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Recent Decisions

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RECENT DECISIONS

ALIENS—AN IMMIGRATION REGULATION THAT DISTINGUISHES AMONG ALIENS BY NATIONAL ORIGIN MUST HAVE A RATIONAL BASIS TO SATISFY THE EQUAL PROTECTION GUARANTEE OF THE FIFTH AMENDMENT

I. FACTS AND HOLDING

Plaintiffs,[1] citizens of the Islamic Republic of Iran, brought suit in the United States District Court for the District of Columbia asking for declaratory and injunctive relief against a regulation[2] promulgated by the defendants[3] at the direction of the President

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1. Plaintiffs included Gholamreza Narenji, Behzad Vahedi, Cyrus Vahidnia, and the Confederation of Iranian Students. The cases of Narenji v. Civiletti, No. 79-3189 (D.D.C. Dec. 11, 1979) and Confederation of Iranian Students v. Civiletti, No. 79-3210 (D.D.C. Dec. 11, 1979), were consolidated on November 27, 1979, pursuant to FED. R. CIV. P. 42 (a), with a full hearing on the merits held December 4, 1979. Narenji v. Civiletti, 481 F. Supp. 1132, 1134 (1979). Narenji, Vahedi, and Vahidnia are nonimmigrant alien post-secondary students who have been admitted to the United States pursuant to an F-1 or J-1 visa. They filed a class action suit on behalf of all Iranians admitted to the United States as nonimmigrant students and affected by the questioned regulation. Plaintiff Confederation of Iranian Students, with approximately 1500 members, also sought a declaratory judgment and injunctive relief against defendant Attorney General Benjamin R. Civiletti in regard to the same regulation.

2. Plaintiffs sought both a declaration that 8 C.F.R. § 214.5 (1979) was unconstitutional and an injunction against its enforcement. Section 214.5 is an Immigration and Naturalization Service (INS) regulation that requires all nonimmigrant alien post-secondary school students who are natives or citizens of Iran to report to a local INS office or campus representative by December 14, 1979, with evidence of their current nonimmigrant status. At the time of reporting each student must present his passport and evidence of the following: (1) his school enrollment, (2) his payment of fees, (3) the number of course hours in which he is enrolled, (4) his good standing, and (5) his current address in the United States. The regulation further provides that failure to comply with the reporting requirement will be considered a violation of the conditions of the nonimmigrants' stay in the United States and will subject him to deportation proceedings under § 1241(a)(9) of the Immigration and Nationality Act of 1952 (Act). 8 C.F.R. § 214.5 (1979).

3. Attorney General Civiletti and David Crosland, Acting Commissioner of Immigration and Naturalization.

of the United States.[4] The Immigration and Naturalization Service (INS) regulation required that all Iranian nonimmigrant alien post-secondary students report to a local INS office by December 14, 1979, with evidence of their current nonimmigrant status.[5] The Government issued the regulation in response to the international crisis precipitated by the "student" invasion and occupation of the United States Embassy in Tehran, Iran, which resulted in the detention of United States hostages.[6] Plaintiffs argued that the challenged regulation violated the equal protection guarantee of the fifth amendment's due process clause because defendants singled out only Iranian students.[7] Defendants re-

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4. On November 10, 1979, President Carter directed Attorney General Civiletti to "identify any Iranian students in the United States who are not in compliance with the terms of their entry visas, and to take the necessary steps to commence deportation proceedings against those who have violated applicable immigration laws and regulations." Announcement on Actions to be Taken by the Department of Justice, 15 WEEKLY COMP. OF PRES. DOC. 2107, 2107 (Nov. 10, 1979).

5. 8 C.F.R. § 214.5 (1979), *See* note 2 *supra.*

6. On November 4, 1979, approximately 2500 Iranian demonstrators, described as "students," invaded and occupied the United States Embassy in Tehran. The demonstrators took as hostages approximately sixty-five United States citizens working in the Embassy compound in an attempt to force the United States to agree to specific demands. Although the "students" released some of the hostages later in November, fifty remained captive. Narenji v. Civiletti, 481 F. Supp. at 1134 *citing* Declaration of Warren Christopher ¶1, Exhibit 7 to Memorandum of Points and Authorities in Opposition to Plaintiffs' Motions for Injunctive Relief [hereinafter cited as Christopher Declaration]. The government of Iran failed to take action to protect the Embassy or its personnel, despite its commitment to do so under the Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, 284 U.N.T.S. 93. Following the Embassy takeover, the Prime Minister and a large number of cabinet officers resigned. A new Cabinet was named, but the successor government maintained an unwillingness to secure the safe release of all hostages or to meet with United States emissaries dispatched to secure release of the hostages. Narenji v. Civiletti, 481 F. Supp. at 1135 *citing* Christopher Declaration ¶3. Recognizing the growing anger and concern among United States citizens at the escalation of the situation resulting from continued threats by the Iranian captors, President Carter directed that several measures, including the promulgation of the instant regulation, be taken in response to the international crisis.

These measures included Presidential orders that oil produced in Iran not enter the United States, Pres. Proc. No. 4702, 44 Fed. Reg. 65,581 (1979), and that the assets of Iran located in this country be frozen, Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979). Narenji v. Civiletti, 481 F. Supp. at 1135.

7. Narenji, Vahedi, and Vahidnia also maintained that the regulation vio-

sponded that the regulation did not violate the fifth amendment because foreign policy determinations of the President and the Attorney General are not subject to judicial review and compelling governmental objectives justified any discrimination.[8] The district court adopted plaintiffs' argument and declared the regulation unconstitutional.[9] On appeal to the United States Court of

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lated the fourth amendment because the "compelled interrogation" by INS officials constituted an illegal seizure since the INS had no reasonable grounds to suspect that a particular Iranian student may have violated the conditions of his or her nonimmigrant status. Further, Narenji, Vahedi, and Vahidnia claimed that section 214.5 violated the first amendment, alleging that the primary purpose of the regulation at issue was both to punish Iranian students in the United States for past demonstrations and to chill the future exercise of their rights of speech, association, and assembly. An additional cause of action in their amended complaint asserted defendants' failure to comply with the notice and comment provisions of the Administrative Procedure Action, 5 U.S.C. § 553 (1976), and the lack of statutory authority for the regulation. Plaintiff Confederation of Iranian Students similarly challenged the issuance of the regulation as violative of the Administrative Procedure Act on the grounds that the notice and comment procedure was improperly waived and the Attorney General exceeded the authority vested in him under the Immigration and Nationality Act. Plaintiff Confederation of Iranian Students also alleged that defendant Civiletti's action violated the first amendment and tenets of internation law. Narenji v. Civiletti, 481 F. Supp. at 1136.

8. *Id.* In response to plaintiffs' other allegations of invalidity, defendants maintained that the waiver of notice and comment was appropriate, as were the terms of the regulation itself, which, they say, were proper under the authority given to the Attorney General pursuant to 8 U.S.C. §§ 1103(a), 1184(a) (1976). Section 1103(a) gives the Attorney General the power to administer and enforce all laws relating to alien immigration and naturalization. Section 1184(a) prescribes the power of the Attorney General to issue regulations to govern the admission of nonimmigrant aliens and to insure the departure of those individuals who violate the terms of their nonimmigrant status. Defendants also asserted that there had been no fourth amendment violation because no "seizure" of the students had occurred. Additionally, defendants contended that the failure of plaintiffs to show any impermissibly selective enforcement of the regulation defeated their claim that the first amendment had been violated. Narenji v. Civiletti, 481 F. Supp. at 1136.

9. The district court first examined the nonconstitutional grounds of plaintiffs' allegations. These arguments failing, the court then determined that the regulation was unconstitutional because it violated the fifth amendment's guarantee of equal protection of the laws. *Id.* at 1137. A finding that section 214.5 was unconstitutional being otherwise compelled, the court found it unnecessary to reach the issues of the regulation's validity under the first and fourth amendments and under international law. *Id.* at 1147.

Appeals, District of Columbia Circuit, *reversed.*[10] *Held:* An Immigration and Nationality Act regulation that directs, under threat of deportation, any Iranian nonimmigrant alien post-secondary student to report to the Immigration and Naturalization Service with passport, evidence of good-standing from school, and current address does not violate the equal protection guarantee of the fifth amendment's due process clause because it has a rational basis and implicates foreign policy matters, rendering it largely immune from judicial inquiry or interference. *Narenji v. Civiletti,* No. 79-2460 (D.C. Cir. Dec. 27, 1979).

