State doctrine in Underhill v. Hernandez, 168 U.S. 250 (1897):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Id. at 252. Recent decisions, however, and the Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) (1976), which attempts to exempt commercial activity from application of the Act of State doctrine, have somewhat restricted the doctrine's scope.

64. *Occidental Petroleum,* 331 F. Supp. at 110.

65. The court ruled that "such inquiries by this court into the authenticity and motivation of the acts of foreign sovereigns would be the very sources of diplomatic friction and complication that the act of state doctrine aims to avert." *Id.* A similar concern for avoiding embarrassment to the executive branch in its conduct of foreign relations is reflected in the doctrine of sovereign immunity. The basis for that doctrine is set out by the Supreme Court in the Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116 (1812):

> [F]ull and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns, nor their sovereign rights, as its objects. . . . [Thus] one sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

Id. at 135-37.

While both doctrines result from the same concerns, the Act of State doctrine precludes judicial review of a foreign government's activities within its own territory; sovereign immunity, however, operates as a jurisdictional tenet under which domestic courts are restrained from exercising jurisdiction over a foreign state.

The current United States doctrine of sovereign immunity is codified in the

immunity for the acts of foreign governments and for efforts to protect these acts from antitrust liability, the Court determined that *Noerr-Pennington* immunity did not extend to antitrust violations committed in the petitioning of a foreign government.

In contrast to the decision in *Occidental Petroleum,* the Justice Department's *1977 Antitrust Guide for International Operations*[66] took the position that the *Noerr-Pennington* doctrine applies to the petitioning of foreign governments. Although the Justice Department acknowledged the domestic constitutional considerations which underlie *Noerr,* it did not consider the doctrine limited to only the domestic area. Thus, the Justice Department concluded that *Noerr-Pennington* protects any attempt to influence foreign governments toward imposing restraints on United States commerce. Therefore, these efforts do not violate United States antitrust laws, even when the goal sought is "highly anticompetitive."[67]

C. Application of the Sham Exception

The Court in *Noerr* held that even when efforts to elicit government action have the specific purpose of harming competitors, this conduct is immune from the antitrust laws.[68] Antitrust liabil-

---

Foreign Sovereign Immunities Act of 1976, which embodies a restrictive standard of sovereign immunity rather than an absolute one. 28 U.S.C. §§ 1330, 1602-1611.

66. ANTITRUST DIVISION OF THE UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (Jan. 26, 1977) (Case N) [hereinafter cited as ANTITRUST GUIDE], *reprinted in* 1977 ANTITRUST & TRADE REG. REP. (BNA) at E-1 (Feb. 1, 1977). The Department's decision was the "most controversial" reported in the Guide, Baker, *Critique of the Antitrust Guide: A Rejoinder,* 11 CORNELL INT'L L.J. 255, 260 (1978), and has done little to eliminate the division between the commentators. *See supra* notes 61-62 and accompanying text.

67. ANTITRUST GUIDE, *supra* note 66, at E-1. The Guide concludes that "[u]nder Noerr-Pennington, the collective exercise of the right of political expression is protected . . . ." *Id.*

68. The Court in *Noerr* held that efforts by a group of railroads to influence the government to enact legislation harmful to its competitors were immune from Sherman Act liability, even though the defendants' purpose was to destroy their competition in the trucking industry and defendants' conduct was tainted by fraud and misrepresentation. 365 U.S. at 127. The Court admitted that the methods employed by the plaintiffs were "far short of the ethical standards generally approved in this country," *id.* at 140, but this did not of itself bring them within reach of the antitrust laws. *Id.* The Court recognized that "an incidental

ity, however, is possible when "efforts ostensibly directed toward influencing governmental action are 'a mere sham to cover what is actually nothing more than an attempt to interfere with the business relationship of a competitor.' "[69] The facts in *Noerr* did not constitute a sham because "the railroads were making a genuine effort[70] to influence legislation and law enforcement."[71]

As mentioned, the Court in *California Motor* extended *Noerr* immunity to the petitioning of courts and administrative agencies,[72] and for the first time the Court invoked the sham exception to petitioning activity. The complaint in *California Motor* alleged that the defendant instituted baseless lawsuits and administrative appeals for the purpose of blocking their competitors from obtaining administrative permits.[73] Justice Douglas emphasized that the conduct was unethical, and compared it to perjury, fraud, and bribery. The Court noted that this conduct would be tolerated in the "political arena" but held that it was intolerable in the adjudicatory setting.[74] Abuse of the judicial and adminis-

---

effect of [every] campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed," *id.* at 143, and it is likely "that those constituting the campaign would be aware and possibly pleased by the prospect of such injury." *Id.*

69. *Id.* at 144.

70. Plaintiff's conduct ultimately was found to be a genuine effort even though both plaintiffs and defendants had used unethical publicizing techniques. Specifically, they had employed the "third party" technique so that publicity sponsored by the parties appeared to be the views of neutral citizens and individuals. The conduct of the defendants was protected because "[a]t least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had." *Id.* at 139-40.

71. *Id.* at 144.

72. *See supra* notes 34, 36-38 and accompanying text.

73. *California Motor,* 404 U.S. at 512-13.

74. *Id.* at 513. The basis and validity of this distinction between unethical conduct in the adjudicatory setting and in the political setting has been questioned. One commentator has argued that "even if the Court was correct in gauging the scope of the right to petition by the existence of sanctions for the general type of activity involved, the Court's distinction between the level of protection afforded conduct in the adjudicatory context and that afforded lobbying is unsupported." Fischel, *supra* note 19, at 99. The author points out that courts and administrative agencies often are involved in policy making and that although the people must petition different governmental bodies, the Constitution does not limit their right to petition. Finally, the author notes that unethical practices such as perjury and bribery are penalized equally in the political context and the adjudicatory setting. *Id.* at 98-100.

trative process, therefore, might subject defendants to the antitrust laws. Evidence of sham includes a pattern of baseless or repetitive claims or actions which effectively bar plaintiffs from access to the agencies and courts.[75] The Court therefore concluded that defendants' first amendment right to petition agencies and courts did not necessarily immunize their conduct from antitrust liability.[76]

The *California Motor* decision has caused confusion[77] and inconsistent application of the sham doctrine primarily because the Court enunciated a variety of grounds for finding sham. In *Semke v. Enid Automobile Dealers, Assoc.*,[78] for example, the Tenth Circuit adopted a standard of misuse or corruption of the legal process which constituted sham.[79] Other courts have deduced from

---

Most commentators, however, agree that it is permissible and appropriate to allow different levels of protection for petitioning of the government. *See generally Corporate Lobbyist, supra* note 40, at 1262-63 (Judges depend on the honesty of the litigants and others who appear before the court because they are the exclusive source of the court's information. Legislators, because they have no limits on their sources of information, are better equipped to handle "slanted or even blatantly dishonest" information. *Id.*). Another commentator claims that the differences in treatment are historical, although he admits a need to change to meet the new role of the courts. *The Quagmire, supra* note 38, at 310.

75. Generally, the courts have agreed that publicity or threats to litigate will not be judged separately from immunized good faith petitioning, unless the petitioning itself is held to be sham. *See, e.g.*, Penwalt Corp. v. Zenith Labs, Inc., 472 F. Supp. 413, 424 (E.D. Mich. 1979), *appeal dismissed*, 615 F.2d 1362 (6th Cir. 1980).

76. 404 U.S. at 515-16.

77. Justice Stewart concurred with the majority's opinion, but he vigorously disagreed with Justice Douglas who asserted that the right of access to the courts and agencies did not "necessarily give . . . [petitioners] immunity from the antitrust laws." *Id.* at 517 (quoting the majority opinion, *id.* at 513). According to Justice Stewart, the statement was "totally at odds" with *Noerr*, which held that the joint exercise of the constitutional right to petition is immune from the antitrust laws. *Id.* at 517. Commentators, however, agree that Justice Douglas' intent was not to wipe out the *Noerr* immunity. According to the commentators, Douglas only suggested that when a party uses the constitutional right of access to the courts to bar another's "free access," immunity would not necessarily extend to the former's conduct. *See* Handler, *supra* note 40, at 438-39; *The Quagmire, supra* note 38, at 285.

78. 456 F.2d 1361 (10th Cir. 1972).

79. *Id.* at 1366; *see also* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965) (Supreme Court held that enforcement of a patent procured by fraud could be part of a broader anticompetitive scheme in violation of the Sherman Act. The case is distinguishable from the genuine interest

California Motor a requirement of multiple baseless litigation.[80] A few courts have interpreted the free access language of *California Motor* to mean that anticompetitive litigation must reach the point where it deprives the plaintiffs of free access to the courts before "sham" can be proven.[81] In *Aloha Airlines, Inc. v. Hawaiian Airlines*[82] one court went so far as to infer that a showing of anticompetitive intent is sufficient to render *Noerr* inapplicable.[83] This result, however, is clearly contrary to *Noerr*.

The trend of the cases is to acknowledge different types of sham conduct. The sham doctrine may be treated as a corollary of *Noerr* immunity. In *Otter Tail Power Co. v. United States*,[84] for example, a case remanded to the district court for further consideration in light of the holding in *California Motor*, the district court noted that "the repetitiveness of litigation by *Otter Tail* was timed and designed principally to prevent the establishment of municipal power systems and, therefore, preserve defendants' monopoly."[85] In effect, the defendants were using litigation merely as a weapon to block their competitors; they were not

---

standard because here the defendant was guilty of fraud. *Id.* at 174.

80. Most courts and commentators have rejected this standard. *See, e.g.*, WIXT Television, Inc. v. Meredith Corp., 506 F. Supp. 1003, 1032 (N.D.N.Y. 1980) ("When the petitioner repetitively abuses the political process through perjury, bribery, or misrepresentation . . . then no constitutional immunity attaches . . . ."); Huron Valley Hosp., Inc. v. City of Pontiac, 466 F. Supp. 1301, 1313-14 (E.D. Mich. 1979). Most authorities, however, have rejected such a standard. *See* Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 662 (1977) (Stevens, J., dissenting); Bien, *Litigation as an Antitrust Violation: Conflict Between the First Amendment and the Sherman Act*, 16 U.S.F.L. REV. 41, 54 n.51 (1981); Fischel, *supra* note 19, at 109-10.

81. *See, e.g.*, Miracle Mile Ass'n v. City of Rochester, 1980-81 Trade Cas. (CCH) ¶ 63,207, at 77,927 (2d Cir. 1980) (court adopted access-barring language of *California Motor* despite the Supreme Court's undermining of that language in *Otter Tail* and *Lektro-Vend*).

82. 349 F. Supp. 1064 (D. Hawaii 1972), *aff'd*, 489 F.2d 203 (9th Cir.), *cert. denied*, 417 U.S. 913 (1974). If broadly interpreted, this decision would seriously constrict *Noerr* immunity and make it almost inapplicable to courts or agencies. *The Quagmire*, *supra* note 38, at 303.

83. *Aloha Airlines*, 349 F. Supp. at 1068.

84. 331 F. Supp. 54 (D. Minn. 1971), *aff'd in part, vacated in part*, 410 U.S. 366 (1973).

85. 331 F. Supp. at 62. This approach is problematic for it is "often difficult to determine when a bona fide attempt is being made." *The Quagmire*, *supra* note 38, at 306.

"genuinely" interested in the outcome of the litigation.[86] The decision in *Otter Tail* corresponds with the result in *Noerr* because the defendants in *Noerr* had a genuine interest in their petitioning activities and, for that reason, their conduct did not fall within the sham exception. Another approach to the sham exception imposes liability for abuses of the adjudicatory process, including acts of bribery, perjury, or misrepresentation.[87] In *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.*,[88] the Supreme Court held that "the enforcement of a patent procured by fraud on the Patent Office may be violative of section 2 of the Sherman Act."[89] Although *Walker Process* was decided well before *California Motor,* Justice Douglas cited *Walker Process* in *California Motor* as a recent example of "abuse" sham.[90] Unlike the genuine interest standard apparently used in *Noerr,* the abuse standard is applicable only to adjudicative bodies. This distinction probably stems from Justice Douglas' comment in *California Motor* that the political arena could tolerate abuses that the courts could not.[91] Because of the difficulty in

---

86. Balmer, *Sham Litigation and the Antitrust Laws,* 29 BUFFALO L. REV. 39, 43 n.23 (1980). Often litigation is more effective as an anticompetitive weapon than many other methods. *See* Bien, *supra* note 80, at 42.

87. *See California Motor,* 404 U.S. at 513, where Justice Douglas discusses "abuses" of the "administrative or judicial processes which may result in antitrust violations" and cites *Walker Process* as authority. *Id.* at 513; *see also infra* note 88. *But see California Motor,* 404 U.S. at 516-18 (Justice Stewart's concurring opinion which points out that because none of these forms of unethical conduct were present in the case, this could not be the basis for the Court's decision).

88. 382 U.S. 172 (1965) (suit brought on basis of fraudulently acquired patent would be unethical conduct and therefore excluded from *Noerr-Pennington* protection).

89. *Id.*

90. 404 U.S. at 512-13. Justice Douglas explained:

> Opponents before agencies or courts often think poorly of the other's tactics, motions or defenses and may readily call them baseless. One claim, which a court or agency may think baseless, may go unnoticed, but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, *viz,* effectively barring respondents from access to agencies and courts.

Id. at 13.

91. The genuine interest test is consistent with the first amendment right of petition because "[t]he first amendment interests involved in private litigation

proving bad faith petitioning of legislative bodies, the sham exception probably will be applied only to the petitioning of the courts and administrative agencies. The instant case presents the issues of whether a worldwide campaign of litigation, which effectively blocks the sale of plaintiff's product, is protected by *Noerr-Pennington* immunity and whether defendants' actions constitute sham conduct even though plaintiffs stipulate to defendants' good faith.

III. Instant Opinion

The instant court held that pursuant to the *Noerr-Pennington* doctrine, defendants' petitioning of foreign courts was immune from antitrust action and directed a verdict in defendants' favor. Citing *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, the court first rejected plaintiff's argument that *Noerr-Pennington* immunity did not extend to boycotts, noting that anticompetitive intent does not vitiate *Noerr* immunity.[92] The court next addressed plaintiff's argument that because the first amendment was the source of the *Noerr-Pennington* doctrine, the doctrine therefore did not apply to litigation brought in foreign courts.[93] Despite the first amendment underpinnings of *California Motor*,[94] the court rejected the notion that *Noerr-Pennington* immunity was limited to the constitutional right to petition and held that *Noerr* was actually a construction of the Sherman Act.[95] Inferring from *Continental Ore Co. v. Union Carbide & Carbon Corp.*[96] that immunity applies beyond the domestic arena,[97] the court declined to follow the Court's ruling in *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*[98] which stated that the first amendment grounds of the *Noerr-Pennington* doctrine and the

---

. . . are not furthered by litigation based on international falsehoods and on knowingly frivolous claims." Balmer, *supra* note 86, at 71. Like libel action against public falsehoods, sham litigation is unprotected by the first amendment. Indeed, the very language of the Constitution in referring to the right of petition implies that they be bona fide.

92. *Coastal States Marketing*, 694 F.2d at 1364.

93. *Id.*

94. *Id.* at 1365.

95. *Id.* at 1364.

96. 370 U.S. 690 (1962).

97. 694 F.2d at 1365.

98. 331 F. Supp. 92 (C.D. Cal.), *aff'd on other grounds*, 461 F.2d 1261 (9th Cir. 1971) (per curiam), *cert. denied*, 409 U.S. 950 (1972).

need for representative democracy limited the doctrine to domestic application.[99] Instead, the instant court relied on *Noerr* and held that the Sherman Act does not extend to joint efforts to influence a government, regardless of its degree of popular representation.[100] Moreover, the court stated that there was no reason why acts that are legal in the United States should be deemed illegal by the United States when they are performed in a foreign country.[101]

The court then rejected plaintiff's claim that threats to litigate did not constitute protected petitioning of the government and the majority view that joint litigation and its reasonably attendant acts are immunized under *Noerr* when they are done in good faith.[102] Pointing to plaintiff's stipulations to defendants' good faith in conducting the investigation and initiating the law suit, the court held that plaintiff could not establish sham because defendants had a substantial good faith interest in obtaining judicial relief.[103] In the court's view the stipulations established at the very least that defendants' motivation was a genuine desire for judicial relief.[104]

IV. COMMENT

The instant decision marks the first time a court has held the *Noerr-Pennington* doctrine applicable to the petitioning of foreign governments. Although the result is acceptable,[105] the court's reasoning is contrary to precedent and provides little guidance for subsequent decisions in this area.[106] By extending *Noerr-Pennington* immunity to the petitioning of foreign governments,[107] the court rejected the implication in *California Motor* that the doctrine was designed to guarantee United States citizens the un-

99. 694 F.2d at 1366.

100. *Id.* at 1367.

101. *Id.* at 1366.

102. *Id.* at 1367.

103. *Id.* at 1372. The court reviewed a number of possible tests for sham, including a "sole motivation" test and "principal purpose" test, but settled on the "substantial good faith" test. *Id.*

104. *Id.* The court here poses another standard for finding sham only to return to a genuine interest test.

105. *Compare supra* notes 66-67 and accompanying text, *with supra* notes 61-62 and accompanying text.

106. *See supra* text accompanying notes 58-65.

107. *Coastal States Marketing*, 694 F.2d at 1365.

compromised constitutional right to petition the United States Government.[108] Although the instant opinion correctly stated that the *Noerr* decision held that the Sherman Act does not reach joint efforts to influence government officials,[109] the opinion failed to acknowledge the entirely domestic rationales for the decision and for the creation of the *Noerr-Pennington* doctrine. The first rationale for the doctrine recognizes that the representative form of government found in the United States, by definition, depends upon the unrestricted ability of individuals to inform the government of their interests.[110] The second rationale is grounded in the first amendment which guarantees the right of every United States citizen to petition the government.[111] Because these domestic rationales do not apply to the petitioning of foreign governments,[112] the court in the instant decision dramatically extended application of the doctrine. Indeed, the decision is most significant because it ignores the rationales underlying the doctrine of *Noerr-Pennington* immunity and fails to differentiate between foreign and domestic application of the doctrine.

The Fifth Circuit cited its reluctance to examine the political nature of foreign governments as a reason for refusing to distinguish between application of the doctrine in a foreign and a domestic context.[113] Thus, the Fifth Circuit implied that this reluctance was another rationale for applying immunity. This reasoning, however, is directly contrary to the rationales for immunity cited in *Noerr* and clarified in *California Motor*.[114] In both of these decisions the Supreme Court clearly established that immunity for the petitioning of a government is a natural extension of a representative form of government rooted in constitutional sanctity. If this is truly the basis for the doctrine, then its application should be limited to the United States.[115] The Fifth Circuit thus deviated from established grounds for applying the *Noerr* doctrine and, by extending the doctrine to foreign petitioning, sidestepped the constitutional limits imposed by *Noerr* and *California Motor*. The court's decision not only rejects clear

108. *See supra* notes 40-41 and accompanying text.
109. *Coastal States Marketing*, 694 F.2d at 1365.
110. *See supra* note 28 and accompanying text.
111. *See supra* notes 29, 41-42 and accompanying text.
112. *See supra* notes 61-62 and accompanying text.
113. *Coastal States Marketing*, 694 F.2d at 1367.
114. *See supra* notes 27-29, 36-41 and accompanying text.
115. *See supra* notes 61-62 and accompanying text.

precedent which sought to confine the doctrine to a constitutional framework but also assumes, inconsistently with *Noerr* and *California Motor,* that immunity can be granted regardless of the nature of the government petitioned.

Despite the shortcomings of the court's analysis and its application of precedent, the instant decision fills a significant void in the case law addressing extraterritorial application of United States antitrust laws.[116] The Act of State doctrine, another primary source of immunity, provides immunity from the antitrust laws only for actions of foreign states.[117] When, as in the instant case, no government decisions or acts resulted from defendants' petitioning, the Act of State doctrine offers no protection. Some recent decisions suggest that the Act of State doctrine may protect the petitioning of foreign governments,[118] but the instant court's extension of *Noerr* immunity assures protection, regardless of whether the petition results in government action. This expansion of immunity thus fills an important gap in the current law and remains consistent with the underlying purposes of the Foreign Sovereign Immunities Act and the Act of State doctrine.[119]

The second aspect of the court's ruling addressed the sham exception but provided little insight into how this exception should be applied. The court failed to set forth clearly the criteria that it applied for determining sham, but the opinion only reflects the imprecise manner in which the sham doctrine has been applied historically.[120] In any event, the stipulations[121] to defendants' good intentions barred any finding of sham by the court, regardless of which test for sham the court applied. Sham cannot be established when the party asserting the sham admits the opposing party's genuine interest in the results of the action. Considering the plaintiff's stipulation to the defendants' good intentions, the court appropriately decided to avoid venturing far from the precepts for sham that were described in *Noerr.*

Charles S. Baugh

---

116. *Cf. supra* notes 63-65 and accompanying text.
117. *See id.*
118. *See id.*
119. *See supra* notes 63-65 and accompanying text.
120. *See supra* notes 76-82 and accompanying text.
121. *See supra* notes 13-15 and accompanying text.

ANTITRUST—FOREIGN IMPORT CARTELS ARE LIABLE UNDER THE SHERMAN ACT ALTHOUGH DOMESTIC EXPORT COMPETITORS ARE SHIELDED WITH A WEBB-POMERENE EXEMPTION, *Daishowa International v. North Coast Export Co.*, 1982-2 Trade Cas. ¶ 64,774 (N.D. Cal.).

I. FACTS AND HOLDING

North Coast,[1] a United States Webb-Pomerene export association,[2] and one of its member companies claimed that Daishowa,[3] a Japanese corporation, and its wholly-owned United States subsidiary violated the United States antitrust laws by joining with other Japanese wood chip buyers[4] to form an import cartel that established minimum prices and boycotted North Coast's exports.[5] Daishowa moved to strike the entire complaint[6] and alternatively sought to limit subsequent inquiry into the boycott allegation.[7] North Coast opposed both motions and requested an injunction prohibiting the boycott and forcing Daishowa to purchase plaintiffs' exports.[8] Daishowa initially contended that

---

1. North Coast Export Cooperative, Inc., and North Coast Export Company are referred to as North Coast. *See* Daishowa Int'l v. North Coast Export Co., 1982-2 Trade Cas. ¶ 64,774, at 71,786 (N.D. Calif.).

2. Webb associations are groups of domestic exporters who are exempt from the United States antitrust law, *see infra* notes 55-57 and accompanying text, subject to certain restrictions. *See infra* notes 58-69 and accompanying text.

3. Daishowa International, Daishowa America, Inc., and the parent corporation, Daishowa Paper Manufacturing Co., Ltd., are referred to as Daishowa. *See id.*

4. No other Japanese paper manufacturer is named in the suit.

5. *Daishowa Int'l*, 1982-2 Trade Cas. at 71,786. Originally, Daishowa sued North Coast for breach of contract. Daishowa alleged that North Coast agreed to supply wood chips at a determined price. When the market price surpassed the contract price, Daishowa contended that North Coast repudiated the contract. North Coast's position was that the alleged contract contained a condition precedent—seller's performance is conditioned on its obtaining adequate financing. North Coast alleged that it obtained financing by relying on Daishowa's oral representation that it would pay the market price. During discovery, North Coast amended its answer and third-party complaint to include the instant antitrust action. *Id.*

6. *Id.*

7. *Id.* at 71,790.

8. *Id.* at 71,786.

the *Timberlane* extraterritorial jurisdiction test[9] requires the instant court to dismiss the complaint, and that North Coast's antitrust exemption should be included as an additional consideration in the *Timberlane* analysis.[10] Daishowa further urged that the possibility of retaliatory actions by the Japanese government[11] should deter the instant court from exercising jurisdiction without clear congressional approval which Daishowa argued was lacking.[12] Alternatively, Daishowa argued that North Coast's Webb-Pomerene exemption from the United States antitrust laws entitles a foreign import cartel to reciprocal immunity.[13] North Coast responded that the *Timberlane* balancing analysis is unnecessary because the allegedly violative conduct occurred within the United States.[14] Furthermore, assuming that the court applied *Timberlane*, North Coast argued that the *Timberlane* criteria weighed in its favor because no conflict of law problem[15] existed and interference by the Japanese government was therefore highly unlikely. Thus, North Coast urged the court to sustain jurisdiction over this action because of the direct effect of this case on the domestic economy and because this case primarily concerns

---

9. Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597 (9th Cir. 1976). *See infra* notes 38-40 and accompanying text.

10. Daishowa argued that *Timberlane* precludes domestic courts from asserting jurisdiction over actions performed by Japanese citizens, allowed by Japanese law, and completed on Japanese soil. *Daishowa*, 1982-2 Trade Cas. at 71,789. It is unclear whether Daishowa is arguing that the "effects" portion of *Timberlane* is not satisfied or that "comity considerations" dictate dismissal. *See infra* notes 36-42 and accompanying text. In any event, the instant court considers Daishowa's contention a comity argument. *See Daishowa*, 1982-2 Trade Cas. at 71,788-89.

11. *Daishowa*, 1982-2 Trade Cas. at 71,789.

12. *See id.* Daishowa argued that Congress demonstrated a lack of interest in the instant controversy by granting Webb-Pomerene associations an exemption from the United States antitrust laws. *Id.*

13. *Id.* at 71,786. Although claiming that a reciprocal immunity exemption would include all the alleged activities, Daishowa specifically sought dismissal of the price fixing allegation because Webb associations are permitted to fix prices. *See infra* note 61 and accompanying text.

14. *Daishowa*, 1982-2 Trade Cas. at 71,788.

15. North Coast illustrated Japanese condemnation of price fixing by submitting a newspaper article which stated that Daishowa Seishi was fined for illegal cartel activity. *Id.* at 71,789. Presumably, the Japanese law that was violated is the Export and Import Trading Act of 1952. *See infra* notes 74-76 and accompanying text.

United States citizens who lack an alternate forum.[16] *Held*: When a Webb-Pomerene association alleges that a foreign import cartel has conspired to fix prices and boycott domestic exports, a United States court can enjoin the cartel from further violation of the United States antitrust laws if: (1) the alleged activities are not encompassed by a domestic export group's Webb-Pomerene exemption; and (2) comity and fairness considerations do not persuade the court to decline jurisdiction.

II. Legal Background

A. Extraterritorial Jurisdiction

Subject matter jurisdiction is the initial hurdle inhibiting United States courts from asserting extraterritorial jurisdiction pursuant to the Sherman Act[17] over actions performed abroad by foreign parties.[18] In *United States v. Aluminum Co. of America (Alcoa)*,[19] Judge Learned Hand relied on the objective territoriality principle and[20] fashioned the original effects test, which limits

16. *Daishowa*, 1982-2 Trade Cas. at 71,789.

17. 15 U.S.C. §§ 1-8 (1976 & Supp. V 1981), *amended by* Export Company Trading Act, P.L. No. 97-290, 96 Stat. 1233 (1982).

18. Five possible bases of jurisdiction exist: (1) the territoriality principle not only allows jurisdiction where the action occurs (subjective territoriality), but also where the action has effects (objective territoriality); (2) the nationality principle allows a state to assert jurisdiction over its citizens; (3) the protective principle safeguards national interests; (4) the universality principle includes universally recognized offenses; and (5) the passive personality principle enables a nation whose citizen is injured to assert jurisdiction. Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77 Colum. L. Rev. 1247, 1249 n.11 (1977).

19. 148 F.2d 416 (2d Cir. 1945). *Alcoa* rejected the subjective territoriality limitation of American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

20. Subjective territoriality does not apply where the situs of the act is abroad. *See supra* note 18. The protective, universality, and passive personality principles are not invoked by the United States courts. Triggs, *Extraterritorial Reach of United States Anti-trust Legislation: The International Implications of the Westinghouse Allegations of a Uranium Producers' Cartel*, 12 Melb. U.L. Rev. 250, 260-61 (1979). The nationality principle does not justify asserting jurisdiction over a foreign party, *id.*, and it is doubtful whether it includes actions by a citizen abroad. *See* Mann, *The Doctrine of Jurisdiction in International Law*, 111 Académie De Droit International: Recueil Des Cours 1, 97 (1964) (international law requires a close connection between the state and the act).

jurisdiction under the Sherman Act[21] to acts of foreign parties "intended" to "affect" United States commerce.[22] Although the requirement of specific intent was abandoned if the effect was reasonably forseeable,[23] most courts continue to apply some form of the original effects requirement.[24] Other courts substituted a less stringent standard.[25] The Ninth Circuit Court of Appeals replaced the *Alcoa* test with a disjunctive test requiring only a demonstration of effect *or* intent.[26] Using either approach, domestic

---

21. Section 1 of the Sherman Act reads in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the states, *or with foreign nations*, is hereby declared to be illegal . . . ." 15 U.S.C. § 1 (1976 & Supp. V 1981) (emphasis added).

22. *Alcoa*, 148 F.2d at 443-44. Although *Alcoa* introduced objective territoriality to sustain jurisdiction, it did not define the exact parameters of the doctrine. *Alcoa* did hold that ". . . it is the situs of the effects as opposed to the conduct, that determines whether United States antitrust law applies." H.R. REP. No. 686, 97th Cong., 2d Sess. (1982) (official source unavailable), *reprinted in* 43 ANTITRUST & TRADE REG. REP. (BNA) No. 1076, at 307 (Aug. 5, 1982) [hereinafter cited as H.R. REPORT No. 686]. The defendants in *Alcoa* included a United States national, thus the question of jurisdiction over a wholly foreign corporation, which made an agreement abroad affecting the United States, is not answered. Victor, *Multinational Corporations: Extraterritoriality and the Prospect of Immunity*, 8 J. INT'L L. & ECON. 11, 16 (1973). Nor has any case after *Alcoa* settled the question. *See infra* notes 23-25, 36-37, 43, 49, 51 and accompanying text.

23. *See* United States v. General Elec. Co., 82 F. Supp. 753, 891 (D.N.J. 1949).

24. *Compare* Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., 383 F. Supp. 586, 587 (E.D. Pa. 1974) ("directly affect"), *with* Waldbaum v. Worldvision Enterprises, Inc., 1978-2 Trade Cas. (CCH) ¶ 62,378, at 76,257 (S.D.N.Y.) ("anticompetive effects").

25. *See* Industria Siciliana Asfalti, Bitumi, S.P.A. v. Exxon Research & Eng'g Co., 1977-1 Trade Cas. (CCH) ¶ 61,256, at 70,784 (S.D.N.Y.) ("impact upon"); *see also* Dominicus Americana Bohio v. Gulf & W. Indus., Inc., 473 F. Supp. 680, 687 (S.D.N.Y. 1979) ("not *de minimus*").

26. Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 615 (9th Cir. 1976). Critics consider the disjunctive test an unprecedented expansion of extraterritorial jurisdiction. *See, e.g.*, Recent Development, *Antitrust—Extraterritorial Jurisdiction Under the Effects Doctrine—A Conflicts Approach*, 46 FORD. L. REV. 354, 360 (1977). The Export Trading Company Act of 1982 amended section 7 of the Sherman Act to require a showing of "direct, substantial, and reasonably foreseeable effect" on United States commerce. Pub. L. No. 97-290, 96 Stat. 1233 (1982); *see also* H.R. REP. No. 686, *supra* note 24, *reprinted* at 307 (the reason for the change was to create a uniform standard).

The full text of amended section 7 is:

> This Act shall not apply to conduct involving trade or commerce (other

courts have sustained jurisdiction in most international disputes.[27] Although Judge Hand labeled the effects doctrine as "settled law" in *Alcoa*,[28] the international community continues to resist vigorously the extraterritorial reach of the United States antitrust laws.[29] Foreign courts often refuse to honor discovery requests[30] or to enforce final judgments.[31] International judicial re-

---

than import trade or import commerce) with foreign nations unless-

(1) such conduct has a direct, substantial, and reasonably foreseeable effect-

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of this Act, other than this section. If this Act applies to such conduct only because of the operations of paragraph (1)(B), then this Act shall apply to such conduct only for injury to export business in the United States.

Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233 (1982). Unfortunately, the newly enacted standard is not an example of careful legislative draftsmanship. For a discussion of some of the problems caused by the awkward language, see generally Fugate, *The Export Trade Exception to the Antitrust Laws: The Old Webb-Pomerene Act and the New Export Trading Company Act*, 15 VAND. J. TRANSNAT'L L. 673, 704-05 (1982). The new Act, however, does not change significantly the current jurisdiction standard. *Id.* at 705. The "direct, substantial, and foreseeable effect" standard generally is accepted. *See* RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(a)(ii) (Tent. Draft No. 2, 1981). *Alcoa*'s intent standard is replaced by the foreseeability requirement to insure an objective standard. H.R. REP. No. 686, *supra* note 22, *reprinted* at 306. *See supra* note 23 and accompanying text.

27. Prior to 1973, none of the 248 cases filed by the Department of Justice were dismissed because the courts lacked jurisdiction. W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS, app. B, 498-551 (2d ed. 1973). Even private actions rarely are dismissed. Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 608 n.12 (9th Cir. 1976). *But cf.* El Cid, Ltd. v. New Jersey Zinc Co., No. 76-1338 (S.D.N.Y. Nov. 30, 1982) (plaintiff failed to satisfy the effects standard).

28. 148 F.2d at 443.

29. Most nations do not accept the effects doctrine. Triggs, *supra* note 20, at 263; *see also* Address by Peter Rees (Britain's Trade Minister), Royal Institute for International Affairs (Oct. 21, 1982) (international law limits a state's extraterritorial jurisdiction to its citizens subject to the territorial state's laws), *discussed in* 43 ANTITRUST & TRADE REG. REP. (BNA) No. 1088, at 861-62 (Nov. 4, 1982) [hereinafter cited as Rees Address].

30. *E.g.*, Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., 1978 A.C. 547 (the British House of Lords upheld a magistrate's refusal to comply with a letter rogatory in the *Westinghouse* litigation).

sistance has been buttressed by recently enacted legislation,[32] and the fear of intrusion by United States courts prompts other nations to deny domestic corporations the opportunity to enter foreign markets.[33] Despite continued foreign opposition to the assertion of United States antitrust jurisdiction and the availability of bilateral agreements to settle the disputes,[34] the United States judiciary insists that the extraterritorial application of its jurisdiction will not be curtailed.[35]

---

31. *E.g.*, United States v. Watchmakers of Switz. Information Center, Inc. (*Swiss Watchmakers*), 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y.), *judgment modified* 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y.). The Swiss watch industry was organized pursuant to government regulations. The United States court enjoined enforcement of the regulations on Swiss soil. After intervention by the Swiss government, the district court modified its order. *Id. See also* British Nylon Spinners Ld. v. Imperial Chem. Indus. Ld., 1953 Ch. 19 (C.A.) (English court refused to enforce an order for specific performance).

32. *See* Comment, *Shortening the Long Arm of American Antitrust Jurisdiction: Extraterritoriality and the Foreign Blocking Statutes*, 27 LOY. L. REV. 213 (1982) (survey of foreign legislation that includes: Australia; Canada; France; New Zealand; Phillipines; South Africa; and the United Kingdom); *see also* Pettit & Styles, *International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 BUS. LAW. 697 (1982) (survey which also includes Belgian, German, and Italian legislation).

33. The English Monopolies and Mergers Commission refused to approve a United States firm's acquisition of a British firm. Rees Address, *supra* note 29, *discussed* at 862.

34. *E.g.*, Agreement Relating to Cooperation of Antitrust Matters, June 29, 1982, United States-Australia (official source unavailable), *reprinted in* 43 ANTITRUST & TRADE REG. REP. (BNA) No. 1071, at 36 (July 1, 1982).

35. United States v. R.P. Oldham Co., 152 F. Supp. 818, 823 (N.D. Cal. 1957). The agreement interpreted in *Oldham* was the Treaty of Friendship, Commerce and Navigation, April 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863, which states:

> The two Parties agree that business practices which restrain competition, limit access to markets or foster monopolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises or by combination, agreement or other arrangement among such enterprises, may have harmful effects upon commerce between their respective territories. Accordingly, each Party agrees upon the request of the other Party to consult with respect to any such practices and to take such measures as it deems appropriate with a view to eliminating such harmful effects.

Id. art. XVIII(1).

The United States plaintiffs in *Oldham* alleged that the United States corporations (including a Japanese subsidiary incorporated in the United States) violated the Sherman Act abroad. 152 F. Supp. at 820. Defendants argued that the

The Ninth Circuit Court of Appeals, in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*,[36] provided the landmark judicial acknowledgement of and response to mounting foreign criticism of the expansive jurisdictional reaches of the United States antitrust laws. Plaintiffs, including United States and foreign citizens, alleged that defendants, also domestic and foreign parties, organized an economic boycott in Honduras in violation of the Sherman Act.[37] Criticizing the effects test for its failure to consider international comity and fairness,[38] the Ninth Circuit developed what it called a triparte balancing analysis to determine the legality of asserting jurisdiction.[39] The first two tiers of the test are two strands of the traditional effects test. The first tier asks if the restraint affects or was intended to affect United States foreign commerce. The second tier addresses whether the violation is substantial enough to be a Sherman Act violation. The final tier questions whether "[a]s a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?"[40] Criteria to be considered

---

agreement stripped the court of jurisdiction. The district court noted that no foreign defendant was named a party to the suit, thus no one had standing to invoke the protection of the agreement. *Id.* at 823. Although the United States signed 20 similar agreements with other nations, the treaties have never been used to settle antitrust disputes. Metzger, *Cartels, Combines, Commodity Agreements and International Law*, 11 TEX. INT'L L.J. 527, 531 (1976).

36. 549 F.2d 597 (9th Cir. 1976).

37. *Id.* at 603-05.

38. *Id.* at 613. The *Timberlane* court also criticized the effects test for "closing the jurisdictional door too tightly" when comity and fairness do not dictate dismissal. *Id.*

39. *Id.* at 615. The test formulated by the *Timberlane* court is: "Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act?" *Id.* The disjunctive test adopted by the Ninth Circuit is not the traditional effects test. *See supra* note 26 and accompanying text (*Alcoa*'s standard was conjunctive). Presumably, the Export Trading Company Act of 1982 forces the Ninth Circuit to abandon the effects standard of *Timberlane*. *See id.*

40. *Timberlane*, 549 F.2d at 615. Judge Choy argued that courts often included considerations of comity and potential conflicts when determining jurisdiction. *Id.* at 612. Express inclusion of the requirement is justified because courts might overlook comity concerns. *Id. But cf. supra* note 26 (the amended section 7 of the Sherman Act omits comity as an express requirement). Although courts can still consider comity, *see infra* note 52 and accompanying text, *Timberlane*'s reasoning suggests that the potential for omission exists.

in any balancing analysis of the final tier include:

> the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the forseeability of such effect, and the relative importance to the violations charged of conduct with the United States as with conduct abroad.[41]

Despite the extensive list of balancing criteria enunciated, the *Timberlane* court sustained jurisdiction of the case simply because no conflict existed between United States and Honduran law.[42] The Third Circuit Court of Appeals, in *Mannington Mills v. Congoleum Corp.*,[43] professed to adopt the *Timberlane* balancing analysis but in fact altered the analysis by separating the questions of jurisdiction and comity. The court retained the *Alcoa* effects test to determine whether jurisdiction could be asserted legally,[44] but considered comity and fairness an abstention doctrine used to determine whether jurisdiction *should* be exercised.[45] Ten criteria were used to weigh the competing interests.[46]

---

41. *Timberlane*, 549 F.2d at 614. The *Timberlane* criteria are derived from two sources—RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965), and K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958). One commentator suggests that *Timberlane* should include the possible lack of an alternate forum. Recent Development, *Timberlane Lumber Co. v. Bank of America*, 4 BROOKLYN J. INT'L L. 97, 111 n.124 (1977).

42. *Timberlane*, 549 F.2d at 614. Binkowski, *Timberlane: Three Steps Forward and One Step Backwards*, 15 INT'L LAW. 419 (1981), criticizes *Timberlane* for its application of the balancing test because weighing the competing interests is required only when a conflict of law exists. *Id.* Applying *Timberlane* where a conflict does not exist is useless because the plaintiff can either sue in both forums or neither forum. *See id.* at 424.

43. 595 F.2d 1287 (3rd Cir. 1979).

44. *Id.* at 1291-92. *Mannington Mills* implicitly refused to follow the *Timberlane* disjunctive effects test. *See supra* notes 26, 39 and accompanying text.

45. *Mannington Mills*, 595 F.2d at 1294.

46. Criteria to be considered are:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;

Judge Adams in his concurring opinion,[47] and commentators[48] consider *Mannington Mills* a departure from the original *Timberlane* test. The Seventh Circuit Court of Appeals followed the *Mannington Mills* approach by separating jurisdiction and comity questions in *In Re Uranium Antitrust Litigation (Westinghouse)*.[49] The court, however, held that the district court did not abuse its discretion when it used criteria different from those adopted by the court in *Mannington Mills* to determine whether comity and fairness indicated that the court should decline jurisdiction.[50] In *Industrial Investment Development Corp. v. Mitsu*

---

5. Existence of intent to harm or affect American commerce, and its foreseeability;
6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either county or be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be accepted in this country if made by the foreign nation under similar circumstances;
10. Whether a treaty with affected nations has addressed the issue.

Id. at 1297-98. Regarding the tenth criterion, *cf. supra* note 35 (where the *Oldham* court ignored the United States-Japan bilateral agreement).

47. *Mannington Mills*, 595 F.2d at 1301. Judge Adams argues that a court cannot decline jurisdiction unless an abstention doctrine exists. *Id.* at 1301 n.9.

48. Comment, *Extraterritorial Application of the Antitrust Laws and Retaliatory Legislation by Foreign Countries*, 11 GOLDEN GATE L. REV. 577, 585 (1981); Case Comment, *Antitrust Law—Extraterritorial Jurisdiction—Court Must Consider International Comity in Exercising Jurisdiction Under Sherman Act*, 4 SUFFOLK TRANSNAT'L L.J. 185, 195 (1980); *see also* Recent Decision, *The Act of State Doctrine and U.S. Antitrust Laws*, 12 LAW & POL'Y INT'L BUS. 503 (1980) (views *Mannington Mills* as an expansion of the act of state doctrine).

49. 617 F.2d 1248 (7th Cir. 1980). The *Westinghouse* litigation sparked a considerable amount of international interest. Twelve foreign corporations were joined with the seventeen United States defendants. *Id.* at 1248. Australia, Canada, South Africa, and the United Kingdom filed amicus curiae briefs. *Id.* at 1253. The potential judgments (in excess of seven billion dollars) prompted Australia to enact the Foreign Proceedings (Prohibition of Certain Evidence) Act of 1976, and Foreign Anti-trust Judgments (Restriction of Enforcement) Act of 1979. Triggs, *supra* note 20, at 251. *See supra* notes 31-33 and accompanying text.