II. LEGAL BACKGROUND

Both the concept of sovereignty and the United States Constitution[11] endow Congress with the power to exclude, admit, or deport aliens. Congress has passed extensive legislation pertaining to alien affairs and currently regulates the immigration of aliens to the United States under the Immigration and Nationality Act of 1952 (Act).[12] The Act defines the term "alien" as "any person not a citizen or national of the United States."[13] A "nonimmigrant alien student" is defined as follows:

> [A]n alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study at an established institution of learning or other recognized place of study in the United States, particularly designed by him and approved by the Attorney General after consultation with the Office of Education of the United States, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of

10. Although the circuit court essentially adopted defendants' position, the court applied the less stringent rational basis test to the regulation's alleged discriminatory effects. The district court applied a strict judicial scrutiny to the regulation, which forced defendants to show a compelling governmental interest in its promulgation and application.

11. U.S. CONST. art. I, section 8, cl. 4 grants to Congress the power "[t]o establish an uniform Rule of Naturalization."

12. 8 U.S.C. §§ 1101-1503 (1976). The Act prescribes specific requirements for the admission of aliens, §§ 1181-1185, the exclusion and deportation of aliens, §§ 1221-1260, and the naturalization of aliens, §§ 1401-1459.

13. *Id.* § 1101(a)(3).

> study fails to make reports promptly the approval shall be withdrawn. . . .[14]

Thus, a nonimmigrant alien is distinguished from a "resident" or "immigrant" alien, who is characterized as "a person admitted for permanent residence [in the United States], entitled to work and live anywhere in the country and eligible for naturalization after five years of residence."[15] A further distinction between immigrant and nonimmigrant aliens arises from the fact that no amount of residence will make a nonimmigrant alien eligible for naturalization.[16] A logical policy preference is evident that places greater restrictions on nonimmigrant aliens, although they are entitled to such rights as procedural due process.[17] The federal government, through the immigration scheme, "invites" immigrant aliens to enter the United States as permanent residents essentially free of restrictions "on an equality of legal privileges with all citizens."[18] Nonimmigrant aliens, on the other hand, enter the United States with the full realization that a variety of restrictions will be placed upon them by the federal government.[19] The Attorney General is the official charged with the administration and enforcement of the Act and "all other laws relating to the immigration and naturalization of aliens, except insofar as the Act or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers."[20] Additionally, the Attorney General is empowered "to perform such other acts as he deems necessary for carrying out his authority" under the provisions of the Act.[21] The Attorney General's

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14. *Id.* § 1101(a)(15)(F)(i).

15. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 277 [hereinafter cited as Rosberg].

16. *Id.*

17. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 77 (1976) (dictum); Wong Wing v. United States, 163 U.S. 228, 238 (1896).

18. Takahashi v. Fish & Game Comm'n., 334 U.S. 410, 420 (1948).

19. *E.g.*, 8 U.S.C. §§ 1184, 1303 (1976). The Attorney General is specifically authorized "to prescribe special regulations and forms for the registration and fingerprinting of . . . aliens of any other class not lawfully admitted to the United States for permanent residence." *Id.* § 1303(a).

20. *Id.* § 1103(a).

21. *Id.* Courts have broadly construed this authority to allow the Attorney General to draw distinctions among nonimmigrant aliens on the basis of na-

power includes the authority to order the deportation of any nonimmigrant alien who fails to maintain his nonimmigrant status or to comply with the conditions of such status.[22] Thus, situations arise in which nonimmigrant aliens, or subclassifications thereof, are subjected to regulations that appear to discriminate between one group and another. The judiciary's approach to these confrontations takes a variety of forms depending upon factual circumstances.[23] The Court has used two interrelated grounds to uphold the validity of such regulations when promulgated at the federal level: (1) the plenary federal power under the Act and the Constitution;[24] and (2) the power of the Executive in the field of foreign affairs.[25] *Mathews v. Diaz*[26] and *Fiallo v. Bell*[27] explore the plenary federal power over the area of immigration and naturalization. Under the federal law contested in *Mathews,* medical insurance was available to elderly citizens without restriction, but to immigrant aliens only if they had resided in the country for five years.[28] Plaintiffs argued that if state limitations on an alien's right to state welfare or state employment violated the equal protection clause of the fourteenth amendment, then analogous fed-

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tional origin as well as on other classifications. The only restraint on the power of the Attorney General is that his actions must be rationally or reasonably related to the statute he is administering. *See, e.g.,* Pilapil v. INS, 424 F.2d 6, 9 (10th Cir.) *cert. denied,* 400 U.S. 908 (1970); Mak v. INS, 435 F.2d 728, 730 (2d Cir. 1970).

22. 8 U.S.C. § 1251(a)(9).

23. Arguments that are commonly made involve alleged violations of the due process and equal protection clauses of the fifth and fourteenth amendments to the Constitution.

24. *Supra* note 11. A review of Supreme Court decisions suggests other possible sources of this congressional power. Numerous opinions evidence the constant presence of the federal power theme in decisions rejecting state attempts to classify on the basis of alienage and upholding the broad power of the federal government to make alienage classifications. Miller & Steele, *Aliens and the Federal Government: A Newer Equal Protection,* 8 U.C.D. L. REV. 1, 16-18 (1975).

25. As decisions in immigration matters may implicate foreign relations, and since a wide variety of classifications must be interpreted in light of changing political and economic circumstances, such decisions are more appropriately addressed by either the Legislature or the Executive than the Judiciary. Mathews v. Diaz, 426 U.S. 67, 81 (1976).

26. 426 U.S. 67 (1976).

27. 430 U.S. 787 (1977).

28. 42 U.S.C. § 1395 (1976).

eral restrictions violated the fifth amendment.[29] *Mathews* held that the fifth amendment does not require the federal government to extend all the advantages of citizenship to all aliens.[30] Rather, the regulation of aliens is entrusted to the political branches of the federal government, dictating a "narrow standard of review."[31] Under this review, the Court concluded that it was not "wholly irrational" for the government to limit the participation of aliens in federal medical insurance programs.[32] In reaching its decision, the *Mathews* Court relied heavily on the unique nature of federal authority over immigration.[33] Although at least one author has expressed dissatisfaction with the Court's reliance on the plenary power thesis to explain the use of restrained review in *Mathews*,[34] the Court, in *Fiallo v. Bell*, reaffirmed its reluctance to scrutinize federal statutes dealing with immigration. Whereas *Mathews* dealt with lawfully admitted resident aliens, *Fiallo* dealt with the special immigration status granted by the Act to those who qualify as "children" or "parents" of United States citizens or lawful permanent residents.[35] In determining whether such a relationship exists, the statute excludes the relationship between an illegitimate child and its natural father, but not the child's natural mother.[36] In upholding the distinctions, the Court stated that "these are policy questions entrusted exclu-

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29. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976). In *Buckley*, the Court indicated that equal protection analysis was the same under the fifth amendment as it was under the fourteenth amendment. 424 U.S. at 93. In *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), however, Justice Stevens attempted to qualify the Court's earlier holding, suggesting that protection under the two amendments was not "coextensive." He noted that "overriding national interests" might justify discrimination that clearly would be prohibited at the local level. 426 U.S. at 100.

30. Mathews v. Diaz, 426 U.S. at 80.

31. *Id.* at 81-82.

32. *Id.* at 83.

33. *Id.* at 81; *accord*, Fiallo v. Bell, 420 U.S. at 792.

34. Rosberg, *supra* note 15 at 317.

35. 8 U.S.C. § 1101(b)(1) & (b)(2) (1976).