50. *Westinghouse*, 617 F.2d at 1255. Criteria considered by the lower court included: "[T]he complexity of the present multi-national and multi-party action; the seriousness of the charges asserted; and the recalcitrant attitude of the defendants." *Id.*

& Co.,[51] an action between a United States plaintiff and a Japanese defendant, the Fifth Circuit Court of Appeals held that the defendants failed to demonstrate why the *Timberlane* doctrine required dismissal. Like the courts in *Mannington Mills* and *Westinghouse*, the circuit court in *Industrial Investment* interpreted *Timberlane*'s jurisdictional analysis as an effects doctrine with the additional comity question.[52] Despite the comity concerns adopted in the balancing analysis, jurisdiction has never been declined under the *Timberlane* doctrine.[53] Facing a unique fact situation, the instant court was presented with an opportunity to avert possible foreign retaliation by placing a foreign import cartel within *Timberlane*'s protective umbrella.

B. Export Exemptions

Like all countries that regulate commerce affecting the domestic economy,[54] the United States exempts from certain regulations export trade affecting only foreign markets. The Webb-Pomerene Act of 1918[55] is a congressional response to the legislature's perception that to compete effectively with foreign cartels, small exporters need the protection of associations exempt from certain

---

51. 671 F.2d 876 (5th Cir. 1982). Although the court rejected the defendant's *Timberlane* argument, it did not expressly adopt the balancing approach. *Id.* at 885.

52. *Id.* at 884 n.7. The legislative history of the newly amended section 7 of the Sherman Act indicates that the drafters recognized *Timberlane*'s concern with comity and fairness; however, like each court which has interpreted *Timberlane*, Congress views comity to be an abstention doctrine and not the threshold question of jurisdiction. H.R. REP. No. 686, *supra* note 22, *reprinted* at 309. *Timberlane* is specifically cited by the House Judiciary Committee's Report, *id.*, but the application of section 7 jurisdiction parallels the *Mannington Mills*, *Westinghouse*, and *Industrial Investment* interpretations. The effects doctrine determines jurisdiction; a court then can abstain for fairness and comity reasons. As noted in Judge Adams' concurrence in *Mannington Mills*, declining to exercise jurisdiction requires an abstention doctrine. 595 F.2d at 1301 n.9. Those currently used in international disputes—act of state, sovereign immunity, and sovereign compulsion—do not encompass the *Timberlane* doctrine. Seemingly, a new abstention doctrine exists.

53. Binkowski, *supra* note 42, at 422.

54. Smith, *Cartels and the Shield of Ignorance*, 8 J. INT'L L. & ECON. 53, 55 (1973). Only Japan considers the effect on the international community. *Id.* at 55 n.10. *See infra* note 76 and accompanying text.

55. 15 U.S.C. §§ 61-65 (1976 & Supp. IV 1980).

Sherman Act requirements.[56] Specifically, section 2 of the Webb Act exempts qualified associations[57] from the Sherman Act subject to certain restrictions. A Webb association, however, loses its exemption when its actions artificially affect prices within the United States or substantially inhibit domestic competition.[58] Because the restrictions have received limited judicial review,[59] the guidelines concerning prohibited and permissible conduct remain unclear. In *United States v. Minnesota Mining & Manufacturing Co.*,[60] a district court suggested the permissible activities of a Webb association. Permissible conduct includes: using the association as the exclusive foreign outlet; refusing to distribute the products of domestic competitors; setting quotas; determining purchase and resale prices;[61] and limiting the number of distributors.[62] Limitations of the Webb exemption were explored by the

---

56. *See* 1 W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS § 7.2, at 379 (3rd ed. 1982).

57. Associations, agreements, or acts that restrain domestic trade or competitors are excluded from the Webb Act. 15 U.S.C. § 62.

58. *See id.* The text of section 2 is:

> Nothing contained in sections 1 to 7 of this title shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: *Provided*, That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition with the United States or otherwise restrains trade therein.

Id.

59. Judicial precedents are limited to three cases, *see infra* notes 60, 63, 70 and accompanying text, and Federal Trade Commission reports. Fugate, *supra* note 26, at 679.

60. 92 F. Supp. 947 (D. Mass. 1950) (held that export of capital did not constitute export trade as defined by section 1 of the Webb Act).

61. *Accord* FEDERAL TRADE COMMISSION, BROCHURE FOR EXPORTERS, ACTIVITIES AND PRACTICES 3 (1982), *discussed in* Fugate, *supra* note 26, at 689.

62. *See Minnesota Mining*, 92 F. Supp. at 965. Most Webb associations engage solely in the traditional cartel activities of price setting and market allocation. *Antitrust and Foreign Export Cartels: The National Commission's Review of the Webb-Pomerene Exemption*, 12 N.Y.U. J. INT'L L. & POL. 59, 63 (1979) (excerpts from the NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS

district court in *United States v. United States Alkali Export Association (Alkali)*.[63] In that case the court decided that the Webb Act prohibits Webb associations from allocating worldwide markets with international cartels[64] and individually engaging in worldwide restraint of trade.[65] The court in *Alkali* also noted that the jurisdictional provision in section 4 of the Webb Act is especially liberal[66] and encompasses foreign activity.[67] Thus, although the *Alkali* court specifically found that the international market allocations in the case included the United States,[68] the decision also restricted market allocations consisting solely of foreign markets.[69] Despite the competitive advantage the drafters of the

---

AND PROCEDURES, REPORT TO THE PRESIDENT AND ATTORNEY GENERAL) [hereinafter cited as *National Commission's Review*]; *see also* Larson, *An Economic Analysis of the Webb-Pomerene Act*, 13 J.L. & ECON. 461 (1970) (empirical study using data collected by the FTC during 1958-62).

63. 86 F. Supp. 59 (S.D.N.Y. 1959). The Supreme Court decided a procedural question before a decision on the merits finally was announced. United States v. United States Alkali Ass'n, 58 F. Supp. 785 (S.D.N.Y. 1944), *aff'd*, 325 U.S. 196 (1948) (held that section 4 of the Webb Act, which expressly grants investigatory power to the FTC, does not preclude Justice Department action).

64. An international cartel is created when a domestic association joins with foreign cartels to establish prices and allocate markets throughout the world.

65. *Alkali*, 86 F. Supp. at 70.

66. *Id.* Section 4 of the Webb Act specifically grants jurisdiction to United States courts over activity abroad by a Webb association. 15 U.S.C. § 64. Section 4 states:

> The prohibition against 'unfair methods of competition' and the remedies provided for enforcing said prohibition contained in the Federal Trade Commission Act shall be construed as extending to unfair methods of competition used in export trade, even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States.

Id. Section 4 was enacted when *American Banana* limited extraterritorial jurisdiction through the subjective territorial doctrine. *See supra* note 19. Drafters of the Webb Act were concerned with the impact of foreign activities on the domestic market, thus an express jurisdictional grant was included. 1 W. FUGATE, *supra* note 56, § 7.2, at 379-82. *Alkali*, however, should not be read too broadly. Its holding, like section 4 of the Webb Act, only applies when the defendant is a Webb association. Although *Alkali* did extend jurisdiction to activity abroad, it did not hold that a wholly foreign corporation could be charged in a United States court for foreign activity. *See supra* note 22 (in this respect, *Alkali* is like *Alcoa*).

67. *Alkali*, 86 F. Supp. at 68.

68. *Id.* at 71-74.

69. 1 W. FUGATE, *supra* note 56, § 7.8, at 395.

Webb Act sought to give United States exporters,[70] the Webb associations have not flourished.[71] Furthermore, the Webb Act is criticized for inconsistently applying United States antitrust policy to protect domestic exporters, but not foreign parties.[72] Foreign reaction to inconsistent United States policy has been expressed in several forms. Foreign legislatures and courts traditionally have responded to United States export policies with defensive cartels.[73] For example, Japan enacted the Export and Import Trading Act of 1952,[74] which allows the Minister of International Trade and Industry (MITI) to authorize formation of import cartels.[75] The MITI will permit formation of an import

---

70. For an eye-opening discussion of the drafters' intent, see United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 206-10 (1968). *E.g.*, " '[W]e have not reached that high plane of business morals which will permit us to extend the same privileges to the peoples of the earth outside of the United States that we extend to those within the United States.' " *Id.* at 207-08 (statement by Senator Pomerene); *see also*, "I would be willing that there should be a combination between anybody or anything for the purpose of capturing the trade of the world, if they do not punish the people of the United States in doing it." *Id.* at 208 (statement by Congressman Webb).

71. *National Commission's Review, supra* note 62, at 64. Instead of small firms needing a competitive advantage, large firms account for eighty percent of Webb exports. *Id.* The number of Webb associations totaled 39 on January 5, 1982, Fugate, *supra* note 26, at 687, and comprised only 1.5% of total exports. *Id.* at 688. The total amount of exports, however, is quite large—$1.725 billion. *Id.* Some industries are dependent on the Webb exemption. *See generally id.* at 687-88.

72. Fugate, *supra* note 26, at 697. Exempting export trade from the antitrust laws is not unique to the United States. Most nations provide a similar exception. 1 W. FUGATE, *supra* note 56, § 7.18, at 420, however, no other country shares the United States' expansive view of its extraterritorial jurisdiction.

73. *See* Chapman, *Exports and Antitrust: Must Competition Stop at the Water's Edge?*, 6 VAND. J. TRANSNAT'L L. 399, 424 (1973) (a defensive cartel is designed to cure a maladjustment in the economy).

74. Yushutsu nyu Torihiki Ho (Export and Import Trading Act), Act No. 299 of 1952, *partially reprinted in* 3 ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES, ch. J, § 1.2 (1973) (official translation) [hereinafter cited as OECD GUIDE]; *see* Agriga & Rickle, *The Antimonopoly Law of Japan and Its Enforcement*, 39 WASH. L. REV. 437, 473 (1964) (the Export and Import Act was partially a response to the Webb Act).

75. Export and Import Trading Act § 7-2(1). Import associations may enter agreements regarding price, quantity, quality, or any other matter. *Id.* Japan currently admits that import cartels exist against Taiwanese onions, Thai corn, and Korean textiles. *U.S. Anti-trust Officials Visiting Japan Encounter Suspicion of Concerted Action*, 43 ANTITRUST & TRADE REG. REP. (BNA) No. 1080, at

cartel only if "[t]he interest of exporters or enterprises concerned at the place of shipment is not injured and there is not fear of gravely injuring international confidence in Japanese importers."[76] An English court decision, *In Re National Sulphuric Acid Association's Agreement*,[77] upheld a pooling agreement among British sulphur importers. Four United States producers, which formed a Webb-Pomerene association named Sulexco, cornered the world sulphur market.[78] Sulexco exploited its dominant position by demanding that foreign importers pay a premium price.[79] Finding that the Webb association unreasonably flexed its market strength,[80] the court concluded that a nation-wide import cartel of sulphur purchasers was consistent with the English public interest and permitted the cartel to continue operation.[81] More recently, the European Economic Community expressed its displeasure with Webb-Pomerene associations by filing suit against a United States wood pulp export group charging the group with antitrust violations.[82] Despite this onslaught of foreign retaliation, the United States has yet to find a solution.

---

411 (Sept. 2, 1982).

76. Export and Import Trading Act, § 7-2(2)(ii). A similar provision regulates conduct of Japanese export cartels. It requires that "[t]he interest of importers or enterprises concerned at the destination is not injured and there is no fear of gravely injuring international confidence in Japanese exporters." *Id.* § 5(2)(ii).

77. 1963 L.R. 4 R.P. 169.

78. *Id.* at 179-80.

79. *Id.* at 180. Foreign importers were required to pay $3 per ton more than United States buyers. *Id.* Because Great Britain's imports totaled more than 440,000 tons in 1963, *id.* at 170, Sulexco could realize over one million dollars in excess profits.

80. *Id.* at 229.

81. *See id.* at 239.

82. *See EC Competition Officials Assure U.S. Colleagues of No Broad Attacks on Webb-Pomerene Associations*, 43 ANTITRUST & TRADE REG. REP. (BNA) No. 1050, at 267 (Feb. 4, 1982). As the title of the above-mentioned article suggests, European officials contend that Webb associations are not *per se* violations of the EEC antitrust laws. *See id.* However, the alleged violations are price fixing, *id.*, which is the dominant activity of Webb associations. *See supra* notes 61-62 and accompanying text. Thus, Washington's concern that the proceeding is a sign of foreign dissatisfaction with the United States antitrust policy, *id.* at 268, is quite understandable. The EEC also is using an "effects" standard, *id.* at 267, although its scope does not include foreign activity by a foreign party. *But cf. supra* notes 20-27 and accompanying text (the United States version of the effects standard does include wholly foreign activity).

The United States zealously safeguards its export exemptions from the antitrust laws regardless of the foreign interests affected. Despite the mounting criticism of the Webb Act,[83] the Export Trading Company Act of 1982[84] not only retained the Webb antitrust exemption, but created a new exemption. This new exemption allows any qualified person[85] to receive a certificate excluding any export trade, including services,[86] from Sherman Act and Federal Trade Commission Act provisions.[87] The Reagan Administration simultaneously expanded the protection afforded domestic exporters and reversed the previous policy of the Justice Department that excluded foreign exporters covered by foreign versions of the United States export exemptions from prosecution for antitrust violations.[88] Although a Webb exemption will protect

---

83. *See supra* notes 71-72 and accompanying text.

84. Pub. L. No. 97-290, 96 Stat. 1233 (1982). For a complete discussion of the new exemption, see generally Fugate, *supra* note 26, at 698-706.

85. Export Trading Company Act § 302(a). The Webb Act only exempts associations of two or more persons, partnerships, or corporations. 15 U.S.C. § 61 (1976 & Supp. IV 1980). One view is that the single company exemption is not helpful because certificates will not be issued to companies that have antitrust worries. Fugate, *supra* note 26, at 703.

Certain criteria must be satisfied to qualify for the new exemption. Export Trading Company Act § 303(a)(1)-(4). The export trade must:

> (1) result in neither a substantial lessening of competition or restraint of trade with the United States nor a substantial restraint of the export trade of any competitor of the applicant;
>
> (2) not unreasonably enhance, stabilize, or depress prices within the United States of the goods, wares, merchandise, or services of the class exported by the applicant;
>
> (3) not constitute unfair methods of competition against competitors engaged in the export of goods, wares, merchandise, or services of the class exported by the applicant; and
>
> (4) not include any act that may reasonably be expected to result in the sale for consumption or resale within the United States of the goods, wares, merchandise or services exported by the applicant.

Id. The restrictions parallel those of the Webb Act. *See supra* note 58.

86. Export Trading Company Act § 311(1). The Webb exemption is limited to goods, wares, or merchandise. 15 U.S.C. § 61 (1976 & Supp. IV 1980). Presumably, *Minnesota Mining* is not affected. *See supra* note 60 (held that export of capital is not export trade).

87. Export Trading Company Act § 311(6). The FTC exemption applies only to the § 5 prohibition against unfair methods of competition. *Id.* Exemptions from state antitrust laws also are provided. *Id.* The Webb Act only exempts Sherman Act violations. 15 U.S.C. § 62 (1976 & Supp. IV 1980).

88. *See* Address by William F. Baxter (Assistant Attorney General), Meeting

a domestic cartel[89] from prosecution, it is now clear that foreign export cartels will be prosecuted for violations of United States antitrust laws. The instant court faced the question whether foreign import cartels, organized to compete with protected United States exporters, are liable for antitrust violations under the same United States laws that placed the foreign importers at a competitive disadvantage.

III. INSTANT OPINION

The instant court applied *Timberlane* to determine whether it was appropriate to assert extraterritorial jurisdiction. After assuming that Daishowa conceded the effects portion of the *Timberlane* test,[90] the instant court ruled that considerations of comity and fairness did not preclude jurisdiction.[91] Absent any proof of Japanese retaliation,[92] conflict with Japanese law, or harm to the Japanese economy,[93] Judge Aguiler considered North Coast's interests in a convenient forum and a prompt remedy controlling[94] and concluded that the extraterritorial assertion of

---

of the ABA International Law Section (Sept. 29, 1981), *quoted in* Fugate, *supra* note 26, at 693. Condoning foreign export cartels was the official policy for many years. Letter from Assistant Attorney General Donald I. Baker to Senator Edward M. Kennedy (Feb. 16, 1977) (reasons why the Justice Department did not prosecute Japanese export cartel of 18 television manufacturers), *discussed in Justice Throws Cold Water on Japanese Color TV Investigations*, ANTITRUST & TRADE REG. REP. (BNA) No. 807, at A-24 (Mar. 29, 1977). The previous policy avoided the anomoly of prosecuting foreign exporters under the antitrust laws when establishing minimum prices and prosecuting them under the antidumping statutes when setting maximum prices. *See id.* at A-25.

89. Use of the term "cartels" regarding United States exporters is deliberate. Domestic export exemptions are designed to allow price fixing and market allocation—classic functions of a cartel. Arguably, United States antitrust policy creates "aggressive cartels," not merely "classic cartels." For the distinction between the two types of cartels, see generally Chapman, *supra* note 73, at 424-38.

90. Daishowa Int'l v. North Coast Export Co., 1982-2 Trade Cas. ¶ 64,774, at 71,788-89 N.D. Calif. It is possible that the court overlooked Daishowa's effects argument. *See supra* note 10 and accompanying text.

91. *Daishowa*, 1982-2 Trade Cas. at 71,790.

92. Judge Aguiler characterized Daishowa's warnings as only speculation. *Id.* at 71,789.

93. Daishowa did not cite the Export and Import Trading Act of 1952. *See id.*

94. *See id.* at 71,789-90. Judge Aguiler expressly noted the possible lack of an alternate forum. *Id.* While this criteria is not in the original *Timberlane* analysis, some commentators favor its inclusions. *See supra* note 41 and accompany-

United States antitrust jurisdiction was proper.[95] Next, he rejected Daishowa's reciprocal immunity arguments. Finding no express exemption in the Webb Act to cover foreign importers,[96] Judge Aguiler declined to imply an exemption and thereby potentially frustrate congressional intent.[97] Furthermore, the court in *Daishowa* relied on *Alkali*[98] and *Minnesota Mining*[99] in determining that the restrictions on Webb associations apply equally to foreign import cartels.[100] The court noted that the Webb Act does not exempt from United States antitrust laws activity by a foreign or domestic company causing an adverse domestic impact.[101] The court also pointed out that North Coast would lose its Webb antitrust exemption if the company fixed prices and organized an economic boycott affecting the United States market.[102] Judge Aguiler dismissed Daishowa's claim for reciprocal immunity because no exemption in the Webb Act covered foreign importers, and because North Coast could have been prosecuted for similar activities.[103] Applying the Sherman Act, the court denied North Coast's petition for a mandatory injunction forcing Daishowa to purchase the plaintiffs' exports, but the court did enjoin Daishowa and the other Japanese buyers from continuing to fix prices and boycotting North Coast exports.[104] Thus, the court prohibited Daishowa from continuing its violation of the United States antitrust laws because the violative activities did not fall within a Webb Act exemption, and *Timberlane*'s comity doctrine did not persuade the court to decline jurisdiction.

---

ing text.

95. *Daishowa*, 1982-2 Trade Cas. at 71,790.

96. *Id.* at 71,787.

97. *See id.* at 71,787-88.

98. *See supra* notes 60-62 and accompanying text.

99. *See supra* notes 63-69 and accompanying text.

100. *Daishowa*, 1982-2 Trade Cas. at 71,787.

101. *Id.* at 71,787. The restriction quoted by the court is section 2 of the Webb Act. 15 U.S.C. § 62 (1976 & Supp. IV 1980). *See supra* note 58.

102. *Daishowa*, 1982-2 Trade Cas. at 71,787.

103. *Id.* at 71,787-88. Interpreting *Minnesota Mining* to prohibit all unfair or oppressive price fixing, the court also denied Daishowa's alternate motion to limit subsequent inquiry to the boycott allegations. *Id.* at 71,790.

104. *Id.* at 71,790-92. The mandatory injunction was denied because serious questions of fact existed concerning the original contract action between Daishowa and North Coast. *Id.* at 71,791-92. Because North Coast demonstrated "serious claims of hardship" and the facts presented "fair ground[s] for litigation," *id.* at 71,791, a prohibitory injunction was granted. *See supra* note 5.

IV. COMMENT

Even though the instant decision did not hold that foreign import cartels are a *per se* violation of the United States antitrust laws,[105] that portion of the court's analysis which evaluates Daishowa's reciprocal immunity argument necessarily leads to this conclusion. The court in *Daishowa* relied on the *Alkali* and *Minnesota Mining* interpretations of the permissible conduct of Webb associations when fashioning an identical exemption standard for the Japanese import cartel.[106] The court, however, failed to recognize a fundamental distinction between the prior cases and the instant situation. In both *Alkali* and *Minnesota Mining* the Justice Department took action against Webb associations for violations of the Webb Act, but in the instant case a Webb export group is alleging the Sherman Act violation.[107] The statutory authority for jurisdiction differs in the two situations. When a Webb association is sued, section 4 of the Webb Act specifically grants extraterritorial jurisdiction.[108] When a Webb association sues a foreign defendant, however, the association must rely on section 7 of the Sherman Act.[109] Because the scope of extraterritorial jurisdiction under section 7 of the Sherman Act is determined by *Timberlane*, the instant court should have considered *Timberlane*'s comity criteria in evaluating Daishowa's reciprocal immunity arguments.[110] Instead, the *Daishowa* court relied on

---

105. The holding is "limited" to acts not within a Webb association's antitrust exemption. Nor did the instant court hold that domestic courts have jurisdiction over a wholly foreign cartel. The import cartel in the instant case included a United States defendant—Daishowa America. In this respect the *Daishowa* decision resembles the post-*Alkali* cases. *See supra* note 22; *see also* United States v. R.P. Oldham Co., 152 F. Supp. 818 (N.D. Cal. 1957) (court sustained jurisdiction over a cartel that included Japanese and United States corporations, but only the domestic conspirators were parties in the suit).