36. *Id.* § 1101(b)(1)(D); Fiallo v. Bell, 430 U.S. at 788-90. The statute in effect discriminated against aliens seeking immigration on two bases that would normally warrant intensified judicial scrutiny if applied to citizens — sex and illegitimacy. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (striking down sex-based classification); Trimble v. Gordon, 430 U.S. 762 (1977) (striking down classification based on illegitimacy applying "not toothless" scrutiny). Maltz, *The Burger Court and Alienage Classifications*, 31 OKLA. L. REV. 671, 686 (1978) [hereinafter cited as Maltz].

sively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress."[37] *Fiallo* underscored the limited scope of judicial inquiry into immigration legislation by noting that it has repeatedly emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over [the admission of aliens]."[38] The Court also construed plenary federal power over the area of immigration to include the authority of the President when the factual circumstances surrounding cases implicate the United States relations with foreign powers.[39] In *Harisiades v. Shaughnessy*[40] the Court observed that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government."[41] Petitioners in *Harisiades* were resident aliens ordered deported on the ground that they had become members of the Communist Party after entering the United States.[42] Although the party terminated at least one petitioner's membership in 1939, he continued associating with its members.[43] The deportation orders were based on a provision of the Alien Registration Act of 1940[44] that required deportation of any alien who, at the time of entering the United States or "at any time thereafter," became a member of an organization advocating the unlawful overthrow of the government.[45] The Court upheld the provision's validity on the ground that the policy toward aliens is exclusively entrusted to the political branches of the federal government, therefore rendering it largely immune from judicial inquiry or in-

37. Fiallo v. Bell, 430 U.S. at 798. In addition to *Fiallo*, other Supreme Court decisions advocate the proposition that the Congress or the Executive may draw reasonable distinctions in the immigration field on the basis of nationality as well as other classifications. *See* Saxbe v. Bustos, 419 U.S. 65 (1974); Mathews v. Diaz, 426 U.S. at 81-82; Maltz, *supra* note 36 at 684-91; L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION, 258 (1972).

38. Fiallo v. Bell, 430 U.S. at 492.

39. *See* Rosberg, *supra* note 15 at 319.

40. 342 U.S. 580 (1952).

41. *Id.* at 588-89.

42. *Id.* at 581-82.

43. *Id.* at 582.

44. 8 U.S.C. § 137 (1940) (current version at 8 U.S.C. § 1251 (1976)). President Roosevelt approved this Act on June 28, 1940, when a world war was threatening to involve the United States.

45. *Id.*

terference.[46] The political branches of government have considerable flexibility in responding to changing world conditions, and judicial review of decisions made by the Congress or the President in the area of immigration and naturalization is narrow.[47] This is particularly important in the vast external realm of foreign affairs, in which the President alone has the power to speak or listen as a representative of the United States.[48] The Court in *United States v. Curtiss-Wright Export Corp.* described the gravity of the matter as follows:

> It is quite apparent that if, in the maintenance of our international relations, embarrassment . . . is to be avoided and success for our aims achieved, congressional legislation . . . must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. . . . [H]e, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war.[49]

The authority of the President as the sole representative of the federal government in foreign affairs does not spring exclusively from an exercise of legislative power. It also exists interrelatedly as a constitutional grant of power which, like all governmental powers, must be exercised in subordination to the applicable provisions of the Constitution.[50] Aside from this responsibility to the Constitution, the single restraint that the Court places on the power of either the President, the Congress, or the Attorney General[51] in the field of immigration and naturalization is that actions taken must not be "wholly irrational"[52] or so "unreasonably exercised"[53] that they warrant judicial interference.

III. The Instant Opinion

The instant decision first addressed appellees' challenge that

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46. Harisiades v. Shaughnessy, 342 U.S. at 588-90; *accord,* Fiallo v. Bell, 430 U.S. at 798; Mathews v. Diaz, 426 U.S. at 81-82.

47. Fiallo v. Bell, 430 U.S. at 796; Mathews v. Diaz, 426 U.S. at 81-82; Harisiades v. Shaughnessy, 342 U.S. at 588-89.

48. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

49. *Id.* at 320.

50. *Id.* at 319-20.

51. *See* note 21 *supra.*

52. Mathews v. Diaz, 426 U.S. at 82-83.

53. Harisiades v. Shaughnessy, 342 U.S. at 588-90.

the Attorney General lacked authority to promulgate the regulation. The court noted that the statute charges the Attorney General with the administration and enforcement of the Act and directs him to "establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority under the provisions of [the Act]."[54] The court also noted that the Attorney General is directed to prescribe by regulation the period of time for which any nonimmigrant alien is admitted to the United States and the conditions of such an admission.[55] Further, the opinion stated that the Act authorizes the Attorney General to order the deportation of any nonimmigrant alien who fails to maintain his nonimmigrant status or to comply with the conditions of such status.[56] Therefore, the court concluded that the applicable statutory provisions of the Act plainly encompass authority to promulgate the challenged regulation.[57] The court next turned to the question of whether the broad scope of authority conferred upon him by the Act empowered the Attorney General to draw distinctions among nonimmigrant alien students on the basis of nationality. Answering in the affirmative, the decision cited relevant authority supporting the proposition that the Act need not specifically authorize every action taken by the Attorney General as long as the action is *reasonably related* to his duties.[58] The court then examined appellees' charge that the regulation violated their right to equal protection of the laws under the due process clause of the fifth amendment. The court cited appropriate authority and held that Congress or the President may draw distinctions on the basis of nationality within the immigration

54. Narenji v. Civiletti, No. 79-2460 (D.D.C. Dec. 27, 1979), slip op. at 1, *citing* 8 U.S.C. § 1103(a) (1976). *See* notes 20-22 & accompanying text *supra.*

55. Narenji v. Civiletti, No. 79-2460, slip op. at 1, *citing* 8 U.S.C. § 1184(a) (1976). *See* note 8 *supra.*

56. Narenji v. Civiletti, No. 79-2460, slip op. at 1-2, *citing* 8 U.S.C. § 1251(a)(9). *See* text accompanying note 22 *supra.*

57. Narenji v. Civiletti, No. 79-2460, slip op. at 2.

58. *Id.* (emphasis added). *See* note 21 *supra.* The court reinforced this conclusion by noting that the Act specifically authorizes the Attorney General "to prescribe *special regulations* and forms for the registration and fingerprinting of . . . aliens of any other class not lawfully admitted to the United States for permanent residence." Narenji v. Civiletti, No. 79-2460, slip op. at 2, *citing* 8 U.S.C. § 1303(a) (1976) (emphasis added). *See* note 19 *supra.* The court saw no obstacle to concluding that the promulgation of the challenged regulation was directly and reasonably related to the Attorney General's duties and authority under the Act. Narenji v. Civiletti, No. 79-2460, slip op. at 2.

field. Further, the court stated that such distinctions must be sustained if they are not wholly irrational.[59] Next, the court examined whether there were circumstances in the instant case that provided a rational basis for the issuance of the regulation. The court noted that an affidavit by the Attorney General stated that the regulation was issued "as an element of the language of diplomacy by which international courtesies are granted or withdrawn in response to actions taken in foreign countries."[60] Recognizing that the instant controversy is inextricably tied up in the United States handling of its foreign affairs, the court cited *Mathews v. Diaz* and stated that the promulgation of the regulation implicates matters over which the President has direct constitutional authority.[61] Thus, the court concluded that the regulation is supported by a rational basis.[62] Next, the court examined to what extent the judiciary can inquire into the propriety of the regulation. The instant opinion noted that the district court "went beyond an acceptable judicial role"[63] when it undertook to evaluate the policy reasons behind the regulation.[64] The court further noted that it is not the business of the judiciary to pass judgment on the decisions of the President in the field of foreign policy because judges, not being expert in that field, lack the information necessary for the formation of a knowledgeable opinion.[65] The court also stated that the probable effect of a statute such as the challenged regulation is a judgment that must be made by the President; it is not permissible for the courts to overrule the Executive in the absence of acts that are clearly in excess of his au-

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59. Narenji v. Civiletti, No. 79-2460, slip op. 3. *See* text accompanying notes 26-38 *supra.*

60. Narenji v. Civiletti, No. 79-2460, slip op. at 3. The affidavit further stated: "the action implemented by these regulations is therefore a fundamental element of the President's efforts to resolve the Iranian crisis and to maintain the safety of the American hostages in Tehran." *Id.; See* note 6 *supra.*