106. *See supra* notes 98-101 and accompanying text.

107. *See supra* notes 61-69 and accompanying text.

108. *See supra* note 66.

109. *See supra* note 26.

110. Although the *Daishowa* court did apply the *Timberlane* balancing analysis in determining whether to exercise jurisdiction, it failed to include North Coast's immunity from the antitrust laws as an additional *Timberlane* criterion. *See supra* note 13 and accompanying text. The significance of this omission is illustrated by the court's cursory dismissal of Daishowa's request to limit further inquiry into the alleged boycott. By using the same standard (effect on the domestic economy) for North Coast and Daishowa, the court ignored other *Timberlane* comity considerations that might persuade a court to allow foreign

Minnesota Mining and *Alkali* to fashion an exemption standard[111] that no foreign import cartel can satisfy. Any action by a foreign group affects the domestic economy,[112] thus violating the standard that restricts a Webb association's conduct. Despite its refusal to imply reciprocal immunity from domestic antitrust laws for foreign import cartels, the *Daishowa* court did not declare that asserting jurisdiction is always appropriate. The instant court recognized that *Timberlane*'s concern with comity and fairness still must be considered in deciding whether a court should use its discretion to assert jurisdiction.

Although courts and commentators still wrangle over the exact meaning of the *Timberlane* doctrine,[113] the consensus is that situations do exist when a domestic court should decline jurisdiction. The instant case presents a situation where a United States court should exercise restraint. The *Daishowa* court relied on two of the *Timberlane* criteria to sustain jurisdiction—there was no conflict between United States and Japanese law, and the plaintiffs possi-

---

price fixing. Foreign import cartels might be organized by foreign governments to protect importers from Webb associations, *see supra* notes 64-76 and accompanying text, or foreign courts might sanction import groups as the only means available to combat Webb associations' monopolistic prices. *See supra* notes 77-82 and accompanying text. While neither foreign action would qualify for the act of state doctrine or sovereign compulsion doctrine, *see* Interamerican Refining Corp. v. Texaco Maricaibo, Inc. 307 F. Supp. 1291 (D. Del. 1970), the *Timberlane* abstention doctrine arguably should declare import cartels that are sanctioned by foreign governments to be outside the jurisdiction of a United States court.

111. A proponent of the *Daishowa* standard could point to the consistency of denying foreign import cartels any absolute immunity because foreign export cartels currently can be attacked in the United States courts. *See supra* notes 88-89 and accompanying text. Also, because Webb associations cannot form import cartels, a superficial equality of treatment seems to exist. Unlike foreign importers, however, domestic corporations do not require protection from foreign export cartels because United States courts liberally apply domestic law to extraterritorial activity. *Cf. supra* note 29; *see also supra* note 72 (other nations have a more limited view of extraterritorial jurisdiction). Also, recognition of foreign import cartels might prevent attacks on United States export cartels. *See supra* note 82 and accompanying text.

112. Foreign action that does not affect the United States will not pass the current jurisdiction test. *See supra* note 26. If foreign activity does affect the United States economy, it will "enhance or depress prices within the United States" or "otherwise restrain trade therein." *See supra* note 58.

113. *See supra* notes 43-52 and accompanying text.

bly lacked an alternate forum.[114] The evidence used by the court to support these findings was totally insufficient.[115] Based on this evidence, the *Daishowa* court issued an injunction to prohibit certain activity on Japanese soil,[116] and that injunction was binding upon importers who were not even parties in the instant action.[117] Although similar court orders have produced foreign government intervention,[118] the instant court disregarded Daishowa's warnings of Japanese retaliation.

A preferable alternative would be to inform the Japanese Fair Trade Commission of the alleged activities and allow the Japanese government to halt the economic boycott and price fixing.[119] This procedure has several advantages. First, if the Japanese Fair

---

114. *See supra* notes 92-94 and accompanying text. One commentator suggests that these factors are mutually exclusive. *See supra* note 42.

115. To demonstrate that there was no conflict of law, the court relied on a newspaper article which stated that an unrelated corporation was fined for price fixing in violation of an unnamed law. *See supra* note 102. The court merely speculated that North Coast lacked an alternate forum. Whether a foreign plaintiff has a cause of action in Japanese courts against a Japanese cartel for violating Japan's antitrust laws is not yet decided. Although the Japanese now have standing to sue in civil actions, *see* Okawa v. Matsushita Denki Sangyo K.K., 863 HANREI JINO 20 (Tokyo High Ct., Sept. 1977), *discussed in* Note, *Trustbusting in Japan: Cartels and Government-Business Cooperation*, 94 HARV. L. REV. 1064, 1080-81 (1981), a foreign corporation was denied standing when seeking to overturn a Fair Trade Commission ruling. Novo Industri A/S v. Fair Trade Commission, (Sup. Ct. Nov. 28, 1975) (official source unavailable) *discussed in* OECD GUIDE, *supra* note 74, § 3.1(6).

116. The court implicitly held that the situs of the act was in Japan, otherwise the *Timberlane* doctrine would not be applicable. *See supra* note 14 and accompanying text.

117. Only one member of the cartel—Daishowa International—was named a party in the suit. *See supra* note 4 and accompanying text.

118. *See supra* note 31 (a similar court order in the *Swiss Watchmakers* case prompted the Swiss government to interfere).

119. Several communication methods are available. Although never used, the United States-Japan Friendship, Navigation, and Communication Treaty contains the needed provisions. *See supra* note 35. Also, the Organisation for Economic Co-operation and Development has a notification system. Ariga, *International Trade of Japan and the Antimonopoly Act*, 8 J. INT'L L. & ECON. 185, 193 (1973). This system is used by other nations to inform the Fair Trade Commission of antitrust violations. *Id.* at 193-95. The Japanese government does act on the communications by issuing strict warnings against future violations. *Id. See generally* Note, *Trustbusting in Japan: Cartels and Government-Business Cooperation*, 94 HARV. L. REV. 1064 (1981) (the Japanese Fair Trade Commission actively pursues antitrust violators).

Trade Commission issues a "Specially Designated Unfair Business Practice" regulation,[120] the United States court is assured that no conflict of law exists. Second, the procedure thwarts possible foreign retaliation and thus achieves the goal of the *Timberlane* doctrine. Then, if the Japanese government should refuse to halt the activity, the domestic court can use the *Timberlane* balancing analysis to settle the dispute, weighing in the apparent conflict of law. Finally, Japanese review of the instant situation might have disclosed facts unknown to the United States courts which could have averted unnecessary conflicts. For example, Daishowa might not be a government-sanctioned import cartel because Japanese law prohibits international cartels.[121] If Daishowa is not a recognized import cartel, the issue of reciprocal immunity could have been avoided by the instant court.

The *Daishowa* court can not be held completely responsible for its failure to use these alternative approaches when they have never been used by any United States court. All United States courts since *Alcoa* have continued to expand the extraterritorial reach of the United States antitrust laws despite *Timberlane*'s professed concern for questions of international comity and fairness. Rightly or wrongly, the *Daishowa* decision not to exempt the foreign import cartel from jurisdiction follows the established pattern moving toward broader assertion of jurisdiction and less emphasis on fairly balancing the *Timberlane* criteria.

Timothy James Peaden

---

120. Issued pursuant to Shiteki Dokusen no Kinshi oyobi Kosei Torihiki no Kakuho ni kansura Horitsu (Act concerning Prohibition of Private Monopoly and Maintenance of Fair Trade), Act No. 54 of 1947, § 7(2), *reprinted in* OECD GUIDE, *supra* note 74, § 1.0. The cease and desist orders are tailored to a specific practice within a designated industry. *Id.*

121. Ariga, *International Trade of Japan and the Antimonopoly Act*, 8 J. INT'L L. & ECON. 185, 196 (citing art. 6(1) of the Export and Import Trading Act); *see also supra* note 75 (wood chip importers currently are not admitted to be an officially sanctioned import cartel).

ADMIRALTY—THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT PROVIDES BENEFITS FOR INJURIES INCURRED ON THE HIGH SEAS, *Cove Tankers Corp. v. United Ship Repair, Inc.*, 683 F.2d 38 (2d Cir. 1982).

I. FACTS AND HOLDING

Plaintiff shipowner[1] sought indemnification from the defendant corporation[2] to recover amounts paid in settlement of several claims. These claims were brought by or for the benefit of defendant's employees who were injured or killed in a boiler explosion that occurred aboard plaintiff's ship[3] on the high seas.[4] In a case of first impression,[5] the United States District Court for the Southern District of New York found that the navigable waters of the United States include the high seas,[6] and therefore, the Longshoremen's and Harbor Workers' Compensation Act (LHWCA)[7] provided the remedy for any injuries suffered by defendant's employees.[8] The district court then held that the LHWCA barred

---

1. Plaintiff, Cove Tankers Corporation (Cove), owned the United States flagvessel S/S Cove Communicator. Cove Tankers Corp. v. United Ship Repair, Inc., 528 F. Supp. 101, 103 (S.D.N.Y. 1981).

2. The defendant is United Ship Repair, Inc. (United). *Id.*

3. The accident injured Christos Roussos and killed Nicos Georgopoulos, ship repairmen and employees of United, who were repairing the boilers of the plaintiff's ship. *Cove Tankers*, 683 F.2d at 39; 528 F. Supp. at 103. Cove sought indemnification for amounts paid in settlement of claims brought by Roussos and the next of kin of Georgopoulos and for legal fees and other expenses incurred while defending those suits. 528 F. Supp. at 104. Plaintiff's complaint claimed the amount sought was " 'paid and incurred as a result in whole or in part of defendant's negligence, breach of contract, and/or breach of warranties to plaintiff.' [Complaint] at ¶ 11." *Id.*

4. At the time of the accident the ship was located approximately 135 miles from shore, having deviated from its intended route between Philadelphia and New York to conduct unspecified tests. Both courts assumed that these waters were part of the high seas. Cove Tankers Corp. v. United Ship Repair, Inc., 683 F.2d 38, 39 (2d Cir. 1982); 528 F. Supp. at 103 & n.1.

5. *Cove Tankers*, 528 F. Supp. at 103.

6. *Id.* at 107.

7. 33 U.S.C. §§ 901-950 (1976 & Supp. V 1981). Compensation is awarded pursuant to the LHWCA only if "disability or death results from an injury occurring upon the navigable waters of the United States." *Id.* § 903(a).

8. 528 F. Supp. at 113. United paid LHWCA benefits to Roussos and the next of kin of Georgopoulos. *See id.* at 104 n.4.

the shipowner's suit against the defendant employer for indemnification and granted the defendant's motion for judgment on the pleadings.[9] On appeal to the Court of Appeals for the Second Circuit, affirmed. *Held:* Regardless of whether the navigable waters of the United States include the high seas, a vessel owner's suit for indemnification against the injured repairman's employer is barred because the LWHCA remains the source of remedy for ship repairmen who are injured while performing traditional ship repair functions aboard a United States flag-vessel, even when a portion of that vessel's domestic voyage includes travel on the high seas.

II. LEGAL BACKGROUND

A person injured or killed on the high seas may claim compensation or damages under one or more statutory or maritime remedial schemes including the LHWCA,[10] the Jones Act,[11] and the Death on the High Seas Act (DOHSA).[12]

A. Longshoremen's and Harbor Workers' Compensation Act

According to the LHWCA, a qualified person engaged in maritime employment,[13] or an employee's personal representative in the event of the employee's death,[14] has an exclusive[15] remedy

---

9. *Id.* at 113. The LHWCA states: "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, . . . may bring an action against such vessel as a third party . . . , and the *employer shall not be liable to the vessel* for such damages . . . ." 33 U.S.C. § 905(b) (1976) (emphasis added).

10. 33 U.S.C. §§ 901-950 (1976 & Supp. V 1981).

11. 46 U.S.C. § 688 (1976).

12. 46 U.S.C. §§ 761-768 (1976 & Supp. V 1981).

13. As enacted in 1927, the LHWCA defined the term "employee" to exclude "a master or member of a crew of any vessel, [and] any person engaged by the master to load or unload or repair any small vessel under 18 tons net." 68 CONG. REC. 5403, 5403 (1927). This early definition was amended by Congress in 1972 and is codified in 33 U.S.C. § 902(3) (1976) as follows:

> The term 'employee' means any person engaged in maritime employment, including any longshoreman . . . , and any harbor-worker including a ship repairman, . . . but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Id.; see also 118 CONG. REC. 36,376, 36,376 (1972).

14. 33 U.S.C. § 905(a).

15. *Id.*

against the employer,[16] without proof of fault,[17] for injuries[18] sustained by the employee in the course of his employment[19] on the navigable waters of the United States.[20] In addition, an employee injured as a result of the negligent operation of a vessel may bring suit against the vessel's owner as a third party.[21] In this situation the employer remains liable to the employee[22] but is not required to indemnify the shipowner for damages paid to the injured

---

16. As enacted in 1927, the LHWCA defined an employer as "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)." 68 CONG. REC. 5900, 5900 (1927).

17. Voris v. Texas Employers Ins. Ass'n, 190 F.2d 929, 934 (5th Cir. 1951), *cert. denied*, 342 U.S. 932 (1952); 33 U.S.C. § 904(b).

18. The definition of "injuries" includes "accidental injury or death arising out of and in the course of employment . . . ." 33 U.S.C. § 902(2).

19. *Id.* § 902(3); *see supra* note 13.

20. As originally enacted in 1927, the LHWCA provided coverage in the event of:

> disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

68 CONG. REC. 5900, 5901 (1927).

As amended in 1972 and codified in 33 U.S.C. § 903(a), the LHWCA provides for coverage in the event of:

> disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employee in loading, unloading, repairing, or building a vessel).

Id.; see also 118 CONG. REC. 36,376, 36,376 (1972).

21. 33 U.S.C. § 905(b). By requiring proof of negligence, the 1972 amendments reversed the Supreme Court's decision in Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946). In *Sieracki*, the Court held that a longshoreman employed by an independent contractor and injured while working on board a vessel in port had a cause of action for unseaworthiness against the vessel owner without proving fault. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 392-93 (2d ed. 1975) [hereinafter cited as GILMORE & BLACK]. Like the doctrine of unseaworthiness applicable to seamen, *see infra* note 61, the *Sieracki* doctrine of unseaworthiness gives the shipowner an absolute and nondelegable duty of insuring seaworthiness, GILMORE & BLACK, *supra*, at 393; 1A E. JHIRAD, A. SANN, B. CHASE & M. CHYNSKY, BENEDICT ON ADMIRALTY § 13 (6th ed. 1982) [hereinafter cited as 1A BENEDICT], because of the hazardous nature of the work at sea. *Id.*

22. 33 U.S.C. § 905(a)-(b); *see also id.* § 933(a)-(b).

employee.[23]

Long before the enactment of the LHWCA, Congress perceived a fundamental difference in the needs of seamen and longshoremen or harbor workers for compensatory protection. The peripatetic seamen required the uniform compensatory protection available only through federal statute;[24] however, longshoremen or harbor workers, who never leave the ports where they are employed, required only the same protection provided to other workers in their locale by state workers' compensation schemes.[25] In a series of cases, however, the United States Supreme Court declared unconstitutional the extension of state worker's compensation plans beyond the water's edge to protect longshoremen and harbor workers.[26] Thus, before enactment of the LHWCA, those longshoremen and harbor workers whose employment required them to work beyond the water's edge, either on a pier or aboard a moored vessel, were denied both federal and state compensatory protection.

Congressional attempts to define the compensatory scope of the LHWCA generated extensive debate during the 1920s. Congress,

---

23. *Id.* § 905(b); 1A BENEDICT, *supra* note 21, § 14; GILMORE & BLACK, *supra* note 21, at 437; *see also supra* note 9. Congress overruled Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956), when it prohibited shipowners from seeking indemnification for damages paid to an injured workman from the workman's employers and amended the LHWCA as codified at 33 U.S.C. § 905(b). 1A BENEDICT, *supra* note 21, § 13; GILMORE & BLACK, *supra* note 21, at 437. In *Ryan,* the Supreme Court had held that a shipowner sued for unseaworthiness by a worker covered by the LHWCA, had a cause of action for indemnification against that worker's employer. *Id.* at 437; 1A BENEDICT, *supra* note 21, § 13. Taken together, a *Sieracki* action for unseaworthiness brought against a shipowner, *see supra* note 21, and the indemnity action against an employer approved by *Ryan* created circular liability. The employer was liable for all damages, including LHWCA compensation, awarded the employee, even though the employee's exclusive remedy against the employer was the compensation provided by the LHWCA. *See* 33 U.S.C. § 905(a). The 1972 amendments dissolved this circular liability. *See* 1A BENEDICT, *supra* note 21, § 14.

24. H.R. REP. No. 639, 67th Cong., 2d Sess. 2 (1922) [hereinafter cited as H.R. REP. No. 639]; *see also infra* note 51.

25. H.R. REP. No. 639, *supra* note 24, at 2.

26. Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). For a discussion of the Court's demand for a uniform national system of compensation for maritime employees, see 1A BENEDICT, *supra* note 21, §§ 2-3.

through a series of proposed bills,[27] forged the LHWCA in a fire of countervailing concerns. First, the Supreme Court mandated national uniformity[28] but limited the scope of compensatory coverage to the existing bounds of United States admiralty jurisdiction.[29] Second, seamen generally expressed satisfaction with their rights to compensation pursuant to the Jones Act and opposed any attempt by Congress to include them in the longshoremen's and harbor workers' compensation plan.[30] Finally, in an attempt to emphasize the status of harbor workers as members of the local labor force, representatives of the longshoremen and other harbor workers lobbied for a federal compensation scheme similar to the one protecting state workers.[31]

The first proposed bill[32] broadly defined LHWCA coverage to include any employment performed within United States admiralty jurisdiction[33] excluding masters and crewmembers of a vessel and excluding any job which was considered strictly local in nature.[34] Next, the Senate Judiciary Committee proposed limiting LHWCA compensatory coverage to injuries or death suffered by employees, excluding masters and seamen, as defined by statute,[35]

---

27. *See infra* notes 32-41 and accompanying text.

28. *See supra* note 26 and accompanying text.

29. Congress perceived a constitutional requirement to leave local affairs to local control. H.R. REP. No. 639, *supra* note 24, at 5. The LHWCA was enacted pursuant to Congress' power to make laws necessary to exercise the admiralty jurisdiction of the United States. Gudmundson v. Cardillo, 126 F.2d 521, 523-24 (D.C. Cir. 1942).

30. 68 CONG. REC. 5402, 5414 (1927) (statement of Cong. Davis); *see infra* note 39 and accompanying text.

31. *See* H.R. REP. No. 639, *supra* note 24, at 2; *see also Compensation for Employees in Certain Maritime Employments: Hearings on S. 3170 Before the Subcomm. of the Senate Comm. on the Judiciary*, 69th Cong., 1st Sess. 21, 26 (1926) [hereinafter cited as *Senate Subcomm. Hearings*] (statements of Mr. A.J. Chlopek and Mr. W.F. Dempsey who represented the International Longshoremen's Ass'n (ILA)) (the ILA wanted a federal statutory scheme providing coverage similar to state workers' compensation plans because longshoremen stayed in port and were not involved with the navigation of the ship).

32. Identical bills proposing compensatory protection for certain maritime workers were introduced as S. 3170 and H.R. 9498. *Senate Subcomm. Hearings, supra* note 31, at 17.

33. S. 3170, 69th Cong., 1st Sess. § 3 (1926), *reprinted in Senate Subcomm. Hearings, supra* note 31, at 2.

34. The bill excluded shipmasters, crewmembers, and "employment of local concern and of no direct relation to navigation and commerce." *Id.*

35. 7 CONG. REC. 10,608, 10,608 (1926). "Employee" was defined to exclude

"upon the navigable waters of the United States (including any dry dock) *or . . . upon the high seas . . . .*"[36] This proposal met substantial criticism during hearings before the House Judiciary Committee.[37]

The Senate Judiciary Committee then proposed an amendment to its bill extending LHWCA coverage to nearly all maritime workers, including seamen.[38] This latest Senate proposal aroused

---

"a master or seaman as defined in Section 4612 of the Revised Statutes, as amended." Section 4612 provides:

> [E]very person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the "master" thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a "seaman" . . . .

REV. STAT. § 4612 (2d ed. 1878).

36. 67 CONG. REC. 10,608, 10,608 (1926) (emphasis added).