61. Narenji v. Civiletti, No. 79-2460, slip op. at 3-4. *See* note 25 *supra.*

62. Narenji v. Civiletti, No. 79-2460, slip op. at 4, *citing* Mathews v. Diaz, 426 U.S. 67, 81-82 (1970); Fiallo v. Bell, 430 U.S. 787 (1977). *See* text accompanying notes 26-53 *supra.*

63. Narenji v. Civiletti, No. 79-2460, slip op. at 4.

64. *Id.*

65. *Id.* In the remainder of the opinion, the court cited *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936), and relied heavily on quotations taken from *Mathews v. Diaz*, 426 U.S. at 81-82, and *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). *See* note 25 & text accompanying notes 30-34 & 39-53 *supra.*

thority.[66] Therefore, the court concluded that the regulation must be sustained.[67]

In a concurring opinion, Judge MacKinnon expressed complete agreement with the court's decision, but wrote separately to add three additional points of support for its ruling.[68] The concurrence first noted that the promulgation of the instant regulation was not an isolated act of diplomacy in the international crisis, but stressed that other measures were taken as part of the same diplomatic effort.[69] Second, the concurrence stated that the regulation "seeks 'to identify Iranian students in the United States who are not maintaining status and to take immediate steps to commence deportation proceedings against such persons' (44 F.Reg. 65, 727 [1979]) 'in accordance with constitutional due process requirements.' (Defendant's Ex. 3)."[70] In explaining the disparate treatment afforded appellee nonimmigrant alien students in violation of United States immigration laws, the concurrence pointed out that the Government of Iran, when it committed a number of "violent lawless acts" against the United States and its citizens, placed appellees and other similarly situated students who owe their allegiance to that country in a different class for immigration purposes from the nonimmigrants of any other country.[71] Therefore, the concurrence concluded that since the Iranian government has made appellees part of a distinctly separate class, the United States, under its Constitution, may treat them differently because of the reasons that separate them from other aliens in the United States.[72] Third, the concurrence stated that the status of the Iranian students cannot be disassociated from their connection with their mother country since an alien "leaves out-

66. Narenji v. Civiletti, No. 79-2460, slip op. at 5-6.

67. *Id.* at 1.

68. *Id.* at 7 (MacKinnon, J., concurring).

69. In addition to the embargo on crude oil produced in Iran and the freeze of the Iranian government's assets in the United States, discussed at note 6 *supra*, the concurrence took judicial notice of reports that substantial forces of the United States Navy were moved to the Indian Ocean and that the President ordered the Iranian Embassy and consulate in the United States to return approximately eighty-five percent of its diplomatic staff to Iran. Narenji v. Civiletti, No. 79-2460, slip op. at 7.

70. Narenji v. Civiletti, No. 79-2460, slip op. at 7.

71. *Id.* at 7-8.

72. *Id.* at 8. The concurrence further concluded that "[t]he different treatment [the students] may receive under [the] regulation is directly related to the reasons for their different classifications." *Id.*

standing a foreign call on his loyalties which international law not only permits [the United States Government] to recognize but commands it to respect."[73] The concurrence further noted that the connection with the home country also means that the power of the United States Government to terminate an alien's stay is a necessary corrollary to that observation.[74] Therefore, the concurrence concluded that the actions of the President and the Attorney General "bear a reasonable relation to protection of the legitimate interests of the United States"[75] and conform to due process requirements.[76]

IV. COMMENT

The instant opinion appears to endow the federal government with unlimited power to discriminate not only against aliens, but also among classes of aliens, on the basis of national origin when the government can demonstrate an involvement with the foreign relations of the United States. Although the District of Columbia Circuit reached a sound result in the instant case, its rationale suffers from a single deficiency. The court failed to address the limits that should be placed on the government's power to discriminate based upon national origin when there is an involvement with foreign affairs. An analysis of federal and Supreme Court decisions supports the instant court's narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.[77] As enunciated by the Court, the only limitations on the power of the Legislature and the Executive in this area are: (1) the applicable provisions of the Constitution and (2) the rule of law that actions taken must not

73. *Id., citing* Harisiades v. Shaughnessy, 342 U.S. at 586.

74. Narenji v. Civiletti, No. 79-2460, slip op. at 8. The concurrence then cites a lengthy quotation from *Harisiades* that stands for the proposition that because an alien's legal status in the United States is not entirely in parity with that of a citizen and because his ability to remain is a matter of permission or tolerance and not of right, the alien remains vulnerable to expulsion, which is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Harisiades v. Shaughnessy, 342 U.S. at 587-88.

75. Narenji v. Civiletti, No. 79-2460, slip op. at 9, *citing* Harisiades v. Shaughnessy, 342 U.S. at 584.

76. Narenji v. Civiletti, No. 79-2460, slip op. at 9, *citing* Harisiades v. Shaughnessy, 342 U.S. at 588-91.

77. Rosberg, *supra* note 15 at 316-36.

be "wholly irrational."[78] Certainly no decision of the Supreme Court can be cited as directly supporting any further limitations. From the earliest cases, the judiciary has declared that determinations of Congress and the President in the immigration field are political in nature and not subject to judicial scrutiny.[79] The Court maintains, with respect to immigration and naturalization, that "over no conceivable subject is the legislative power of Congress more complete."[80] Therefore, in the immigration field, the Court is reluctant to enforce the constitutional standards that control the exercise of other Congressional powers.[81] The importance of the interests involved has generated persistent efforts to question the assumption that Congressional pronouncements in the immigration area are unassailable. Although every attack thus far has failed, the tenor of recent Supreme Court expressions has revealed a marked reluctance to endorse a doctrine of limitless power.[82] The Court has not implied that the power to regulate immigration overrides all constitutional limitations. Although the Court has repeatedly described the power as plenary, the use of that term does not in itself suggest that the power is without limits under the Constitution. The Court has described the President's "delicate, plenary and exclusive power . . . in the field of international relations" as a power that "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."[83] As mentioned above, the

78. *See* text accompanying notes 47-53 *supra.*

79. Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952); Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893).

80. Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909).

81. *See* Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893); United States v. MacIntosh, 283 U.S. 605 (1931); Hein v. INS, 456 F.2d 1239 (5th Cir. 1972). *See generally,* Hertz, *Limits to the Naturalization Power,* 64 GEO. L.J. 1007 (1976); Note, 80 YALE L.J. 769 (1971).

82. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (decisions of the political branch of the government "dictates a narrow standard of review of decisions made by Congress or the President in the area of immigration and naturalization"); Mathews v. Diaz, 426 U.S. 67 (1976) (despite "paramount federal power over immigration and naturalization," broad discrimination justifies "some judicial scrutiny of the deprivation" even though due process applicability is limited); Fiallo v. Bell, 430 U.S. 787 (1977) (while Congress has "exceptionally broad power" to define classes of admissible aliens, the exercise of such power may be subject to "limited judicial review" in an extreme case, at the behest of the appropriate party).

83. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

"narrow standard of review" is currently in vogue, but such a standard still places nearly limitless power in the hands of the federal government. Particularly when there is some aspect of foreign affairs involved, the opportunity for abuse of this discretion is too substantial to remain unchecked. The instant court is correct in its analysis of the law governing the validity of the challenged regulation; and the result it reached is sound, considering the international crisis that precipitated the controversy. The weakness of the opinion lies in its apparent endorsement and expansion of the plenary federal power thesis at the expense of individual rights and liberties. Such a weakness portends incrementally increasing encroachments on heretofore constitutionally protected territory. The Supreme Court erects only artificial obstacles when it asks the government to demonstrate "overriding" or "legitimate" national interests in order for their actions, under the language of the instant opinion, to pass constitutional examination. Whatever the Court's intention, its repeated insistence that Congress has plenary power to regulate the activities of aliens without adequate limitations must be seen as an invitation to Congress to act capriciously and without significant concern for the legitimate interests of aliens. If the judiciary is forbidden to inquire into the proposed effect of legislation on the rights of those subject to the legislation,[84] it will not be in a position to determine whether there is truly a legitimate national interest that would justify the abridgement or restriction of those individual rights. Similarly, if the judiciary is forbidden to inquire into the policy reasons upon which legislation is based,[85] it will not be in a position to determine whether such legislation is wholly irrational. Followed to a logical extreme, this implies that the judiciary will be unable to perform its duty of safeguarding the rights of individuals under the Constitution. The problem with the cur-