37. One witness testified that the Senate's proposal to extend LHWCA coverage to persons on the high seas, *see supra* text accompanying note 36, while excluding masters and seamen as defined by statute, *see supra* note 36 and accompanying text, was inconsistent. *See To Provide Compensation for Employees Injured and Dependents of Employees Killed in Certain Maritime Employments: Hearings on S. 3170 Before the House Comm. on the Judiciary*, 69th Cong., 1st Sess. 177 (1926) (statement of Mr. S.D. McComb, Manager of the Marine Office of America) [hereinafter cited as *House Comm. Hearings*]. According to Mr. McComb, anyone going on the high seas aboard a vessel in the course of his employment would be included in the definition of seamen provided in REV. STAT. § 4612. *See House Comm. Hearings, supra*, at 177. Thus, even though the LHWCA would purport to provide coverage for injuries or death occuring on the high seas, no one injured on the high seas would be eligible to receive its compensatory benefits. *See id.*

In response to this criticism, the House committee chairman proposed to amend the coverage section, *see supra* notes 35-36 and accompanying text, to read:

> This act shall apply to any employment performed in or upon the high seas or on navigable waters, or in or upon dry docks . . . and all places within the admiralty jurisdiction of the United States, except employment of local concern and of no direct relation to navigation and commerce, *and shall not apply to seamen on foreign voyages.*

Id. at 186 (emphasis added). The chairman's proposed amendment was inconsistent with the desires of the original bill's proponents who intended the compensation scheme to reflect the local status of the covered employees. *See supra* text accompanying note 31.

38. H.R. REP. No. 1767, 69th Cong., 2d Sess. 19 (1927). The Senate decision to include seamen under LHWCA coverage apparently reflected its belief that the Supreme Court's demands for a uniform admiralty compensation scheme, *see supra* text accompanying notes 26, 28, required their inclusion. *See* 68 CONG.

strong and persuasive opposition from the representatives of various seamens' groups, and many of these representatives began to lobby members of the House Judiciary Committee.[39] Because of this opposition, the House committee substantially rewrote the Senate proposal to exclude seamen from LHWCA coverage.[40] Both the House and the Senate passed the rewritten version and the LHWCA was enacted in 1927.[41]

The LHWCA was substantially revised in 1972.[42] Congress increased the LHWCA's benefits,[43] abolished its causes of action for

---

REC. 5402, 5410 (1927) (statement of Cong. Graham).

39. 68 CONG. REC. 5402, 5412, 5414 (1927) (statements of Cong. O'Connor and Cong. Davis).

40. *Id.* at 5907-08 (statements of Sen. Reed).

41. *Id.* at 5414, 5909. As enacted, the term "employee" did not include "a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under 18 tons net." *Id.* at 5900.

The coverage provisions, which excluded any reference to the high seas, were enacted providing compensation for disability or death of an employee, but only if this resulted from an injury sustained "upon the navigable waters of the United States (including any drydock). . . ." *Id.* at 5901.

The originally proposed bill, *see supra* text accompanying note 33, provided for the establishment of compensation districts, presided over by appointed officers for the purpose of adjudicating claims, to include "places where work covered by this act is done. . . ." S. 3170, 69th Cong., 1st Sess. § 56(a) (1926), *reprinted in Senate Subcomm. Hearings, supra* note 31, at 14. The current version of this provision, enacted in 1927, provides appointed officers jurisdiction of compensation districts that include the high seas. *See* 33 U.S.C. § 939(b) (1976); 67 CONG. REC. 10,608, 10,612 (1926).

Thus, as enacted, the LHWCA established a national uniform scheme of compensatory protection covering those employees ineligible for state workers' compensation and excluding those persons already covered by the Jones Act. In addition, Congress narrowed the scope of LHWCA coverage from "any employment performed . . . within the admiralty jurisdiction," *see Senate Subcomm. Hearings, supra* note 31, *reprinted* at 2; *see also supra* note 33 and accompanying text, to employment upon the navigable waters of the United States and excluded any reference to coverage of employment on the high seas. When revising the LHWCA's coverage provisions, Congress rejected a proposal which would require the inclusion of seamen. *See supra* note 37; *see also supra* text accompanying note 38. Consequently, only the description of compensation districts refers to the high seas. *See* 33 U.S.C. § 939(b) (1976).

42. *See* Amendment to the Longshoremen's and Harbor Workers' Compensation Act, Pub. L. No. 92-576, 86 Stat. 1251 (1972); *see also* 118 CONG. REC. 36,376 (1972); 1A BENEDICT, *supra* note 21, § 12.

43. H.R. REP. No. 1441, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4698, 4698-99 [hereinafter cited as H.R. REP. No. 1441].

unseaworthiness[44] and indemnity,[45] and expanded the Act's coverage[46] in an attempt to resolve any compensatory disparities that arose as a result of where the harbor worker was injured. Those workers who were injured on land or the pier were subject to state compensation plans, but those workers who were injured on a ship at the pier were compensated pursuant to the LHWCA.[47] Al-

---

44. *Id., reprinted* at 4701-04; *see supra* notes 21-23 and accompanying text.

45. H.R. REP. No. 1441, *supra* note 43, *reprinted* at 4704-05; *see supra* note 23 and accompanying text.

46. The geographic coverage of the Act was broadened by deleting all the words after "(including any dry dock)" from 33 U.S.C. § 903(a), *see supra* note 41, and inserting "(including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." 118 CONG. REC. 36,376, 36,376 (1972).

Congress expanded employee coverage by deleting the previous definition of "employee," *see supra* note 41, and inserting the following definition at 33 U.S.C. § 902(3):

> The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, any harbor-worker including a ship repairman, . . . but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Id., reprinted in 118 CONG. REC. 36,376, 36,376 (1972); *see also* H.R. REP. No. 1441, *supra* note 53, *reprinted* at 4707; 118 CONG. REC. 36,376, 36,385 (1972) (Questions and Answers); GILMORE & BLACK, *supra* note 21, at 424 (with the 1972 amendments, the LHWCA "has clearly crossed the Jensen line and gone ashore").

The Supreme Court said these amendments replaced the single situs requirement with a "two-part situs and status standard." P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 73 (1979). According to the Court, Congress' purpose in enacting the amendments was to guarantee that workers who did not enjoy continual coverage under the pre-1972 Act would be afforded complete protection under the 1972 Act. *Id.* at 75. Thus, by enlarging the covered situs and enacting the status requirement, Congress sought to ensure that "a worker's eligibility for federal benefits would not depend on whether he was injured while walking down a gangway or while taking his first step onto the land." *Id.*

47. H.R. REP. No. 1441, *supra* note 43, *reprinted* at 4707. The 1972 amendments arose from two concepts. First, with respect to the landward expansion of coverage and the types of employment covered, *see supra* note 46, Congress disfavored disparities between benefits paid for the same type of injury because of the situs of the injury. In other words, a maritime worker who is injured in the course of his employment should receive the same compensation regardless of whether his injuries were sustained on a ship, at the pier, or on the pier itself. *Id.* Second, Congress, which continued to distinguish between seamen and longshoremen (including harbor workers), *see supra* text accompanying notes 24-25,

though Congress addressed one set of disparities, the 1972 amendments actually widened the compensation gap between LHWCA workers and Jones Act seamen.[48] Nevertheless, a maritime worker injured in the course of his employment may refuse LHWCA compensation and, if he can prove seaman status, seek remedies as a seaman.[49]

B. Jones Act

The Jones Act[50] provides an injured seaman or a deceased seaman's personal representative an action at law, including a trial by jury, for damages resulting from personal injuries sustained in the course of the seaman's employment.[51] The courts have given

---

viewed increased benefits to be a substitute for the LHWCA workers' reliance on the unseaworthiness doctrine for additional compensation. The unseaworthiness doctrine, *see infra* note 51, is a judicially created concept that is designed to protect seamen from the extreme hazards of their work. Similar hazards are not faced by longshoremen and other nonseamen who are working on board a vessel in port. H.R. REP. No. 1441, *supra* note 43, *reprinted* at 4703. This line of reasoning is consistent with the amendments' purpose of "plac[ing] an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore . . . and not endow[ing] him with any special maritime theory of liability . . . ." *Id.; see also* 118 CONG. REC. 36,376, 36,387 (1972) (statement of Congressman Quie) (The doctrine of unseaworthiness was retained as a source of remedy for seamen because seamen work under a "situation of obedience." Longshoremen, on the other hand, work on both docks and ships and, therefore, should have coverage different from that of seamen).

48. *See supra* note 47 and accompanying text.

49. 1A BENEDICT, *supra* note 21, § 23; *see infra* text accompanying notes 52-61; *see also* GILMORE & BLACK, *supra* note 21, at 427-28 (the abolition of the LHWCA worker's cause of action for unseaworthiness may cause an increased number of Jones Act claims by harbor workers).

50. 46 U.S.C. § 688 (1976). The Jones Act, enacted in 1920, GILMORE & BLACK, *supra* note 21, at 326-27, pursuant to Congress' authority to regulate commerce and its power to make laws enabling execution of those powers vested in the government by the Constitution, incorporated elements of the Federal Employers Liability Act, 45 U.S.C. §§ 51-60 (1976). *See* O'Donnell v. Great Lakes Co., 318 U.S. 36, 38-39 (1943); *see also* U.S. CONST. art. I, § 8, cl. 3; *id.* art. I, § 8, cl. 18; *id.* art. III, § 2, cl. 1.

51. 46 U.S.C. § 688. It is common practice to join a general maritime law warranty action for unseaworthiness with a Jones Act negligence action. GILMORE & BLACK, *supra* note 21, at 383. Described as the completely overlapping "Siamese twin" of the Jones Act, *id.*, an action for unseaworthiness, which is pleaded separately from the Jones Act, charges the shipowner with a violation of his absolute, nondelegable duty " 'to furnish the [seaman] with safe appliances and a safe place to work.' " *Id.* at 386 (quoting Mahnich v. Southern S.S. Co.,

the Jones Act broad application.[52] Although the Supreme Court has restricted the protection of the Jones Act to "members of a crew of a vessel,"[53] the meaning of the terms "seaman,"[54] "vessel," and "member of a crew"[55] are questions of fact to be determined by the jury or other trier of fact.[56]

According to the test articulated by Judge Wisdom in *Offshore Co. v. Robison*,[57] a Jones Act case may go to the jury:

> (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usu-

---

321 U.S. 96, 102 (1944)). Neither predicated on negligence nor fulfilled by the exercise of due diligence, GILMORE & BLACK, *supra* note 21, at 386, the shipowner's warranty of seaworthiness to the seaman arises because the seaman " 'is subject to the rigorous discipline of the sea, and all the conditions of his service constrain him to accept, without critical examination and without protest, working conditions and appliances as commanded by his superior officers.' " *Id.* at 386-87 (quoting *Mahnich*, 321 U.S. at 103).

Although a Jones Act plaintiff pleads both the Jones Act negligence count and the unseaworthiness count, the amount of recovery is the same under both actions and the plaintiff can recover for only one of the counts. GILMORE & BLACK, *supra* note 21, at 389. In addition, pursuant to the duty of maintenance and cure arising from the employment contract with a seaman, a ship owner is required to pay a seaman's living and out-of-pocket medical expenses if that seaman suffers from an illness or disability incurred during his service with the ship. *See* Mahramas v. American Export Isbrandtsen Lines, Inc., 475 F.2d 165, 172 (2d Cir. 1973) (citing The Osceola, 189 U.S. 158, 175 (1903)); *see also* Koslusky v. United States, 208 F.2d 957, 959 (2d Cir. 1953). The duty is not dependent upon the shipowner's culpability or a nexus between the employment and the illness. Calmar S.S. v. Taylor, 303 U.S. 525, 527 (1938). Maintenance and cure, therefore, is not an award of compensation and is limited to the seaman's need. *Id.* at 528, 531.

52. *See, e.g.*, Offshore Co. v. Robison, 266 F.2d 769, 773-74 (5th Cir. 1959).

53. Swanson v. Marra Bros., 328 U.S. 1, 5 (1946), *quoted in Robison*, 266 F.2d at 774. The LHWCA covers maritime workers except "masters and members of a crew of a vessel." 33 U.S.C. § 903(a); *see supra* notes 41, 46; *see also Robison*, 266 F.2d at 774.

54. "Seaman" is not defined in the Jones Act. *Robison*, 266 F.2d at 771 (construing 46 U.S.C. § 688 (1976)).

55. "The courts have held that the terms 'seaman' and 'member of the crew' are synonymous." 1B A. SANN, S. BELLMAN, N. GOLDEN & B. CHASE, BENEDICT ON ADMIRALTY § 11a, at 2-2 n.2 (7th ed. 1982) [hereinafter cited as 1B BENEDICT].

56. *Robison*, 266 F.2d at 779-80. Although permitting juries to determine questions of seaman status has resulted in a broad application of the Jones Act by the courts, Congress has not been provoked to restrict the Act's coverage. *Id.* at 774, 780.

57. 266 F.2d 769 (5th Cir. 1959) (2-1 decision).

> ally employed as a means of transport by water but designed to float on water) or *performed a substantial part of his work on the vessel;* and (2) if the *capacity* in which he was employed or the *duties* which he performed *contributed to the function of the vessel* or to the *accomplishment of its mission,* or to the *operation or welfare of the vessel* in terms of *its maintenance during its movement* or during anchorage for its future trips.[58]

Consequently, the *Robison* court determined that a reasonable jury could find that an oil field worker who had never carried seaman's papers as a condition of employment[59] and who had been injured on board a drilling barge "resting firmly on the bottom of the Gulf of Mexico, about three miles from the Texas coast,"[60]

---

58. *Id.* at 779 (emphasis added). The *Robison* test is a liberal restatement of those criteria followed by previous courts determining: "(1) that the vessel be in navigation; (2) that there be a more or less permanent connection with the vessel; and (3) that the worker be aboard primarily to aid in navigation." *Id.* at 775 (citing Wilkes v. Mississippi River Sand & Gravel Co., 202 F.2d 383, 387 (6th Cir. 1953)). For a discussion of the evolution of the *Robison* test, see 1B BENEDICT, *supra* note 55, § 11a.

The *Robison* test does not include explicitly the earlier expressed requirement that the vessel be in navigation. Whether a vessel is in navigation is a question of fact. M. NORRIS, THE LAW OF SEAMEN § 669 (3d ed. 1970). A vessel is in navigation "when it returns from a voyage and is taken to a drydock or shipyard to undergo repairs in preparation to making another trip . . . [or when it is] moored to a dock . . . in readiness for another voyage." *Id.* § 306. Alternatively, a vessel is in navigation if it is "engaged as an instrument of commerce and transportation on navigable waters." *Id.* § 664 (2d ed. 1962); *see* Williams v. Avondale Shipyards, Inc., 452 F.2d 955, 958 (5th Cir. 1971). "[A] ship is not in navigation if there is no present hope or intention of having her go to sea and if it would take a long time to put her in shape for an ocean voyage." M. NORRIS, *supra,* § 669 (3d ed. 1970).

59. Although seaman's papers were considered evidence of seaman status in Mahramas v. American Export Isbrandtsen Lines, Inc., 475 F.2d 165, 167 (2d Cir. 1973), the court in *Robison* did not consider possession of such papers controlling. 266 F.2d at 771, 781.

60. *Robison,* 266 F.2d at 772. According to Judge Wisdom:

> There is nothing in the act to indicate that Congress intended the law to apply only to conventional members of a ship's company. The absence of any legislative restriction has enabled the law to develop naturally along with the development of unconventional vessels, such as the strange-looking specialized watercraft designed for oil operations offshore and in the shallow coastal waters of the Gulf of Mexico. Many of the Jones Act seamen on these vessels share the same marine risks to which all aboard are subject.

Id. at 780.

Influenced by the decision in Wilkes v. Mississippi River Sand & Gravel Co.,

was a seaman and a member of a vessel's crew for purposes of the Jones Act.[61]

In most cases brought pursuant to the Jones Act, the employer and the ship's owner are the same entity.[62] The Act, however, is not limited on its face to claims against either a shipowner[63] or the employer of the injured seaman.[64] Moreover, in *Mahramas v.*

---

202 F.2d 383, 388 (6th Cir. 1953), the *Robison* majority held:

> [A]n employer who hires men to work on the water on vessels engaged in navigation and permits them to have *such a permanent connection* with the vessel as *to expose them to the same hazards of marine service* as those shared by all aboard should not be permitted, by merely restricting their duties or by adopting particular nomenclature as descriptive of their tasks, *to limit his liability to such employees,* in the event of disability or death alleged to have been caused by the negligence of the employer, *to the extent prescribed by the Longshoremen's Act.*

266 F.2d at 775 n.8 (emphasis added); *see also Mahramas,* 475 F.2d at 170 (although not performing any of the historic functions of a ship's crew, a hairdresser was considered a seaman because the Jones Act remedies "are designed to protect those who perform services upon ships and are exposed to the unique hazards of work upon the sea").

For further examples of the application of the *Robison* test, see Slatton v. Martin K. Eby Construction Co., 506 F.2d 505 (8th Cir. 1974) (a jury could reasonably find that a welder working on a work barge moored to a bank of the Arkansas River was a seaman for purposes of the Jones Act); Stafford v. Perini Corp., 475 F.2d 507 (1st Cir. 1973).

61. *Robison,* 266 F.2d at 781. Without citation to judicial authority, the editors of a leading treatise claimed that since the LHWCA's amendment in 1972 courts have no longer extended Jones Act coverage to workers performing functions and duties not ordinarily associated with those traditionally performed by seamen. 1B BENEDICT, *supra* note 55, § 11a. Those editors, however, did not indicate whether the courts in those uncited decisions considered the question of the LHWCA's applicability in cases involving injuries sustained on the high seas.

62. GILMORE & BLACK, *supra* note 21, at 335; *see* Mahramas v. American Export Isbrandtsen Lines, Inc., 475 F.2d 165, 170-71 (2d Cir. 1973).

63. *See infra* notes 65-66 and accompanying text.

64. Although incorporating elements of the Federal Employers Liability Act, *see supra* note 50, which clearly limits injured railroad workers to actions against the railroad employing them, GILMORE & BLACK, *supra* note 21, at 335, the Jones Act does not explicitly limit an injured seaman's right of remedy to actions against his employer. *Id.* The Jones Act only requires that the seaman's case be brought in "the court of the district in which the defendant employer resides or in which his principal office is located." 46 U.S.C. § 688; *see* GILMORE & BLACK, *supra* note 21, at 335 & n.121i; *see infra* notes 67-75 and accompanying text.

American Export Isbrandtsen Lines, Inc.,[65] the circuit court held that a negligent employer need not be the ship's owner to be held liable pursuant to the Jones Act.[66] Some commentators go even further and maintain that a ship's owner need not be an employer to be held liable. Judge Oakes, dissenting in *Mahramas,* asserted that the availability of a Jones Act claim should not rest upon the existence of an employer-employee relationship. He argued that, in light of the broad remedial purpose of the Jones Act, a seaman injured on board a ship in the course of his employment, but employed by someone other than the ship's owner, should nevertheless be allowed to bring a claim against the ship's owner.[67] His dissent discounted as dicta the Jones Act cases purporting to hold that "only one person, firm or corporation can be sued as employer,"[68] because those cases did not consider the claims of seamen against shipowners who were not their employers.[69] Judge Oakes ultimately feared that if Jones Act claims were limited to actions against an injured seaman's employer there would be "a gaping hole" in the Act's coverage.[70]

> [T]hose who are concededly seamen but hired by a concessionaire are not entitled to recovery under the Jones Act for the shipowner's negligence; they cannot recover in the usual case because, except in connection with the equipment or management of the concession, the concessionaire has nothing to be negligent about.

---

65. 475 F.2d 165 (2d Cir. 1973).

66. *Id.* at 171-72. In *Mahramas,* plaintiff hairdresser, a seaman for Jones Act purposes, *id.* at 170; *see also supra* note 60, was hired and paid by an independent contractor operating a beauty salon on board a cruise vessel. *Mahramas,* 475 F.2d at 171. Although the plaintiff signed the ship's articles, *id.* at 171 n.9, the circuit court held she was neither the employee of, nor responsible to, the shipowner for working orders or call to duty. *Id.* at 171-72. Thus, the court affirmed the dismissal of her Jones Act claim against the shipowner. *Id.* at 172. The court also held that even though an employer who is not a shipowner may be held liable under the Jones Act, the plaintiff had failed to assert, and the court could not perceive any facts supporting an allegation that her employer, the beauty shop operator, had negligently caused the plaintiff's injury. *Id.*

67. *Mahramas,* 475 F.2d at 174-75 (Oakes, J., dissenting). Judge Oakes advocated that the injured seaman be allowed to bring either a direct claim against the shipowner or an indirect claim against his employer, who then could seek indemnification from the shipowner.

68. *Id.* at 175 (quoting Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 791 (1949)).

69. *Id.*

70. *Id.*

> They are not wards of the admiralty, they are orphans at sea, with the crumb of concessionaire's liability for maintenance and cure, but without the bread-and-water sustenance of liability on the part of anyone for negligence under Jones Act principles.[71]

In their treatise, Gilmore and Black[72] agree with this reasoning and state that there are no good policy reasons for confining recovery pursuant to the Jones Act to actions against employers.[73] They add that a seaman's Jones Act recovery against a shipowner who is not his regular employer can be facilitated by findings that: (1) the seaman is employed by both the shipowner and his regular employer;[74] (2) Jones Act liability rests essentially on control of the ship's operation; and (3) the seaman's employer, who may later seek indemnification against the shipowner, is required to compensate the seaman for injuries sustained as a result of the shipowner's negligence.[75]

---

71. *Id.*

72. GILMORE & BLACK, *supra* note 21.

73. *Id.* at 338.

74. *Id.* at 339. Citing RESTATEMENT (SECOND) OF AGENCY § 226 (1957), Judge Oakes stated that at common law a servant could serve two masters at the same time "if the service to one does not involve abandonment of the service to the other." *Mahramas*, 475 F.2d at 175 (Oakes, J., dissenting).

Related to this concept of agency is the "borrowed servant" doctrine. 1B BENEDICT, *supra* note 55, § 12, establishes the following evidentiary guidelines to determine whether a person is a borrowed servant: (1) whether the borrowing employer has a right to control or exercises control over the employee; (2) whether the general employer has relinquished his right to control; (3) whether the borrowing employer pays the employee; (4) whether the employee is performing for the benefit of the borrowing employer; (5) whether the borrowing employer provides the tools and work space; (6) whether there is an agreement between the borrowing and general employer; and (7) whether the right to control is authoritative or merely advisory. None of these criteria is alone controlling. *Id.* For cases discussing the application of the above guidelines, see Guidry v. South Louisiana Contractors Inc., 614 F.2d 447, 452 (5th Cir. 1980) ("even if a seaman is deemed to be a borrowed servant of one employer, this does not automatically mean that he ceases to be his immediate employer's servant for Jones Act purposes"); Dugas v. Pelican Construction Co., 481 F.2d 773, 778 (5th Cir. 1973), *cert. denied*, 414 U.S. 1093 (1973).

Although the editors of one treatise assert that the ship's articles are an employment contract between the master and the servant, M. NORRIS, *supra* note 58, § 88 (3d ed. 1970), the majority in *Mahramas* stated that "[s]igning ship's articles makes a seaman subject to the rules and discipline of the ship, but . . . *does not make him the ship's employee.*" 475 F.2d at 171 n.9 (emphasis added).

75. GILMORE & BLACK, *supra* note 21, at 339.

C. Death on the High Seas Act

The personal representative of an individual killed on the high seas has a cause of action for wrongful death pursuant to the Death on the High Seas Act (DOHSA).[76] Although the DOHSA ambiguously refers to recovery for the death of a "person,"[77] the Act has long been interpreted to provide a remedy for beneficiaries of decedents who were not seamen.[78] The DOHSA, however, does not provide recovery for the pain and suffering of the decedent before death.[79] Nevertheless, in the event of the death of a nonseaman on the high seas, the courts have applied state survival statutes[80] in conjunction with the DOHSA to enable the

---

76. 46 U.S.C. §§ 761-768 (1976 & Supp. IV 1981). This provision was enacted by Congress "under its power to regulate commerce and in pursuance of the constitutional provision extending the judicial power of the government to all cases of admiralty and maritime jurisdiction." Echavarria v. Atlantic & Carribbean Steam Navigation Co., 10 F. Supp. 677, 678 (E.D.N.Y. 1935); *see* U.S. CONST. art. I, § 8, cl. 3; *id.* art. III, § 2, cl. 1. DOHSA created a wrongful death action for death outside the three-mile limit. Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 575-76 (1974). For a discussion of the legislative history of the DOHSA and the significance of the three-mile limit, see Wilson v. Transocean Airlines, 121 F. Supp. 85, 88-91 (N.D. Cal. 1954). For a discussion defining the scope of the DOHSA, see Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631 (8th Cir.), *on remand,* 352 F. Supp. 633 (E.D. Mo. 1972).

77. 46 U.S.C. § 761; *see* GILMORE & BLACK, *supra* note 21, at 364-65; 2 A. SANN, S. BELLMAN & B. CHASE, BENEDICT ON ADMIRALTY § 81 (7th ed. 1981) [hereinafter cited as 2 BENEDICT]; *see also* Doyle v. Albatross Tanker Corp., 260 F. Supp. 303, 305 (S.D.N.Y. 1965) (a seaman is a "person" under the DOHSA), *aff'd per curiam,* 367 F.2d 465 (2d Cir. 1966).

78. The Tungus v. Skovgaard, 358 U.S. 588 (1959); O'Brien v. Luckenbach S.S. Co., 293 F. 170 (2d Cir. 1923); Maines v. A/S Nye Kristianborg, 84 F. Supp. 775 (D. Md. 1949). Because the injuries involved in the instant case occurred on the high seas and not within the territorial waters of any state, this discussion of the DOHSA does not deal with Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970), or its progeny. Nevertheless, any discussion of wrongful death actions in admiralty would be incomplete without noting that in *Moragne* the Supreme Court held that an action for death lies under general maritime law in situations not covered by the DOHSA. In effect, a death occurring within a marine league of the United States shore may give rise to a cause of action under general maritime law, but not under the DOHSA. *Id.* at 402, 409; *see also* Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573 (1974) (suit pursuant to general maritime law for damages for wrongful death of decedent longshoreman injured in the territorial waters of Louisiana was not barred by prior receipt of judgment and damages for those injuries during decedent's lifetime).

79. GILMORE & BLACK, *supra* note 21, at 361.

80. Usually the courts apply the survival statute of the state where the tort-

decedent's personal representatives to recover for the decedent's pain and suffering.[81] Furthermore, the personal representative of a seaman killed on the high seas may bring a claim pursuant to the Jones Act, the DOHSA, or perhaps both.[82]

III. INSTANT OPINION

In the instant case, the Second Circuit Court of Appeals refused to affirm the district court's holding that the navigable waters of the United States include the high seas[83] and that the

---

feasor is domiciled or incorporated. 2 BENEDICT, *supra* note 77, § 81; GILMORE & BLACK, *supra* note 21, at 364-65.

81. 2 BENEDICT, *supra* note 77, § 81.

82. GILMORE & BLACK, *supra* note 21, at 363-64; 2 BENEDICT, *supra* note 77, § 81.

83. Cove Tankers Corp. v. United Ship Repair, Inc., 683 F.2d 38, 41 (2d Cir. 1982). Before admitting that it found congressional intent ambiguous on the issue of whether the LHWCA applies on the high seas, Cove Tankers Corp. v. United Ship Repair, Inc., 528 F. Supp. 101, 111 (S.D.N.Y. 1981), the district court cited Szumski v. Dale Boat Yards, Inc., 90 N.J. Super. 86, 216 A.2d 256, *rev'd on other grounds*, 48 N.J. 401, 226 A.2d 11 (1966), *cert. denied*, 387 U.S. 944 (1967), as purporting to hold that the LHWCA applied on the high seas. *Cove Tankers Corp.*, 528 F. Supp. at 104. Without deciding whether the LHWCA applies on the high seas, the New Jersey Supreme Court reversed, holding that the deceased land-based worker was covered by state worker's compensation. Szumski v. Dale Boat Yards, Inc., 48 N.J. 401, 407, 226 A.2d 11, 14 (1966), *cert. denied*, 387 U.S. 944 (1967). A noted treatise, however, states that:

> [A]lthough the constitutional maritime power of the United States includes not only the navigable waters of the United States but the high seas as well, it seems clear from the choice of statutory language that Congress intended to confine the Longshoremen's Act to the territorial navigable waters of the United States.

4 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 89.33 (1983); *see also supra* text accompanying notes 24-47.

The district court cited several cases to support the proposition that the high seas are included in the navigable waters of the United States. *See Cove Tankers Corp.*, 528 F. Supp. at 106. None of the cases cited, however, applied the LHWCA. Furthermore, only two of the cases were decided after the LHWCA was enacted, and only one case was decided after the enactment of the 1972 amendments. In United States v. Asbury Park, 340 F. Supp. 555 (D.N.J. 1972), the court held that the Atlantic Ocean is part of the navigable waters of the United States. *Id.* at 562 (construing the meaning of the Rivers and Harbors Appropriation Act of 1899). According to the court in United States v. Hilton, 619 F.2d 127 (1st Cir.), *cert. denied*, 449 U.S. 887 (1980), for purposes of determining the legality of the Coast Guard's boarding of vessels on the high seas, "[t]he high seas lie seaward of the territorial waters, which extend three miles from the coast, . . . [and] encompass the contiguous zone . . . extending three

LHWCA therefore provides the compensatory remedy when ship repairmen, who are protected by the LHWCA while working in port, incur injuries while working on the high seas during the course of their employment.[84] The Second Circuit, however, agreed with the district court that employee compensation was the ultimate issue of the case,[85] even though the suit was filed by a shipowner seeking indemnification and not by an injured employee demanding compensation.[86] The circuit court found that the LHWCA focuses not upon maritime workers injured on the high seas but upon workers who are employed at the water's edge and are not protected by state compensation laws.[87] The circuit court believed the 1972 amendments to the LHWCA reinforced this landward focus,[88] but shared the district court's concern that Congress had failed to contemplate the increasingly common practice of sending repairmen to sea when it enacted and amended the LHWCA.[89] The court feared that a reversal of the district court's holding, which allowed recovery pursuant to the LHWCA, would necessarily delay and might even jeopardize that

---

to twelve miles from the coast." *Id.* at 131 n.1. Finally, the Supreme Court has declared:

> Under generally accepted principles of international laws, the navigable sea is divided into three zones, distinguished by the nature of the control which the contiguous nation can exercise over them. Nearest to the nation's shores are its inland, or internal waters . . . . Beyond the inland waters, and measured from the seaward edge, is a belt known as the marginal, or territorial sea . . . . Outside the territorial waters are the high seas . . . .

United States v. Louisiana, 394 U.S. 11, 22-23 (1969).

84. *Cove Tankers Corp.*, 683 F.2d at 40. The district court invited alternative theories of compensation by stating: "There is no contention before us that the physical character of the high seas is such that a different rule of workmen's compensation should apply there than applies in coastal waters." 528 F. Supp. at 112.

85. 683 F.2d at 41. Summarizing the ultimate issue, the circuit court declared that "the question is not whether a federal, as opposed to a state, compensation scheme applies; rather the question is whether the federal, or no, scheme of compensation applies." *Id.*

Accepting LHWCA benefits, *see supra* note 8, bars pursuit of Jones Act claims. *See* Wilkes v. Mississippi River Sand & Gravel Co., 202 F.2d 383, 386 (6th Cir.), *cert. denied*, 346 U.S. 817 (1953).

86. *Cove Tankers Corp.*, 683 F.2d at 40.

87. *See id.*

88. *Id.* at 42.

89. *Id.* at 40-42.

recovery.[90] Thus, to ensure compensation pursuant to the LHWCA, even though the injuries were sustained on the high seas, the circuit court examined the policies underlying the 1972 amendments of the LHWCA[91] to justify affirmance of the district court's decision.

Noting first that the 1972 amendments effected a landward extension of the LHWCA's coverage,[92] the court, citing *P.C. Pfeiffer Co. v. Ford*,[93] recognized that Congress, even before it amended the LHWCA, had expressed some concern that particular workers might "walk in and walk out" of the LHWCA's coverage.[94] The court believed that judicial recognition of a three-mile United States coastal limit beyond which the LHWCA was inapplicable would result in the undesirable possibility that a worker could move in and out of the LHWCA's coverage at the whim of a shipowner.[95] Because of the perceived congressional intent to deemphasize the importance of where the injuries occurred,[96] and because the plaintiff's vessel ventured onto the high seas for only a fraction of its voyage,[97] the circuit court found that the injured ship repairmen were covered by the LHWCA despite the presence of the vessel on the high seas at the time of the accident.[98] Thus, the instant court, holding that application of the LHWCA defeats a shipowner's claim for indemnity, affirmed the district court's ruling which granted defendant's motion for judgment on the pleadings.[99]

IV. COMMENT

The circuit court's reluctance to determine whether the high seas are included in the navigable waters of the United States for

90. *Id.* at 41.

91. *Id.* at 41-42. By way of analogy, the circuit court stated that "[t]he case before us presents the reverse of the traditional situation that had troubled the courts and Congress for so many years, since the employees here were injured far seaward of any previously drawn *Jensen* line." *Id.* at 41.

92. *See id.*

93. 444 U.S. 69 (1979).

94. *Cove Tankers Corp.*, 683 F.2d at 42.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

LHWCA purposes,[100] coupled with the court's application of the LHWCA to the facts of the instant case, may foster disparities in compensation available to persons injured or killed on the high seas. For example, a Jones Act seaman and a LHWCA worker, both injured in the same accident aboard a vessel on the high seas, would receive different compensatory benefits even though they worked under the same conditions and confronted the same maritime hazards.

Ignoring the ramifications of its own conclusion that Congress did not contemplate application of the LHWCA to repairmen injured on the high seas[101] and disregarding the district court's invitation for arguments suggesting alternative theories of compensation,[102] the circuit court applied the LHWCA to the facts of the instant case for two reasons. First, the court felt it must ensure LHWCA relief because of the repairman status[103] of Roussos and Georgopoulos.[104] Second, the court believed that Congress intended to ensure compensation of LHWCA workers regardless of where the injuries occurred.[105]

In theory,[106] the instant court should not have felt constrained to permit compensation under the LHWCA; the injured worker, Roussos, and the beneficiaries of Georgopoulos could have received complete relief under the Jones Act. Considering the broad application of the Jones Act[107] in accordance with the *Robison* test,[108] sufficient evidence was presented to submit for jury determination the question of Roussos' and Georgopoulos' status as Jones Act seamen despite their failure to carry seaman's papers.[109] During the voyage, both workers performed substantial parts of their work on board the vessel[110] and, in their capacities

---

100. *See supra* notes 83-84 and accompanying text.

101. *See supra* text accompanying notes 83-89.

102. *See supra* note 84.

103. A repairman may be a LHWCA worker. *See supra* note 46.

104. *See supra* text accompanying note 91.

105. *See supra* note 46; *see supra* text accompanying notes 92-98.

106. Acceptance of LHWCA benefits by Roussos and the beneficiaries of Georgopoulos, *see supra* note 8, barred later consideration of Jones Act claims. *See supra* note 85; *see also supra* note 49 and accompanying text (worker's option to refuse LHWCA compensation and pursue a Jones Act claim).

107. *See supra* notes 52-56 and accompanying text.

108. *See supra* notes 57-61 and accompanying text.

109. *See supra* note 59 and accompanying text.

110. *See supra* text accompanying note 58.

as repairmen, they contributed to the welfare of the vessel. These workers, along with the members of the regular crew, risked the same unique hazards of the sea.[111] Furthermore, sound arguments supported Jones Act suits by both workers against their employer or the vessel owner. According to the *Mahramas* court, an employer of seamen, although not the shipowner, may be liable to his employees for negligence under the Jones Act.[112] Also, a seaman who is not a regular employee on the vessel may sue the vessel owner for negligence if he can prove either that he is an employee of both his regular employer and the vessel owner or that he is a borrowed servant of the vessel owner.[113] Whatever the approach taken, a party found liable pursuant to the Jones Act would be responsible for providing maintenance and cure,[114] and the vessel might be held liable for unseaworthiness.[115] Even if the court had denied Jones Act relief, the beneficiaries of Georgopoulos could have obtained relief under the DOHSA, regardless of the decedent's status as a Jones Act seaman.[116] Neither the case law nor the commentators suggest that a ship repairman covered by the LHWCA while in port cannot be a seaman covered by the Jones Act while performing duties on the high seas. In fact, the authorities suggest that this dual status is indeed possible,[117] although the same worker may not pursue claims under both the Jones Act and the LHWCA.[118]

The instant court expressed concern that if the court recognized a three-mile limit to LHWCA coverage, Roussos and Georgopoulos could have been "moved in and out" of that coverage at the whim of the shipowner.[119] The court rejected the three-

111. *See supra* notes 51, 60.

112. *See supra* notes 65-66 and accompanying text; *see supra* text accompanying note 75.

113. *See supra* notes 67-74 and accompanying text. Another theory supporting shipowner liability to a seaman who is not the shipowner's regular employee holds that liability rests on the party in operational control of the vessel and is not determined by the employment relationship. *See supra* text accompanying note 75.

114. *See supra* note 51.

115. *Id.*

116. *See supra* notes 76-82 and accompanying text.

117. *See supra* note 49 and accompanying text.

118. *See id.*

119. *See supra* text accompanying notes 94-95. A three-mile limit is not without precedent; the DOHSA does not apply unless the injury resulting in death occured at least three miles from shore. *See supra* text accompanying

mile limit for the LHWCA by analogizing this concern to the concerns that motivated Congress to amend the LHWCA in 1972.[120] In 1972 Congress had sought to eliminate disparities between the compensation received by a repairman injured on a pier, when a state compensation plan would apply, and the compensation received by a repairman injured on a ship moored at the same pier, when the LHWCA would apply. After passage of the 1972 amendments, repairmen were entitled to receive the same amount of compensation for injuries occuring at either location.[121] The court's analogy simply does not apply, however, when the injury occurs on the high seas. The 1972 amendments stand as evidence that Congress desired to place the LHWCA worker who is injured on the high seas in the same position as a similar worker who is injured on the shore.[122] Even so, Congress has continued to approve the separate compensation schemes for the LHWCA worker and the Jones Act seaman.[123] According to Congress, the seaman alone endures the unique hazards of the sea,[124] and thus the land-based LHWCA worker does not need the protection of an action for unseaworthiness.[125] Equal treatment of a worker on the pier and a worker on a ship moored at the same pier, therefore, required abolition of the LHWCA worker's unseaworthiness cause of action. Denying the worker on a ship on the high seas this right of action, however, creates inequality between the worker and a Jones Act seaman. Application of the LHWCA on the high seas clearly creates disparity.

By limiting its decision to the facts of the instant case, the circuit court has created a zone of uncertainty:[126] a worker, covered by the LHWCA while in port, but qualifying as a Jones Act seaman while working on the high seas, is given no judicial guidance

---

note 79.

120. *See supra* text accompanying note 95.

121. *See supra* note 21; *see also supra* notes 46-47 and accompanying text.

122. *See supra* note 47 and accompanying text.

123. *See id.*

124. *Id.*

125. *Id.*

126. *See supra* note 49 and accompanying text. The retention of the high seas within the compensation districts, *see supra* note 41, can be reconciled with the removal of the high seas from the coverage provisions of the LHWCA, *see supra* notes 36, 37, 41 and accompanying text, by reading the LHWCA as applying to injuries sustained on the high seas only if the injuries are not covered by the Jones Act.

concerning which act to invoke if he is injured on the high seas. To be consistent with congressional intent to endow seamen with special maritime protection, courts should limit application of the LHWCA to cases that arise within three miles of the United States shore or to instances when the injured worker cannot qualify as a Jones Act seaman.

Marc W. Joseph

ALIENS—IMMIGRATION AND NATURALIZATION SERVICE POLICY OF EXCLUDING HOMOSEXUAL ALIENS WITHOUT A MEDICAL CERTIFICATE IS INVALID, *Hill v. United States Immigration and Naturalization Service,* 714 F.2d 1470 (9th Cir. 1983).

I. FACTS AND HOLDING

In the first of two companion cases,[1] Hill, a homosexual alien, petitioned for writ of habeas corpus[2] seeking review of an Immigration and Naturalization Service (INS) decision to deny him entry into the United States. When Hill arrived in the United States,[3] he voluntarily stated to an INS official that he was a homosexual. The INS immediately notified Hill that he was probably subject to exclusion under section 1182(a)(4) of the Immigration and Nationality Act. That Act excludes aliens who have certain mental disorders.[4] At Hill's exclusionary hearing the immigration judge refused to exclude him from the United States because the INS had not provided the court with Public Health Service (PHS) certification confirming that Hill was afflicted with a medical defect.[5] The Board of Immigration Appeals (Board) reversed, holding that certification was irrelevant,[6] and Hill ap-

---

1. The first case was *In re* Hill. Lesbian/Gay Freedom Day Comm., Inc. v. INS, 541 F. Supp. 569 (N.D. Cal. 1982). The second case was Lesbian/Gay Freedom Day Comm., Inc. v. INS. *Id.* The court heard motions within a few weeks in both cases and because the factual and legal questions were so closely related decided to consolidate the actions.

2. Aliens have no constitutional right to enter the United States, *see infra* text accompanying note 68; therefore, Hill could not challenge the propriety of excluding homosexuals. Instead, he challenged the procedures for exclusion.

3. Hill was a citizen of Great Britain and sought entry into the United States as a "nonimmigrant visitor for pleasure." *Lesbian/Gay Freedom Day Comm., Inc.,* 541 F. Supp. at 573.

4. 8 U.S.C. § 1182(a)(4) (1976). The statute traditionally has been used to exclude homosexual aliens. *See infra* notes 18-33 and accompanying text. It provides that "[a]liens afflicted with psychopathic personality, sexual deviation, or a mental defect" are excluded from admission into the United States. 8 U.S.C. § 1182(a)(4) (1976).

5. The PHS had been told not to certify homosexuals as sexual deviates or mental defectives. *See infra* text accompanying notes 55-56. Thus, the INS could not obtain the requisite certification to exclude Hill. *Lesbian/Gay Freedom Day Comm., Inc.,* 541 F. Supp. at 573.