84. Narenji v. Civiletti, No. 79-2460, slip op. at 5-6.

85. *Id.* at 4. In Hirabayashi v. United States, 320 U.S. 81 (1943), the Court upheld legislation establishing a curfew for persons of Japanese ancestry. Justice Murphy (concurring) reinforced the hesitancy of the Court to restrict personal liberties in all but the most extreme circumstances. He stated as follows:

> While this Court sits, it has the inescapable duty of seeing that the mandates of the Constitution are obeyed. That duty exists in time of war as well as in time of peace, and in its performance, we must not forget that few indeed have been the invasions upon essential liberties which have not been accompanied by pleas of urgent necessity advanced in good faith by responsible men.

rent narrow standard of review in immigration cases is that virtually any action the government takes could be described as not "wholly irrational" when there is involvement with the foreign relations of the United States. The nature of foreign affairs dictates that the President has direct constitutional authority as the sole representative of the United States in its external relations;[86] and, with respect to immigration, the decisions of the political branches are largely immune from judicial control.[87] With the merger of these two propositions, the rights of aliens in the United States become dependent upon the maintenance of peaceful relations between the United States and their home countries. Consequently, it is not difficult to envision possible circumstances in which the courts might find that a legislative mandate conflicts with some safeguard of the Constitution. If the threat of this situation is to be averted, judicial opinions examining the interrelationship between immigration and foreign affairs must attempt to express flexible limits on the merger of authoritty in such cases. These limits are essential in order that future courts may simultaneously perceive both the delineation of expansive federal powers in this area and the enumeration of protected rights of aliens under the Constitution. Only in this fashion will the rights and liberties of every individual be preserved.

Scott R. Valby

86. United States v. Curtiss-Wright Export Corp., 299 U.S. at 319.
87. Fiallo v. Bell, 430 U.S. at 792.

ANTITRUST— EXTRATERRITORIAL APPLICATION OF THE SHERMAN ACT SHOULD NOT BE CURTAILED AT THE PRE-DISCOVERY STAGE IF SIGNIFICANT UNITED STATES INTERESTS ARE INVOLVED AND THERE ARE FACTUAL DISPUTES CONCERNING THE APPLICABILITY OF THE ACT OF STATE DOCTRINE.

I. FACTS AND HOLDING

Plaintiffs,[1] an individual and a number of United States and Dominican corporations affiliated to establish hotel and condominium accommodations in the La Romana section of the Dominican Republic, alleged they were hindered in their efforts by illegal acts of the defendant, United States and Dominican concerns[2] that own and operate existing tourist facilities in La Romana. Plaintiffs brought suit in the United States District Court, Southern District of New York, for treble damages and injunctive relief. The complaint alleged slander and unfair competition and asserted causes of action under Sections 1 and 2 of the Sherman Act.[3] Plaintiffs also alleged that defendants, through fraud and

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1. Dominicus Americana Bohio, a limited partnership, is the principal plaintiff. Other plaintiffs include one individual, Wayne Fuller, and ten other United States and Dominican corporations or limited partnerships.

2. A Delaware corporation, Gulf & Western Industries, Inc. (G & W), is the principal defendant. Other defendants are The Dominican Tourist Information Center, a New York corporation, a number of G & W's subsidiaries, and several undesignated parties.

3. Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2 (1976) state that:

§1. 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.

§2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, 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 imprison-

coercion, improperly influenced the Dominican government to take anticompetitive actions unfavorable to plaintiffs. According to plaintiffs, defendants encouraged government officials: 1) to prevent or inhibit plaintiffs from using La Romana marinas; 2) to relocate a road that was to serve plaintiffs' facilities; 3) to prohibit charter flights from landing at the La Romana Airport if they were transporting guests to plaintiffs' complex; 4) to delay government approval for a number of steps involved in the construction of plaintiffs' facility; and 5) to expropriate plaintiffs' private land in order to create a national park.[4] Plaintiffs further alleged that defendants: 1) interfered with plaintiffs' construction scheme by blockading a public road; 2) encouraged local concerns, including private transportation companies and a tourist information center,[5] to impede plaintiffs' progress; and 3) promoted meritless litigation to cloud title to plaintiffs' land. Defendants argued that the act of state doctrine precluded the court from exercising jurisdiction over at least some of these claims, and that several of the plaintiffs lacked standing to sue.[6] Defendants also contended that plaintiffs' complaint contained a number of fatal errors,[7] and that in the alternative, the court should refuse jurisdiction on grounds of international comity. On defendants' motion to dismiss and plaintiffs' cross-motion for partial summary judgment on the applicablity of the act of state doctrine, *denied.*

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ment not exceeding three years or by both said punishments, in the discretion of the court.

4. The Dominican government, however, rescinded its confiscation order soon after discovering that the land involved was plaintiffs' property. Dominicus Americana Bohio v. Gulf & Western, Inc., 473 F. Supp. 680, 685 (S.D.N.Y. 1979).

5. Plaintiffs claimed that the Dominican Tourist Information Center, a nominally neutral organization sanctioned by the Dominican government, discouraged tourists from visiting plaintiffs' resort area and encouraged them to go to the defendants' complex instead. *Id.*

6. Defendants argued that many of the plaintiff corporations, such as subcontractors that had arranged to provide goods and services to the facilities when the construction was completed, were affected only indirectly by defendants' acts and were therefore not within the "target area" of defendants' alleged antitrust violations. *Id.* at 686.

7. Defendants alleged that the plaintiffs neither averred nor showed that the acts complained of placed a substantial burden on interstate commerce sufficient to support jurisdiction under the Sherman Act. Defendants also argued that plaintiffs' definition of the relevant market was too narrow and that the allegations of fraud, corruption, and conspiracy were not pled with sufficient specificity. *Id.* at 686-87.

Held: In complex antitrust suits involving issues of transnational legal significance, United States courts should not refuse to accept subject matter jurisidiction at the pre-trial state of litigation if: (1) many defendants as well as plaintiffs are United States corporations; (2) the anti-competitive conduct is alleged to have occurred in the United States; and (3) there are factual disputes concerning the applicability of the act of state doctrine. *Dominicus Americana Bohio v. Gulf & Western, Inc.*, 473 F. Supp. 680 (S.D.N.Y. 1979).

II. LEGAL BACKGROUND

In *Underhill v. Hernandez,*[8] the seminal act of state case, the Supreme Court held that the courts of the United States will not sit in judgment on the acts of the government of another state, done within that state's own territory. Twelve years later, in 1909, the Court decided *American Banana Co. v. United Fruit Co.,*[9] which cast serious doubt on the applicability of United States antitrust laws to actions taken outside the territory of the United States. Expanding the *Underhill* philosophy, Justice Holmes' opinion stated that the characterization of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.[10] Gradually, the doctrine enunciated in *American Banana* eroded;[11] it was first expressly distinguished in *United States v. Sisal Sales.*[12] In *Sisal,* the complaint alleged that three United States banks conspired with other United States nationals and a Mexican corporation to obtain a monopoly in the trade of sisal,[13] including the export of sisal into the United States. As part of this conspiracy, the defendants allegedly motivated the Mexican and Yucatan governments to pass discriminatory legislation in favor of a Mexican corporation. The Court distinguished *American Banana* on the Sherman Act issue, concluding that the act complained of in *American Banana* took place in a foreign country (Costa Rica), while the conspiracy in *Sisal* was entered into and made effective by acts committed within the United States. *Sisal* evidenced a clear retreat from

8. 168 U.S. 250 (1897).
9. 213 U.S. 347 (1909).
10. *Id.* at 356.
11. *See, e.g.,* United States v. American Tobacco Co., 221 U.S. 106 (1911).
12. 274 U.S. 268, 275 (1927).
13. Sisal is a fiber used to make rope.