6. The Board said that when an alien makes an unsolicited statement that

pealed the decision to the United States District Court for the Northern District of California. He argued only that the INS could not exclude a homosexual alien without medical certification by the PHS.[7] That court granted Hill's writ of habeas corpus[8] and held that it is an abuse of discretion for the INS to exclude him on the grounds that he has a sexual deviation without first obtaining a medical certificate.[9]

In the second action, plaintiffs, Lesbian/Gay Freedom Day Committee, Inc. and its officers, alleged that the INS policy which excluded homosexuals because they voluntarily admitted their homosexuality was invalid and sought a permanent injunction[10] against the INS to prevent it from implementing that policy. The Lesbian/Gay Freedom Day Committee (Committee) sponsors a yearly celebration in San Francisco designed to promote the rights of gay citizens. The celebration includes speeches by and conversations with homosexuals from various countries.[11] Plaintiffs argued that Congress intended section 1182(a)(4) to be a medical exclusion and that because homosexuality was no longer considered a sexual deviation, the INS policy excluding homosexuals was contrary to congressional intent and therefore invalid.[12] Plaintiffs also contended that the policy was unconstitutional because it prevented homosexuals from entering the United States, and thereby infringed upon plaintiffs' first amendment right to

---

he is a homosexual he thereby fails to meet his burden of establishing that he is admissible to the United States. Thus, regardless of whether he was a certified sexual deviate, Hill was excludable. *Lesbian/Gay Freedom Day Comm., Inc.*, 541 F. Supp. at 574.

7. *Id.*

8. The court first determined that it had jurisdiction. The INS alleged that because Hill had left the United States he was no longer in custody and his petition was moot. The court found that Hill was still in custody because the Board's decision was binding and could be used to bar him from future entry. Furthermore, the repetition/evasion exception to the mootness doctrine prevented that doctrine from deflating Hill's petition. *Id.* at 575-77.

9. *Id.* at 580.

10. A preliminary injunction enjoining defendants from interfering with the entry of homosexual aliens had been granted earlier by the court because an injunction would prevent serious infringement of the plaintiffs' rights without harm to the government. *Id.* at 580-81.

11. The celebration includes a parade and speeches advocating gay rights. Homosexuals from several foreign countries are invited to attend and share their experiences and insights concerning the social and political status of homosexuals in their countries. *Id.* at 580.

12. *Id.* at 581, 583-84.

associate with homosexuals from foreign countries.[13] The INS responded that its policy could not be reviewed by the court because that policy was dictated by congressional statute.[14] The district court ruled in favor of the plaintiffs[15] and held that Congress had intended to exclude homosexuals only if homosexuality constituted a medical disorder. Because homosexuality is no longer considered such a disorder, the court found that the INS policy excluding homosexuals violated congressional intent.[16] The court also held that the policy infringed upon first amendment rights by limiting plaintiffs' ability to converse with homosexuals.[17] The INS appealed to the Ninth Circuit Court of Appeals. That court affirmed the *Hill* decision but vacated the judgment which granted the Committee injunctive relief. *Held:* The INS cannot exclude homosexual aliens without PHS medical certification of psychopathic personality, sexual deviation, or mental defect, but issuance of an injunction was no longer proper because the possibility that aliens might at some future time be excluded solely due to their professed homosexuality was too speculative to create a case or controversy.

II. Legal Background

A. Exclusion of Homosexual Aliens

Homosexuals were first excluded from entry into the United States by the Immigration and Nationality Act of 1917.[18] That

---

13. *Id.* at 585.

14. *Id.* The INS contended that only discretionary acts of the executive are subject to judicial review. *Id.* (construing Kleindienst v. Mandel, 408 U.S. 753 (1972)). Because INS policy excluding homosexuals was pursuant to an act of Congress, 8 U.S.C. § 1182(a)(4), it was not discretionary and not subject to review. *Lesbian/Gay Freedom Day Comm., Inc.*, 541 F. Supp. at 585 (construing 8 U.S.C. § 1182(a)(4) (1976)). The court rejected this argument, ruling that § 1182(a)(4) excludes aliens with mental disorders and homosexuality is not a mental disorder. Thus, the INS decision to adopt a policy excluding homosexuals was a discretionary act, rather than an act dictated by congressional statute. *Id.* at 585.

15. *Id.* at 588.

16. *Id.* at 585.

17. *Id.* at 587.

18. Immigration and Nationality Act of 1917, ch. 29, 39 Stat. 874 (1917) (repealed 1952). This Act was a codification of all earlier immigration policies. It was designed to keep out persons who were undesirable because of their poor health, their politics, their race, or simply because they glutted the labor market.

Act denied entry to persons who were certified by an examining physician as "mentally . . . defective" or afflicted with a "constitutional psychopathic inferiority."[19] The INS and PHS classified homosexuals as constitutional psychopathic inferiors or mental defectives and excluded them accordingly.[20]

In 1952 Congress passed the McCarren-Walter Act[21] which repealed the Immigration and Nationality Act of 1917 and revised immigration policies and procedures.[22] In an effort to use more modern medical terminology in the new immigration law, Congress asked the PHS to recommend which physical defects should be grounds for denying aliens entry.[23] In response, the PHS listed several classes of aliens who should be refused entry for medical reasons,[24] and Congress incorporated that list in the Act.[25] One of

---

Wasserman, *The Immigration and Nationality Act of 1952—Our New Alien and Sedition Law*, 27 TEMP. L.Q. 62, 66-67 (1953).

19. Immigration and Nationality Act of 1917 § 3.

20. *See, e.g., In re* La Rochelle, 11 I. & N. Dec. 436 (1965) (The Board reviewed a decision by the INS to deport a homosexual alien who had entered the United States in 1949. Applying the Immigration and Nationality Act of 1917, which was in effect at the time of the alien's entry, the Board concluded that the Act's exclusion of constitutional psychopathic inferiors included homosexuals.); *see also In re* Fleuti, 12 I. & N. Dec. 308, 309 (1965) ("Under the immigration laws, a person of constitutional psychopathic inferiority may be one whose history reveals a pattern of anti-social conduct or conflict with authority or it may be one who is a sex pervert such as a homosexual."); United States v. Flores-Rodriguez, 237 F.2d 405 (2d Cir. 1953) (homosexual could be excluded under the 1917 Act because he was constitutionally psychopathic, inferior, or mentally defective).

21. McCarren-Walter Act, ch. 477, 66 Stat. 163 (1952) (current version at 8 U.S.C. §§ 1101-1503 (1976 & Supp. II 1978)).

22. H.R. REP. No. 1365, 82d Cong., 2d Sess. 1 (1952), *reprinted in* 1952 U.S. CODE CONG. & AD. NEWS 1653 [hereinafter cited as H.R. REP. No. 1365]. The McCarren-Walter Act also codified the procedures to be followed in excluding aliens for medical reasons. Upon arrival at any port of entry into the United States, all aliens suspected of having a physical or mental defect must be examined by a PHS medical officer. 8 U.S.C. § 1224 (1976). If an alien suffers from an excludable medical defect, the examining physician certifies that fact to the INS. *Id.* The INS is then required to conduct a hearing to determine whether the alien should be excluded or allowed to enter. *Id.* That determination is based solely on the medical certificate from the PHS. 8 U.S.C. § 1226 (1976).

23. *See* H.R. REP. No. 1365, *supra* note 22, *reprinted* at 1698-99.

24. *Id., reprinted* at 1699-1702.

25. McCarren-Walter Act § 212(a)(1)-(7) (codified with amendments at 8 U.S.C. § 1182(a)(1)-(5) (1976)). There is one exception; although the PHS suggested that the term "feebleminded" be substituted for "idiots, imbeciles or mo-

the classifications was persons "afflicted with psychopathic personality,"[26] and Congress adopted that classification intending it to encompass homosexuals.[27] Significantly, the PHS appeared to have intended for homosexuality to be medically diagnosed.[28] It referred to "the diagnosis of homosexuality,"[29] and the "utility of psychological tests" in determining whether persons were homosexual.[30] Also, the House Report concerning adoption of the PHS's medical classifications refers to those classifications as "the *medical* grounds for exclusion."[31] Thus, after passage of the Act, the PHS certified homosexual aliens as having psychopathic personalities[32] and the INS used the PHS certification to bar those aliens from the United States.[33]

The McCarren-Walter Act codified the procedures which were to be followed by the INS in excluding aliens for medical reasons.

---

rons," H.R. REP. No. 1365, *supra* note 22, *reprinted* at 1700, it was not. *See* McCarren-Walter Act § 212(a)(1).

26. McCarren-Walter Act § 212(a)(4). In full, the statute excluded "[a]liens afflicted with psychopathic personality, epilepsy, or a mental defect." *Id.* The PHS defined psychopathic personality as "disorders of the personality . . . . Individuals with such a disorder may manifest a disturbance of intrinsic personality patterns, exaggerated personality trends . . . [and] frequently include those groups of individuals suffering from addiction or sexual deviation." H.R. REP. No. 1365, *supra* note 22, *reprinted* at 1700. Psychopathic personality was intended to replace "constitutional pyschopathic [sic] inferiority." S. REP. No. 1137, 82d Cong., 2d Sess. 9 (1952), *reprinted in* 3 O. TRELLES & J. BAILEY, IMMIGRATION AND NATIONALITY ACTS LEGISLATIVE HISTORIES AND RELATED DOCUMENTS (1979) [hereinafter cited as S. REP. No. 1137].

27. The original bill explicitly provided for exclusion of homosexuals. *See id., reprinted* at 1701. The final draft did not mention homosexuals, apparently because the PHS believed the exclusion of aliens with a psychopathic personality or mental defect would include homosexuals. *See id., reprinted* at 1700; S. REP. No. 1137, *supra* note 26, *reprinted* at 9. The Senate said the change in terminology was not to be construed "as modifying the intent to exclude all aliens who are sexual deviates." *Id.*

28. H.R. REP. No. 1365, *supra* note 22, *reprinted* at 1701.

29. *Id.*

30. *Id.*

31. *Id.* at 1698 (emphasis added).

32. *See In re* S, 8 I. & N. Dec. 409, 410-11 (1959) (PHS certified homosexual as a psychopathic personality); *In re* P, 7 I. & N. Dec. 258, 259 (1959) (PHS certified respondent had a psychopathic personality at the time of his entry because respondent admitted his homosexuality).

33. *See* Boutilier v. INS, 387 U.S. 118, 118-20 (1967); Quiroz v. Neelly, 291 F.2d 906 (5th Cir. 1961); *In re* S, 8 I. & N. Dec. 409 (1961); *In re* P, 7 I. & N. Dec. 258 (1959).

First, all aliens are detained for a sufficient time to allow immigration and medical officers to examine them and determine whether they are a member of an excluded class.[34] All aliens suspected of having a physical or mental defect must be examined by a PHS medical officer who decides whether the aliens suffer from an excludable medical defect.[35] If an alien does have an excludable medical defect, the examining physician certifies that fact to the INS.[36] Then, the INS is required to conduct a hearing to decide whether the alien should be excluded or allowed to enter.[37] That determination is dictated by the medical certificate from the PHS.[38] The legislative history of the McCarren-Walter Act emphasizes the importance of the certificate.[39] Both House and Senate reports state that once a PHS officer certifies an alien's mental or physical defect, the special inquiry officer at the exclusionary hearing must base his decision only on that certificate.[40]

The INS policy of excluding homosexuals was challenged successfully in *Fleuti v. Rosenberg*.[41] In that case the Ninth Circuit held that the term "psychopathic personality" was void for vagueness.[42] The court found that the term did not provide a "sufficiently definite warning" that "psychopathic personality" embraced homosexuality and sexual perversion.[43] Congress amended the statute[44] in response to the *Fleuti* decision by adding "sexual deviation" to the list of excludable medical afflic-

---

34. 8 U.S.C. § 1222 (1976).

35. *Id.* § 1224 (1976).

36. *Id.*

37. *Id.*

38. *Id.* § 1226 (1976).

39. *See* H.R. REP. No. 1365, *supra* note 19, *reprinted* at 1711, S. REP. No. 1137, 82d Cong., 2d Sess. 45 (1952).

40. *Id.*

41. 302 F.2d 652 (9th Cir. 1962), *vacated on other grounds*, 374 U.S. 449 (1963).

42. 302 F.2d at 658.

43. *Id.* The court recognized that Fleuti was deported because he was afflicted with a psychopathic personality at the time he entered the United States and that Congress had full power to deny entry to any class of aliens. Nevertheless, the government's use of post-entry conduct denied Fleuti the chance to abstain from homosexual conduct and avoid being deported because the statute was too vague to give Fleuti adequate notice that his subsequent conduct would lead to deportation. *Id.* at 655-56, 658.

44. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified at 8 U.S.C. § 1182(a)(4) (1976)).

tions.[45] Congress stated that it had intended for the original wording to encompass homosexuals, but because the Ninth Circuit had held the wording unconstitutionally vague, the sexual deviation category was added "to resolve all doubt."[46]

The Supreme Court upheld the INS policy of excluding homosexuals in *Boutilier v. Immigration and Naturalization Service.*[47] A PHS officer certified that the homosexual petitioner in *Boutilier* was afflicted with a psychopathic personality.[48] The Court denied petitioner's contention that although he was a homosexual, he was not therefore a psychopathic personality.[49] Instead, the Court found that Congress did not intend the term "psychopathic personality" to be used in its clinical sense but "to effectuate its purpose to exclude from entry all homosexuals and other sex perverts."[50] Furthermore, the Court found that the term was not unconstitutionally vague and thus overruled *Fleuti.*[51] After the 1965 amendment and *Boutilier,* the INS had full authority to continue its policy of excluding homosexuals from entry on the grounds they were sexual deviates and psychopathic personalities.[52]

During the 1960s, the medical and scientific communities began criticizing the classification of homosexuality as an illness.[53] Con-

---

45. S. REP. No. 748, 89th Cong., 1st Sess. 18-19 (1965), *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 3328, 3337 [hereinafter cited as S. REP. No. 748].

46. *Id.*

47. 387 U.S. 118 (1967).

48. *Id.* at 120.

49. *Id.* at 120-23.

50. *Id.* at 122.

51. *See id.* at 123-25. The Court found that petitioner was not being deported for his conduct after he entered the United States, but for characteristics he possessed at the time he entered. Furthermore, because Congress has plenary power to exclude aliens for any reason, the alleged vagueness of the statute was irrelevant. In any event, the notice requirement was inapplicable because petitioner was affected with homosexuality whether or not he had notice such a condition could lead to his deportation. *Id.*

52. *See* Lavoie v. INS, 418 F.2d 732 (9th Cir. 1969), *cert. denied,* 400 U.S. 854 (1970).

53. The biologist, Alfred Kinsey, published his famous work on sexuality in 1948. He found that an individual's sexual behavior cannot be represented as either normal or abnormal. A. KINSEY, W. POMEROY & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE, 638-59 (1948). Instead, he suggested viewing behavior as a point along a continuum of sexual activity which includes homosexuality and heterosexuality. *Id.* After the Kinsey report, attitudes in the psychiatric community towards homosexuals began to change. Homosexuality was no longer considered a mental illness, but merely one form of sexual behavior. *See* V. BUL-

sequently, the American Psychiatric Association voted in 1973 to remove homosexuality from its list of medical disorders.[54] In August 1979, the Surgeon General declared that homosexuality no longer was considered a mental defect[55] and that PHS officers should not certify homosexuals as sexual deviates or psychopathic personalities solely on the basis of their homosexuality.[56]

No longer able to obtain the certification necessary to exclude homosexuals, the INS allowed them to enter the United States conditionally while it sought the advice of the Department of Justice.[57] When the Department informed the INS that it was still required to exclude homosexuals,[58] the INS formed a new policy to implement this exclusionary rule. In essence, that policy required immigration officers to exclude from the United States anyone who offered an unsolicited admission of homosexuality.[59] Thus, although the grounds for their exclusion were medical, homosexuals could be excluded without medical certification.[60] This policy was successfully challenged in the lower court opinion of the instant case, *Lesbian/Gay Freedom Day Committee, Inc. v. INS*.[61] The district court found that Congress placed aliens afflicted with a psychopathic personality, sexual deviation, or mental defect among those classes of aliens excludable for medical reasons.[62] Additionally, the court found that Congress intended to exclude homosexuals on the premise that homosexual-

---

LOUGH, HOMOSEXUALITY: A HISTORY 154-62 (1979); *Epilogue*, HOMOSEXUALITY AND THE ISSUE OF MENTAL ILLNESS IN HOMOSEXUAL BEHAVIOR 391 (J. Marmor ed. 1980).

54. N.Y. Times, Apr. 9, 1974, at 12, col. 4.

55. Memorandum from Julius Richmond, Assistant Secretary for Health, United States Dep't of Health, Education, and Welfare, to William Foege and George Lythcott (Aug. 2, 1979), *cited in* Bogatin, *The Immigration and Nationality Act and the Exclusion of Homosexuals: Boutilier v. INS Revisited*, 2 CARDOZO L. REV. 359, 360 (1981).

56. *Id.*

57. N.Y. Times, Aug. 15, 1979, at A14, col. 1.

58. Memorandum from John Harmon, Assistant Attorney General, to David Crossland, Acting Commissioner, INS (Dec. 10, 1979), *cited in* Lesbian/Gay Freedom Day Comm., Inc. v. INS, 541 F. Supp. 569, 573 (N.D. Cal. 1982).

59. Department of Justice, Guidelines and Procedures for the Inspection of Aliens Who are Suspected of Being Homosexuals (Sept. 9, 1980) (press release), *cited in* Bogatin, *supra* note 55, at 369-72.

60. *Id.*

61. 541 F. Supp. 569 (N.D. Cal. 1982).

62. *Id.* at 577.

ity is a medical defect.[63] Because homosexuality is a medical exclusion, the court determined that a medical examination and certificate are required by statute before an alien can be excluded for homosexuality.[64] Congress could not intend to exclude homosexuals because homosexuality is no longer considered a medical disorder.[65] Thus, the court held that the INS policy which excludes homosexual aliens solely because they make an unsolicited admission of their homosexuality to an INS officer is contrary to congressional intent and therefore invalid.[66] On appeal the Ninth Circuit had the opportunity to review the district court's interpretation of the INS policy and Congress' intent concerning exclusion of homosexuals.

B. Judicial Review of Exclusion Policy and Procedure

The power of Congress to decide which aliens may cross United States borders has long been accepted by the courts as plenary and nearly unqualified.[67] Admittance into the United States is a privilege, not a right, and Congress may condition that privilege in any fashion or revoke it at any time.[68] The immigration power is peculiarly political, arising as it does from the absolute sovereignty of the United States as a nation and from the executive and legislative authority over national security and foreign affairs.[69] Because immigration matters are political, the judiciary consistently has refused to scrutinize congressional decisions concerning immigration.[70] The courts, therefore, will not review an

---

63. *Id.* at 578-79.

64. *Id.* at 579-80.

65. *Id.* at 585.

66. *Id.*

67. Kleindienst v. Mandel, 408 U.S. 753 (1972); Galvan v. Press, 347 U.S. 522 (1954); Fong Yue Ting v. United States, 149 U.S. 698 (1893); The Chinese Exclusion Case, 130 U.S. 581 (1889).

68. Aliens have been excluded solely because of their nationality, *see* The Chinese Exclusion Case, 130 U.S. 581, 606 (1889), and for membership in the Communist Party even though membership was terminated before the statute prohibiting it was enacted. *Galvan,* 347 U.S. 523-29; *see also* Fiallo v. Bell, 430 U.S. 787 (1977) (sustaining a statute allowing preferential immigration status to natural mothers of illegitimate children but not to natural fathers).

69. *See* Mathews v. Diaz, 426 U.S. 65, 81 (1976); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952); The Chinese Exclusion Case, 130 U.S. at 603-06.

70. *Harisiades,* 342 U.S. at 589. *See generally* 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 8 (1982).

exclusion order on substantive grounds.[71]

The courts, however, are willing to review exclusionary procedures to decide whether certain procedural requirements have been followed.[72] Congress created certain minimal procedural requirements for exclusions, and the courts have been granted the authority to determine whether the INS and PHS adhere strictly to those procedures.[73] In this manner aliens are guaranteed certain procedural due process rights, including the right to notice of charges and an administrative hearing.[74] Procedural challenges often involve the propriety of medical exclusions. Consistently, the Board of Immigration Appeals has required a medical certificate to exclude aliens on medical grounds.[75] The courts have enforced that requirement. In *Johnson v. Shaughnessy*,[76] for example, the Supreme Court reversed a deportation order that was based upon an improperly obtained medical certificate.[77] The Court pointed out that medical certification by the PHS is final evidence of a physical defect, and held that exclusion for medical reasons must be grounded upon a proper examination and certificate. The district court's opinion in *Lesbian/Gay Freedom Day Committee, Inc.* was consistent with that holding.[78]The district court recognized the requirement that the INS follow medical procedures[79] and held that petitioner Hill could not be excluded as a person afflicted with a sexual deviation without a medical certificate from the PHS.[80] Although the courts will not substantively review exclusionary policies on behalf of aliens seeking admission into the United States,[81] in recent years the judiciary has substantively reviewed exclusion policies in challenges brought by United States citizens. These citizens claim that the exclusion of a particular class of aliens infringes upon certain constitutional rights guaranteed to United States citizens. In *Kleindienst v.*

---

71. *See Fiallo*, 430 U.S. 787, 792; *Mandel*, 408 U.S. at 762; Knauff v. Shaughnessy, 388 U.S. 537, 543 (1950).
72. *See* Johnson v. Shaughnessy, 336 U.S. 806 (1949).
73. *See id.* at 809-10.
74. *See* 8 U.S.C. § 1252(b)(1)-(4) (1976) (extending these rights to aliens).
75. *See, e.g., In re* Caydem, 12 I. & N. Dec. 528 (1967).
76. 336 U.S. 806 (1949).
77. *Id.* at 815.
78. 541 F. Supp. 569 (N.D. Cal. 1982).
79. *Id.* at 579-80.
80. *Id.* at 580.
81. *See supra* text accompanying note 70.

Mandel,[82] for example, the Supreme Court reviewed an exclusion policy that allegedly violated plaintiffs' first amendment right to hear from and speak with an alien.[83] In that case, a Belgian Marxist lecturer was denied entry into the United States because the Immigration Act excludes from the United States aliens who advocate world communism.[84] According to the statute, however, the Attorney General has discretion to waive the exclusion upon the Secretary of State's recommendation.[85] The Secretary of State in this case had recommended that Mandel be allowed to enter the United States,[86] but despite the recommendation, the INS refused to grant Mandel a temporary visa.[87] Plaintiffs, university professors who had invited Mandel to speak at their universities, alleged that the refusal of the INS to grant Mandel a waiver deprived them of their first amendment right to hear from and speak with him.[88] Although the Court recognized the plaintiffs' rights,[89] it emphasized the broad congressional power to exclude aliens, and held that because the action of the INS was based on a facially legitimate and bona fide reason,[90] the Court would not scrutinize the action further by balancing the competing interests.[91] According to the Court, if the exercise of power is based on a "facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against a First Amendment interest . . . ."[92] That standard of review was extended to challenges of congressional immigration policies in *Fiallo v. Bell*,[93] when citizens of the United States claimed that certain exclusionary poli-

82. 408 U.S. 753 (1972).
83. *See id.* at 754.
84. 8 U.S.C. § 1182(a)(28)(D) (1976).
85. *Id.* § 1182(d)(3).
86. *Mandel*, 408 U.S. at 759.
87. *Id.*
88. *Id.* at 760.
89. *Id.* at 762-63.
90. Mandel had twice applied for temporary visas, both of which were granted upon recommendations from the Attorney General. *Id.* at 756. On his second trip, Mandel allegedly did not follow his stated itinerary and engaged in activities that went beyond the stated purpose of his trip. For this reason, the State Department refused Mandel a third visa. *Id.* at 757-59.
91. *Id.* at 770.
92. *Id.*
93. 430 U.S. 787.

cies violated their fundamental right to a family relationship.[94]

The Court in *Fiallo* addressed the section of the Immigration and Nationality Act that extends preferential immigration status to children and parents of United States citizens.[95] The definition of "child" and "parent" in the Immigration and Nationality Act encompasses relationships between natural mothers and their illegitimate children, but not relationships between natural fathers and their illegitimate children.[96] Plaintiffs, unwed natural fathers and their illegitimate children who had been denied preferential status, claimed that the Immigration and Nationality Act violated their fundamental interest in a family relationship.[97] Again pointing out Congress' plenary power to create immigration classifications,[98] the Court applied the *Mandel* standard of review to the statute.[99] Finding that the statute was based on a facially legitimate and bona fide reason, the Court ended its review and sustained the Act.[100] Significantly, the Court rejected an argument alleging that the decision to exclude or admit an alien rests solely within the realm of the political branches, and instead took the position that even immigration policies are subject to a limited standard of review.[101] Neither the decision in *Mandel* nor that in *Fiallo* expressly indicates what test should be used to determine the question of admittance if the executive decision or congressional policy results from an improper motive.

The court in *Lesbian/Gay Freedom Day Committee, Inc.*[102] extended the test initiated in *Fiallo* and *Mandel* when it said, "if the court finds that there is no facially legitimate and bona fide reason behind Congress' enactment or the executive action, it then balances the interests of Congress in enacting the legislation or the executive in taking the action against the First Amendment interests being infringed by the legislation or executive ac-

94. *Id.* at 791.

95. *Id.* at 788. *See* 8 U.S.C. § 1101(b)(1)(D), (b)(2) (1976).

96. 8 U.S.C. § 1101(b)(1)(D) defines an illegitimate child as a child "by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother . . . ." Section 1101(b)(2) defines the parent in relation to his "child."

97. *Fiallo*, 430 U.S. at 790-91.

98. *Id.* at 792-94.

99. *Id.* at 794-95.

100. *Id.* at 799.

101. *Id.* at 793 n.5.

102. 541 F. Supp. 569 (N.D. Cal. 1982).

tion to determine whether the legislation or action is constitutional."[103] The court then applied the test in its entirety to the facts of the case. It found that the INS policy was not based upon a legitimate and bona fide reason because medical authorities no longer recognize homosexuality as a per se mental disorder or sexual deviation.[104] Section 1182(a)(4) is a medical ground for exclusion of aliens, so in the court's view Congress could not have intended to exclude homosexuals pursuant to that section if the medical grounds for excluding them no longer exist.[105] Thus, the INS had no legitimate reason for the exclusion. Furthermore, the court stated that, according to *Fiallo v. Bell,* even if Congress did intend to exclude homosexuals, that decision would be subject to the same challenge and standard of review as an INS policy decision.[106] Thus, this decision would be invalid because it would not be based on a legitimate and bona fide reason.[107] The medical reasons on which Congress originally based its decision to exclude homosexuals are no longer recognized. "It is neither legitimate nor bona fide to continue such an exclusion when the reason for it is gone."[108] After finding that the INS policy was not based on a legitimate and bona fide interest, the court proceeded to balance the interest of the INS in the exclusion against the plaintiffs' first amendment interests.[109] Because the INS could show no medical reason to exclude homosexuals, the court found that the plaintiffs' strong interests in conversing with homosexual aliens clearly outweighed the government's interest in the policy.[110]

C. The Right to Receive Information and Ideas

The courts now recognize that the first amendment protects the freedom to receive information and ideas along with the freedom to speak.[111] That protection is grounded in the belief that the

103. *Id.* at 583.
104. *Id.* at 586.
105. *Id.* at 583, 586.
106. *Id.* at 585-86 nn.8-9.
107. *Id.*
108. *Id.* at 586 n.9.
109. *Id.* at 586-87.
110. *Id.* at 587. The court did not accept as a sufficient government interest evidence that some citizens may find homosexuality morally repugnant or that homosexuality is criminal in some states. *Id.*
111. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976); Kleindienst v. Mandel, 408 U.S. 753, 762-63

freedoms of speech and press were designed to promote the free flow of communication and the interchange of ideas.[112] Thus, the right to speak necessarily encompasses a right to hear what is spoken.[113] In 1943 the Supreme Court first acknowledged the right to receive information in *Martin v. City of Struthers.*[114] The Court in *Martin* held unconstitutional an ordinance that forbade the distribution of leaflets and found that there was a freedom to receive the information in the leaflets, as well as a freedom to distribute them.[115] Later, the Court affirmed the right to receive information in a 1965 case, *Lamont v. Postmaster General.*[116] In *Lamont* the Court ruled that a federal statute which required persons to request in writing that their postmaster deliver mail from abroad that contained Communist political propaganda was unconstitutional.[117] Because the statute deterred the receipt of this propaganda, the Court found that the statute abridged the recipients' first amendment rights.[118]

Four years later, the Court again recognized the freedom to re-

---

(1972); Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Lamont v. Postmaster Gen., 381 U.S. 301, 305-07 (1965).

112. New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964). The first amendment protects the freedom of expression. "[D]ebate on public issues should be uninhibited, robust, and wide-open . . . ." *Id.* at 270. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 (1957). The free exchange of ideas has been viewed as the most effective means of ascertaining the truth. "[T]he best test of trust is the power of the thought to get itself accepted in the competition of the market . . . ." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). "It is the purpose of the first amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . ." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). A free flow of information is necessary for self-government because reasonable decisions depend upon it. *See* Ivester, *The Constitutional Right to Know,* 4 HASTINGS CONST. L.Q. 109, 109 (1977).

113. *Virginia State Bd. of Pharmacy,* 425 U.S. at 756; *Lamont,* 381 U.S. at 308 ("It would be a barren marketplace of ideas that had only sellers and no buyers") (Brennan, J., concurring); Martin v. City of Struthers, 319 U.S. 141, 143 (1943). *See generally* Emerson, *Legal Foundations of the Right to Know,* 1976 WASH. U.L.Q. 1 (explores the possible constitutional theories and rules).

114. 319 U.S. 141 (1943); *see also* Thomas v. Collins, 323 U.S. 516, 533-34 (1945) (labor organizer asked an audience to join a union).

115. *Martin,* 319 U.S. at 141-43, 149.

116. 381 U.S. 301 (1965).

117. *Id.* at 302-04, 307.

118. *Id.* at 305, 307.

ceive information in *Red Lion Broadcasting Co. v. FCC*[119] and in *Stanley v. Georgia.*[120] The Court in *Red Lion Broadcasting* addressed the constitutionality of the fairness doctrine. That doctrine requires broadcasters to give coverage of public issues "that accurately reflects opposing views."[121] The Court found that the doctrine actually enhanced the freedom of speech, stating that the rights of the viewers, not those of the broadcasters, were at issue[122] because every person has the right to receive "suitable access to social, political, aesthetic, moral and other ideas and experiences."[123] In *Stanley v. Georgia* the Court held that a statute which punished the private possession of obscene material violated the first amendment.[124] To control the content of one's thoughts is inconsistent with the first amendment. The first amendment protects the right to receive information and ideas "regardless of their social worth."[125]

During the 1970s, the Supreme Court upheld the freedom to receive information in three major decisions. The first was *Kleindienst v. Mandel,*[126] in which the Court readily determined that United States citizens have a right to receive information and ideas from aliens.[127] The second was *Procunier v. Martinez,*[128] in which the Court held that censorship of prisoners' mail violated the rights of those free persons to whom the mail was addressed.[129] Finally, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,*[130] the Court ruled unconstitutional a Virginia statute that prohibited pharmacists from

---

119. 395 U.S. 367 (1969).

120. 394 U.S. 557 (1969).

121. *Red Lion Broadcasting Co.*, 395 U.S. at 369. Broadcasters claimed that they had a first amendment right to broadcast whatever they wished. *Id.* at 386.

122. *Id.* at 390.

123. *Id.*

124. *Stanley*, 394 U.S. at 568.

125. *Id.* at 564.

126. 408 U.S. 753 (1972).

127. *Id.* at 762-63. The Court, however, held that when Congress delegates to the executive branch the power to exclude aliens and the Attorney General precludes entry of an alien for a legitimate reason, the Court will neither examine that decision nor test it against the first amendment interests of those who desire personal communication with the alien. *Id.* at 769-70.

128. 416 U.S. 396 (1974).

129. *Id.* at 408-09.

130. 425 U.S. 748 (1976).

advertising prescription drug price information.[131] Citing *Lamont* and *Mandel,* the Court acknowledged that consumers had a first amendment right to receive information and ideas[132] and found that the statute abridged consumers' right to "receive information pharmacists wished to communicate to them through advertising."[133]

Generally, once the Court finds that a first amendment right to receive information exists and determines that the right has been restricted, it applies a strict standard of review.[134] The government must demonstrate a compelling interest for abridging a first amendment freedom if the restriction is to withstand the Court's scrutiny.[135] Thus, in *Virginia State Board of Pharmacy,* the Court decided that the state's interest in maintaining a high degree of professionalism among its pharmacists was not a sufficiently compelling reason to ban the advertisement of drug prices and thereby transgress first amendment rights.[136] The Court deviated from its usual strict standard of review, however, in *Kleindienst v. Mandel.*[137] In that case the Court upheld the first amendment restriction on the showing of only a legitimate and bona fide governmental interest.[138] By expanding the test in *Mandel* to include a balancing of competing interests,[139] the court in *Lesbian/Gay Freedom Day Committee, Inc.* brought the *Mandel* test closer to the usual strict standard of review used in first amendment cases. On appeal, the Ninth Circuit had the opportunity to join the district court in recognizing and protecting the first amendment rights that are threatened by certain immigration policies.

---

131. *Id.* at 770.

132. *Id.* at 756-57.

133. *Id.* at 754.

134. *See id.* at 766-70; *Stanley,* 394 U.S. at 565-68; *Lamont,* 381 U.S. at 306-07; *Martin,* 319 U.S. at 143-49.

135. NAACP v. Button, 371 U.S. 415, 438-39 (1963). An analysis of the subtleties of first amendment review are beyond the scope of this comment. For an overview of the several levels and approaches, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 576-736 (1978).

136. *See Virginia State Bd. of Pharmacy,* 425 U.S. at 766-70.

137. 408 U.S. 753 (1972).

138. *See supra* notes 90-91 and accompanying text.

139. *See supra* note 103 and accompanying text.

III. INSTANT DECISION

In the instant opinion the Ninth Circuit affirmed the district court's decision in *Hill v. INS*, but vacated the lower court's decision in *Lesbian/Gay Freedom Day Committee, Inc. v. INS*. In the first case the court began its analysis by recognizing Congress' plenary power over immigration and the judiciary's limited ability to question immigration policies.[140] Rather than concentrating on the validity of the challenged policy, the court focused on congressional intent and asked whether Congress had intended to exclude homosexuals without medical certification of psychopathic personality, sexual deviation, or mental defect.[141] The Ninth Circuit concluded that the language of the Act, its legislative history, and its administrative and judicial interpretation dictated a finding that Congress did not intend to exclude anyone for medical reasons without a medical certification.[142]

The court noted that no section of the Act expressly requires a medical certificate to exclude an alien for medical reasons[143] but the court determined that the requirement emerges from several sections of the Act read as a whole.[144] First, 8 U.S.C. section 1222 provides that aliens shall be detained for a medical examination to determine whether they should be excluded for medical reasons.[145] Second, 8 U.S.C. section 1224 states that such examinations shall be performed by medical officers[146] who certify any medical defect observed.[147] Finally, the court discussed section 1226(d), which mandates that a decision to exclude for medical reasons be based solely upon medical certification. Then, the court reasoned that if the medical certification is determinative of exclusion and an examination by PHS officers is required, a strong implication arises that the certificate is a prerequisite to exclusion.[148] Thus, Congress has dictated a procedure for medical examinations and medical certificates which must be followed

---

140. Hill v. INS, 714 F.2d 1470, 1472 (1983).
141. *Id.* at 1474.
142. *Id.* at 1480.
143. *Id.* at 1474.
144. *Id.* at 1475.
145. *Id.* at 1474. *See supra* note 34 and accompanying text.
146. *Hill*, 714 F.2d at 1474. *See supra* note 35.
147. *Hill*, 714 F.2d at 1474.
148. *Id.* at 1475.

before an alien can be excluded on medical grounds.[149]

The court then turned to the Act's legislative history and found that it reinforced the court's interpretation of the statutory language. The court noted that the medical recommendations of the PHS, which were specifically adopted by Congress,[150] referred to the suggested classifications as those "subject to *determination* on medical grounds,"[151] and the report "elaborated on the point that homosexuality was to be medically determined."[152] Also, the court noted that congressional reports discussed the procedures for medical exclusions and emphasized that such an exclusion must be based solely on a medical certificate.[153] Thus, the court found that the legislative history supports the requirement of a medical examination and certification. The court was forced to distinguish *Boutilier*. It did so simply by saying: "That Congress referred to the exclusion for psychopathic personality as one on medical grounds does not conflict with *Boutilier's* finding that Congress did not intend to use the term in its clinical sense."[154]

Next, the court turned to the administrative and judicial interpretations of the Act. It noted that prior to its new policy, the INS had consistently required a medical examination and certificate for exclusion on medical grounds.[155] Furthermore, the courts have repeatedly recognized the need for a medical certificate to exclude aliens on medical grounds.[156] The court relied most heavily on *Johnson v. Shaughnessy*;[157] however, it also found some support for its decision in *Boutilier* saying that the Court in that case indicated that an actual medical examination, rather than reliance on the alien's admissions, would be needed for exclusion.[158] Thus, the court held that Congress intended to require a medical examination and certification of all aliens excluded on medical grounds.[159]

Next the court turned to *Lesbian/Gay Freedom Day Commit-*

149. *Id.*
150. *See supra* notes 23-24 and accompanying text.
151. *Hill*, 714 F.2d at 1476 (emphasis added). *See supra* notes 28-29.
152. *Hill*, 714 F.2d at 1476.
153. *Id.* at 1477. *See supra* note 30.
154. *Hill*, 714 F.2d at 1476 n.6.
155. *Id.* at 1477. *See supra* note 75.
156. *See supra* notes 76-78.
157. *See supra* notes 76-77 and accompanying text.
158. *Hill*, 714 F.2d at 1479.
159. *Id.* at 1480.

tee, Inc. v. INS and the plaintiffs' allegation that the INS policy infringed upon their first amendment rights. Rather than rule on this case, the court held that because the INS could no longer exclude homosexuals without medical certificates, which could not be obtained from the PHS, exclusion of homosexuals in the future was completely speculative.[160] Thus, no case or controversy was presented, and the district court's issuance of the injunction was improper. Therefore, the judgment was vacated.[161]

IV. COMMENT

The district court opinion in the instant case was exceedingly far-reaching. It invalidated the INS policy that excluded homosexuals without a medical certificate and, more significantly, it broadened judicial review of exclusion policies. The Ninth Circuit, however, narrowed the district court's holding to the point that congressional power over exclusion will remain undaunted.

The instant opinion does affirm the district court's holding that homosexuals cannot be excluded without a medical certificate. In so doing it had to erode the Supreme Court's decision in *Boutilier*, which appears to dictate a contrary result. This is an appropriate result. The statutory language and legislative history of the McCarren-Walter Act clearly indicate that Congress intended homosexuality to be a medical exclusion. As such, the exclusion of a homosexual without the requisite medical examination and medical certificate would violate procedural due process requirements. Also, marked advances in medical thinking have taken place since 1967. In light of these advances, Justice Douglas' dissent in *Boutilier* is especially compelling. "To label a group so large 'excludable aliens' would be tantamount to saying that Sappho, Leonardo da Vinci, Michelangelo, Andre Gide, and perhaps even Shakespeare . . . would be unfit to visit our shores."[162] Because the implications of the INS exclusion policy would be so great, and because Congress originally excluded homosexuals for medical reasons that no longer exist,[163] the court was correct in finding the policy invalid. If Congress wishes to continue to exclude homosexual aliens, it should make its intent to do so statutorily explicit.

---

160. *Id.* at 1481.

161. *Id.*

162. *Boutilier*, 387 U.S. at 130 (Douglas, J., dissenting) (quoting *id.*, 363 F.2d 488, 497-98 (1966) (Moore, J., dissenting)).

163. *See supra* notes 53-56 and accompanying text.

Without such a mandate, the INS policy is contrary to evidence of both congressional intent and present medical thinking.[164]

The Ninth Circuit ceased its examination of the district court decisions after affirming *In re Carl Hill.* The case thereby became one that concerned only a procedural question—whether homosexuals could be excluded without a medical certificate—and failed to address the first amendment issue presented in *Lesbian/Gay Freedom Day Committee, Inc. v. INS.* Consequently, the circuit court lost the opportunity to expand judicial review of exclusion policies. The district court decision was truly a landmark case in immigration and first amendment law. When the district court reviewed the INS policy as it affected plaintiffs' first amendment rights, it initially applied the standard of review set forth in *Mandel* and *Fiallo.* However, it went beyond the "legitimate and bona fide interest" query and balanced the interests of the opposing parties. The *Mandel* Court focused on the traditional plenary power of Congress to develop immigration policies.[165] The plaintiff's right to receive information and ideas from *Mandel* was lost in the Court's zeal to give Congress broad latitude in excluding aliens.[166] Thus, the Court applied an unusually deferential standard of review in a first amendment analysis, an area traditionally warranting strict scrutiny. Significantly, the district court in the instant case emphasized plaintiffs' right to hear from and speak with homosexual aliens, rather than the power of Congress to exclude aliens.[167] The judiciary has traditionally given Congress and the INS free rein to exclude any class of aliens for any reason.[168] *Mandel* and *Fiallo* limited that power somewhat but neither actually invalidated an INS or congressional immigration policy. In the instant case the district court invalidated an INS policy and stated that it would have been invalid even if it had been created by Congress because it was based on no legitimate reason.[169] Thus, that opinion checked the historically unqualified power of Congress to dictate which aliens may enter the United States.

Aliens would have benefited vicariously from the decision be-

164. *See id.*
165. *Mandel,* 408 U.S. at 765-67.
166. *Id. See supra* text accompanying note 92.
167. *Lesbian/Gay Freedom Day Comm., Inc.,* 541 F. Supp. at 582-87.
168. *See supra* notes 67-71 and accompanying text.
169. *See supra* note 103.

cause their exclusion would form the basis for possible constitutional violations. Certainly one might argue that such a limitation would have "open[ed] the floodgates" and allowed numerous aliens into the United States and that the exclusion of virtually any class of aliens would have affected some citizens' rights of association. This argument, however, overstates the case. The district court decision required only that Congress present a legitimate and bona fide interest for its exclusionary policies and required that these policies be subject to scrutiny and balanced against the constitutional rights infringed.[170] Only those cases in which first amendment concerns outweigh the demonstrated governmental interest would aliens who were otherwise excludable be permitted to enter. In light of the values protected by the first amendment,[171] it seems only appropriate that Congress should demonstrate in every circumstance some legitimate interest before abridging those values.

Nevertheless, the circuit court convincingly claimed that the first amendment question had been rendered entirely speculative. In an area that affects numerous aliens and citizens, however, it is unfortunate that the circuit court declined to address the issues presented by the district court. A discussion of the constitutional issues could have strengthened the lower court's attempt to prevent Congress from exercising a virtually unlimited power to infringe on the rights of citizens in exclusionary decisions.

Melissa Quinn Windham

170. *See supra* notes 120-21.
171. *See supra* note 112 and accompanying text.