American Banana, indicating that jurisdiction would be found when there was a trade effect in the United States and some conspiratorial conduct occurred domestically, even though more significant anti-competitive activity took place abroad. The 1945 landmark decision of the Second Circuit in *United States v. Aluminum Co. of America (Alcoa)*[14] almost completely vitiated the jurisidictional issue of *American Banana.* Judge Learned Hand argued that although Congress did not intend the Sherman Act to prohibit conduct that has no consequences in the United States, it did intend to reach conduct outside the United States that has a sufficient effect on the interstate or foreign commerce of this country.[15] *Alcoa* gave birth to the well-known "effects" test, which has since been augmented by later cases and commentators. Recent cases have interpreted the effects test to mean that an effect on interstate or foreign commerce in the United States that is not both insubstantial and indirect (*i.e.,* not de minimus) is sufficient to confer jurisdiction.[16] Sometimes juxtaposed on this framework, however, is a balancing test that perhaps indicates a resurfacing of the *American Banana* doctrine. This test argues that the impact of the foreign conduct on United States commerce must be weighed against the potential international repercussions of asserting jurisdiction.[17] These repercussions may generally be measured by analyzing factors such as the relative importance of the alleged violation of conduct in the United States compared to that abroad, the degree of conflict with foreign law or policy, and the nationality of the parties involved.[18] If

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14. 148 F.2d 416 (2d Cir. 1945).

15. *Id.* at 443-44.

16. *See* Continental Ore v. Union Carbide Corp., 370 U.S. 690, 704-05 (1962); Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597, 610-11, 613, 615 (9th Cir. 1976); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 102-03 (C.D. Cal. 1971), *aff'd,* 461 F.2d 1261 (9th Cir.), *cert. denied,* 409 U.S. 950 (1972).

17. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1291-92 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of America, N. T. & S. A., 549 F.2d at 611-12, 614.

18. The Third Circuit has suggested that the following factors should be considered in determining whether extraterritorial jurisdiction should be exercised:

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;

a court has applied this balancing test and found that such factors outweigh potential international repercussions, thereby passing the jurisidictional threshold on the issue of extraterritorial application of the Sherman Act, the court may still confront a compelling act of state defense if an act of a foreign sovereign was involved. In *Alfred Dunhill of London, Inc. v. Republic of Cuba*,[19] the Supreme Court restated the *Underhill* doctrine[20] as follows: "The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations."[21] Any lawsuit, therefore, that challenges the validity *per se* of an act of a foreign sovereign is non-justiciable in United States courts.[22] Less clear is the situation in which an antitrust conspira-

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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 country 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 acceptable in this country if made by the foreign nation under similar circumstances; [and]
10. Whether a treaty with the affected nations has addressed the issue.

Mannington Mills Inc. v. Congoleum Corp., 595 F.2d at 1297-98 (court's footnote omitted). The Ninth Circuit's approach, which was cited with approval by the *Mannington Mills* court, includes the following factors as part of its balancing test:

> 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 of the violations charged of conduct within the United States as compared with conduct abroad.

Timberlane Lumber Co. v Bank of America, N. T. & S. A., 549 F.2d at 614. The instant court relied somewhat more heavily on the *Mannington Mills* court's analytical framework. 473 F. Supp. at 688.

19. 425 U.S. 682 (1976).

20. *See* text accompanying note 8 *supra*.

21. 425 U.S. at 697, citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427-28, 431-33 (1964).

22. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. at 697;

tor purposefully involves a foreign government in an anticompetitive scheme in order to obtain the immunity that attaches to an act of state. The Supreme Court in *Sisal*[23] was unwilling to allow an act of state defense to be based on the mere approval of a foreign government or on foreign government actions that were directly induced by the defendant. The Court reaffirmed this postion in *Continental Ore v. Union Carbide & Carbon Corp.*[24] The Canadian government appointed a wholly-owned Canadian subsidiary to one of the defendants as its exclusive wartime agent for the importation and allocation of ferrovanadium and vanadium oxide. Plaintiff alleged that the defendant had improperly influenced the subsidiary to exclude plaintiff from the Canadian ferrovanadium market, resulting in a violation of the Sherman Act. The Court found that "(a)s in *Sisal,* the conspiracy was laid in the United States, was effectuated both here and abroad, and respondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government."[25] A number of commentators, in apparent approval of these Supreme Court decisions, have argued that private acts aimed at instigating foreign governmental action to restrain trade should not be immune from judicial scrutiny; to allow such acts immunity would in effect invite would-be antitrust conspirators to involve foreign governments in monopolistic schemes.[26] The Second Circuit, however, has not limited the application of the act of state doctrine to cases challenging the validity of acts of foreign governments. When it is necessary to inquire into the motivation behind an anticompetitive act of a foreign government in order to determine whether the decision was instigated by a private defendant, the Second Circuit will apply the act of state doctrine.[27] The court in *Hunt* stated that "the issue of legality cannot be isolated from the issue of motivation of the foreign sovereign."[28] Perhaps due partly to this broad construction, several

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Hunt v. Mobil Oil Corp., 550 F.2d 68, 77 (2d Cir. 1977).

23. 274 U.S. 268 (1927). *See* text accompanying notes 12 & 13 *supra.*

24. 370 U.S. 690 (1962).

25. *Id.* at 706.

26. *See* Davidow, *Antitrust, Foreign Policy, and International Buying Cooperation,* 84 YALE L.J. 268, 282-83 (1974); Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns,* 77 COLUM. L. REV. 1247, 1260 (1977).

27. Hunt v. Mobil Oil Corp., 550 F.2d at 78.

28. *Id. See also* Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. at 110-11.

exceptions to the doctrine are developing. If the government act in question is of a commercial nature, it may not be immunized as an act of state.[29] Also, the initiation of judicial proceedings in a foreign country does not constitute an act of state even though foreign courts determine the ultimate result of the proceedings.[30] Another possible exception of the act of state doctrine pertains to acts of a foreign government procured through fraud, coercion, or corruption of government officials. *Hunt* expressly left open the question whether the act of state doctrine applies if bribery is alleged;[31] moreover, several commentators have stated that it is inappropriate to allow corporations to invoke the act of state doctrine to protect questionable payments made to foreign government officials.[32] The *Noerr-Pennington* doctrine,[33] which states that legitimate attempts to petition the United States government cannot be attacked on antitrust grounds, probably does not preclude application of the Sherman Act to such questionable payments. At least one case has questioned whether the *Noerr-Pennington* rationale has any bearing at all on acts in foreign countries.[34] In any event, the doctrine does not immunize any government petition that is "[a] sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor."[35] Thus, there are at least two major issues that continue to arise in cases attempting to apply the Sherman Act extraterritorially: 1) whether the act of state doctrine automatically precludes examination of the motivation of a foreign government's anticompetitive act in order to establish

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29. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. at 693-95; Hunt v. Mobil Oil Corp., 550 F.2d at 73.

30. Timberlane Lumber Co. v. Bank of America, N. T. & S. A., 549 F.2d at 608.

31. 550 F.2d at 79.

32. *See* McManis, *Questionable Corporate Payments Abroad: An Antitrust Approach*, 86 YALE L.J. 215, 237 (1976); Costilo, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense*, 66 MICH. L. REV. 333, 350-51 (1967); Note, *supra* note 26, at 1262.

33. *See* United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern Railroad Presidents' Conference v. Noerr Motor Freight Inc., 365 U.S. 127 (1961).

34. Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. at 107-08.

35. California Motor Transport Co. v. Trucking Unltd., 404 U.S. 508, 511 (1972), (quoting Eastern Railroad Presidents' Conference v. Noerr Motor Freight Inc., 365 U.S. at 144).

defendant's guilt; and 2) which exceptions to the act of state doctrine United States courts should recognize.

III. THE INSTANT OPINION

In the instant case, the court found that even wholly foreign conduct may come within the purview of the antitrust laws if it has a sufficient effect on the interstate or foreign commerce of the United States.[36] The court stated that the effects test alone is inadequate because it fails to consider potential problems of international comity. According to the court, the proper standarnd also involves balancing the impact of the foreign conduct on United States commerce against the potential international repercussions of asserting jurisdiction.[37] In the instant case, the court found that when the record addressed the key elements of such a balancing test, it supported jurisdiction; many of the defendants as well as the plaintiffs were United States corporations, some of the anticompetitive conduct was alleged to have occurred in the United States, and United States consumers were "exported" to take advantage of the services provided in the Dominican Republic.[38] The instant court indicated that discovery would be necessary to elucidate other factors relevant to the foreign relations issue.[39] With regard to the act of state doctrine, the instant court held that many of the acts alleged in the complaint fall outside the doctrine's penumbra, and therefore are justiciable.[40] Among these alleged acts are defendants' obstruction of a public road in order to inhibit plaintiffs' construction, and defendants' encouragement of local concerns to impede plaintiffs' progress.[41] The instant court also found that the allegation that defendants promoted and financed meritless litigation designed to cloud title to plaintiffs' property presented a justiciable issue since the initiation of judicial proceedings in a foreign country is not encom-

36. Dominicus Americana Bohio v. Gulf & Western, Inc., 473 F. Supp. at 687.

37. *Id.*

38. *Id.* at 688.

39. The factors the court listed include: "the degree of conflict with foreign law, the relative importance of the alleged antitrust violations in the Dominican Republic, the availability of a remedy there, and the existence of any agreement between the United States and the Dominican Republic regarding antitrust policy." *Id. See* note 18 and accompanying text *supra.*

40. *Id.* at 689.

41. *Id.*

passed by the act of state doctrine.[42] The instant court somewhat reluctantly applied the *Hunt* rule that states that the act of state doctrine precludes an investigation of the motivation of a foreign government's act.[43] The court found, however, that some of the Dominican government's acts, such as rerouting a road and prohibiting plaintiffs from using the La Romana airport, might perhaps come under the *Dunhill* commercial activity exception.[44] Furthermore, the court noted that discovery on this matter was needed before any such determination could be made.[45] The court also held that the Dominican government's expropriation of plaintiffs' land in order to create a national park "would appear to be a quintessential public act," and would therefore seem to be nonjusticiable under the act of state doctrine.[46] The instant court suggested, however, that since the Dominican government rescinded its confiscation order when it learned that the land belonged to plaintiffs, the original act (and defendants' alleged complicity therein) might not be subject to act of state immunity. The court cited *Banco Nacional de Cuba v. Sabbatino*[47] to support the proposition that an act that would normally be immune from judicial inquiry may lose its privileged status if the government subsequently repudiates it.[48] The court in the instant case then argued that even an unrepudiated act of state may be scrutinized if it resulted from the corruption of government officials; *Hunt*[49] and several law review articles[50] were cited as supporting this idea.[51] The instant court then addressed the defendants' other defenses and found, for the purposes of a summary judgment motion, that the plaintiffs' market definition was sufficient, that all plaintiffs had standing to sue, and that the plaintiffs' complaint contained no fatal errors.[52] Finally, the court concluded that the record before it supported a finding of jurisdiction, and

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42. *Id.*, (quoting Timberlane Lumber Co. v. Bank of America, N. T. & S. A., 549 F.2d at 608).
43. 473 F. Supp. at 689. *See* text accompanying note 27 *supra.*
44. *See* note 29 and accompanying text *supra.*
45. 473 F. Supp. at 689-90.
46. *Id.* at 690.
47. 376 U.S. at 432.
48. 473 F. Supp. at 690.
49. Hunt v. Mobil Oil Corp., 550 F.2d at 79.
50. McManis, *supra* note 32, at 236-37; Note, *supra* note 32, at 1262.
51. 473 F. Supp. at 690.
52. *Id.* at 690-93.

that discovery was necessary to determine the applicability, if any, of the act of state doctrine.

IV. COMMENT

The court in the instant case, apparently siding with the Ninth[53] and Third Circuits,[54] adopted an ad hoc approach to antitrust cases involving the acts of a foreign sovereign — a "rule of reason" approach that weighs factors of international comity against legitimate United States antitrust interests. The instant opinion is implicitly critical of the Second Circuit's decision in *Hunt v. Mobil Oil.*[55] The instant court indicated that persuasive arguments have been made to the effect that a broad construction of the act of state doctrine invites potential antitrust conspirators to involve foreign governments in anticompetitive schemes.[56] The *Hunt* rationale has received widespread criticism for uselessly thwarting legitimate regulatory interests of the United States.[57] It is significant that a district court in the Second Circuit has, at least impliedly, joined in this criticism. The instant case, if appealed, may provide a proper vehicle for the Second Circuit to modify and revise the *Hunt* rationale. It should be noted, however, that there is a lack of proper substantiation for the instant court's finding that an act normally immune from judicial inquiry, such as the quintessentially public act of expropriation, may lose its privileged status if it is repudiated.[58] Although *Sabbatino* discussed both the possibility of a determination by the United States executive branch that a foreign government's act is in violation of international law and the legal repercussions that might conceivably flow therefrom,[59] *Sabbatino* did not address the situation in which a foreign sovereign repudiates its own former act. Furthermore, the instant court stretched the holding of *Hunt* when it cited that case in support of the proposition that an

53. Timberlane Lumber Co. v. Bank of America, N. T. & S. A., 549 F.2d 597 (9th Cir. 1976).

54. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979).

55. 550 F.2d 68 (1977).

56. 473 F. Supp. at 689.

57. *See* note 32 and accompanying text *supra.*

58. The instant court cited Banco Nacional de Cuba v. Sabbatino, 376 U.S. at 432, as supporting this theory. 473 F. Supp. at 690. *See* note 47 and accompanying text *supra.*

59. 376 U.S. at 432.

act of state may be scrutinized by the courts if it resulted from the corruption of government officials.[60] *Noerr*[61] did hold, in a domestic setting, that the act of state doctrine does not immunize lobbying efforts that are clearly "sham," or fraudulent.[62] As the instant court correctly argued in a footnote,[63] however, it is an open question whether the *Noerr-Pennington* doctrine, with its "sham" exception, applies to the lobbying of foreign governments. Thus, while the instant case appears to be correctly decided, the court's opinion does not impart any further clarity or direction to the act of state doctrine and its exceptions. The instant decision, however, has dual significance. First, the district court impliedly criticized *Hunt,* which could be influential in modifying the Second Circuit's *Hunt* rationale if the instant case is appealed. Second, the court exhibited a reluctance to abdicate subject matter jurisidiction at an early stage of the antitrust litigation because of the existence of both apparent involvement of United States interests and the presence of factual disputes concerning the applicability of the act of state doctrine.

Jeffrey Paul Marston

60. 473 F. Supp. at 690. In *Hunt*, the Second Circuit stated that there was no express or implied allegation that representatives of the foreign government "were seduced or enticed in any manner by the payment of bribes or boodle to take the action complained about. . . .This appeal therefore is not the proper vehicle for consideration of international commercial bribery in so far as it affects the act of state doctrine." 550 F.2d at 79.

61. 365 U.S. 127 (1961); *See* note 35 and accompanying text *supra.*

62. *Id.* at 144; *See also California Motor Transport Co. v. Trucking Unltd.,* 404 U.S. at 511.

63. 473 F. Supp. at 690.

TRANSPORTATION—INTERSTATE COMMERCE ACT—ICC HAS PLENARY AND EXCLUSIVE JURISDICTION OVER JOINT THROUGH ROUTES BETWEEN OUTLYING POSSESSIONS OR TERRITORIES AND THE UNITED STATES

I. FACTS AND HOLDING

Petitioner, Trailer Marine Transport Corporation (TMT), a common carrier by water, filed a tariff with the Interstate Commerce Commission (ICC)[1] for a new rail-water intermodal service[2] on a joint through route[3] between Puerto Rico and inland points in the United States. The ICC, asserting exclusive jurisdiction,[4]

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1. In connection with the regulation of rates, fares, and charges of common carriers by public service commissions, the carriers are generally required to publish schedules of charges, commonly referred to as tariff schedules. By virtue of the Interstate Commerce Act, common carriers have the duty to adhere to such tariff schedules, and may not charge a greater or lesser compensation for the transportation of passengers or property than the rates, fares, and charges specified in the schedules. Such rates, fares, and charges named in the schedule become the legal rate for services rendered, and must be charged by the carrier and paid by the shipper or passenger without deviation. 13 AM. JUR. 2d *Carriers* § 107 (1964). TMT's tariff was filed in August 1977. Since early 1975, TMT had operated a single rate, all-water service between Florida and Puerto Rico, and had filed tariffs with the Federal Maritime Commission under the Intercoastal Shipping Act, as amended, 46 U.S.C. §§ 801-842 (1976).

2. "Intermodal" is a term used to define one continuous route of carriage composed of two different modes of transportation. *See* Dempsey, *The Contemporary Evolution of Intermodal and International Transport Regulation Under the Interstate Commerce Act: Land, Sea, and Air Coordination of Foreign Commerce Movements*, 10 VAND. J. TRANSNAT'L L. 505, 547 (1977).

3. A "joint through route" has been defined as a "through movement of cargo from a point of origin on the line of one carrier to a point of destination on the line of the other." Commonwealth of Pennsylvania v. ICC, 561 F.2d 278, 282 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978). A "joint through rate" has been defined as the "single charge published by one carrier and concurred in by connecting carriers as the rate that will apply" for carriage along a joint through route. 561 F.2d at 281-82.

4. Jurisdiction was asserted under the recently recodified Interstate Commerce Act, which provides:

> (a) Subject to . . . [§§ 10501-10562 of the Interstate Commerce Act as amended and recodified, establishing the jurisdiction of the ICC] and other law, the Interstate Commerce Commission has jurisdiction over transportation—
>
> (1) by rail carrier . . . [and] water common carrier . . . that is—

accepted the tariff. Respondent, Federal Maritime Commission (FMC), then ordered TMT to show cause why it was not in violation of the Intercoastal Shipping Act.[5] Specifically, the FMC ordered TMT to justify its refusal to acknowledge FMC jurisdiction over the marine segment of the route and to disclose the proportionate division of rates applicable to rail and water transportation.[6] The FMC subsequently issued a Report and Order directing TMT to file tariffs within thirty days.[7] TMT's motion for a stay of the FMC order was granted[8] pending judicial appeal to determine proper regulatory jurisdiction.[9] On appeal to the United States Court of Appeals for the District of Columbia Circuit, *vacated in part and remanded in part. Held:* The Interstate Commerce Act and the Intercoastal Shipping Act, read together, confer plenary and exclusive jurisdiction on the ICC to regulate

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. . .

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment . . . [and]

(2) *to the extent the transportation is in the United States and is between a place in—*

. . .

(C) *a State and a place in a territory or possession of the United States . . .*

49 U.S.C. § 10501 (1979) (emphasis added).

5. Pub. L. No. 72-415, ch. 199, 47 Stat. 1425-27 (1933), as amended, 46 U.S.C. §§ 843-848 (1976). The Intercoastal Shipping Act is a part of the Shipping Act of 1916, Pub. L. No. 64-260, ch. 451, 39 Stat. 728 (1916), as amended, 46 U.S.C. §§ 801-842 (1976).

6. *See* FMC Docket No. 77-55, *Trailer Marine Transport Corporation—Joint Single Factor Rates, Puerto Rican Trade,* Order to Show Cause and File Section 21 Reports, Nov. 18, 1977.

FMC contended that information concerning the share of the revenues collected by TMT would be necessary to enable FMC to determine the reasonableness of TMT's rates for port-to-port service even if no through rate was charged.

7. FMC Docket No. 77-75, *In Re: Trailer Marine Transport Corporation—Joint Single Factor Rates, Puerto Rican Trade,* Report and Order of March 15, 1978.

8. The motion was granted by the Circuit Court for the District of Columbia on May 5, 1978.

9. Sea-Land Service, Inc. (Sea-Land) appeared as an intervenor. Sea-Land is a common carrier by water in direct competition with TMT that filed tariffs for a similar joint through route with both the FMC and the ICC. The ICC asserted exclusive jurisdiction, but a majority of ICC Commissioners voted to defer a final ruling on whether the ICC should seek to enforce its assertion pending judicial resolution of the jurisdictional issue.

both rail and water segments of joint through trade between Puerto Rico and inland points in the United States. *Trailer Marine Transport Corp. v. Federal Maritime Commission,* 602 F.2d 379 (D.C. Cir. 1979).

II. Legal Background

The Interstate Commerce Commission and the Federal Maritime Commission are two of three regulatory agencies that regulate transportation in foreign commerce.[10] The FMC has substantive regulatory jurisdiction[11] over common carriers engaged in water transportation in either foreign or interstate commerce, including transportation by water from port to port between a state and a territory of the United States.[12] The ICC has jurisdiction over rail, motor, and water carriers, brokers, and freight forwarders,[13] as well as a congressional mandate to ensure the development, coordination, and preservation of a transportation system to meet the transportation needs of the United States.[14] ICC policy governing regulation of joint through routes and rates has undergone change and modification because amendment and recodification have altered ICC jurisdiction.[15] Sections 1, 6, and 15 of the first Interstate Commerce Act (Act) defined the substantive regulatory power of the ICC.[16] Section 1 outlined ICC jurisdiction, section 6 required carriers subject to the Interstate Commerce Act to publish and file tariffs, including the rates for transportation or service under the Act, with the ICC, and section 15 empowered the ICC to regulate rates that violated the Act.[17] These three sections defined carriers and routes subject to tariff filing requirements and substantive regulatory powers of the ICC. Originally, section 1 limited ICC jurisdiction to rail-water joint

10. The third agency is the Civil Aeronautics Board (CAB), which regulates domestic and international air carriers.

11. The FMC regulates ocean carriers pursuant to two statutes: the Shipping Act of 1916, 46 U.S.C. §§ 801-842 (1976) and the Intercoastal Shipping Act of 1933, 46 U.S.C. §§ 843-848 (1976).

12. 46 U.S.C. § 801 (1976).

13. 49 U.S.C.A. §§ 10501, 10521, 10541, 10561 (1979).

14. 49 U.S.C.A. § 10101(a) (1979).

15. *See* Commonwealth of Pennsylvania v. ICC, 561 F.2d 278 (D.C. Cir. 1977), in which the court states a brief history of the ICC's position on joint through rates.

16. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (1887).

17. *Id.*

through routes between the United States and an adjacent foreign country.[18] Under the constraint of this "adjacent" limitation, the ICC established its policy governing the filing of rail-water joint international through route tariffs in *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.*[19] The ICC asserted that section 1 made a clear distinction between commerce within the United States and commerce with a foreign country not adjacent to the United States, and found that the Act precluded ICC jurisdiction over foreign commerce when there was a continuous carriage of goods beyond United States' ports.[20] The ICC also determined that it was powerless to require the filing of rail-water joint through rates because section 6 contemplated only the filing of joint rates between two or more carriers designated in section 1 as subject to ICC regulation.[21] Furthermore, the ICC noted that Congress had not sought to exercise control over all-water carriage, whether transoceanic or inland.[22] Despite the subsequent exercise of congressional control over all-water carriage routes under the Shipping Act of 1916[23] and a change in the language of section 1, effected by the Transportation Act of 1920,[24] the ICC

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18. Section 1 provided:

> [t]hat the provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from . . . any place in the United States to an *adjacent* foreign country, or . . . from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an *adjacent* foreign country . . . .

Id. (emphasis added).

19. 13 I.C.C. 266 (1908).

20. *Id.* at 271.

21. *Id.* at 280.

22. *Id.* at 270.

23. Pub. L. No. 64-260, ch. 451, 39 Stat. 728 (1916). The Shipping Act of 1916 subjected carriers on all-water inland and oceanic routes to government regulation. Section 3 of the Shipping Act created the United States Shipping Board, which was given the power to regulate all-water inland and oceanic transportation.

24. Pub. L. No. 152, ch. 91, §§ 400-403, 41 Stat. 474 (1920). The Transportation Act of 1920 expanded ICC jurisdiction under Section 1 of the Interstate Commerce Act to include carriers engaged in rail-water joint through routes between any place in the United States and a foreign country, "but only insofar as such transportation . . . takes place within the United States." *See* § 400(1) (codified at 49 U.S.C. §1(1) (1976)). This limiting language followed an ambigu-

adhered to a policy prohibiting inland domestic carriers from filing joint through rates with ocean carriers. In *United States v. Pennsylvania Railway Co.*[25] the Supreme Court recognized the ICC's substantive regulatory jurisdiction over rail-water joint through routes passing through a foreign port and international waters. The *Pennsylvania Railway* Court construed the statutory limitation of ICC jurisdiction "within the United States" as an expression of congressional intent to prevent the ICC from regulating rail transportation in foreign countries.[26] The Court held that the limitation clause did not restrict ICC power to regulate routes between two points within the United States merely because a substantial part of the carriage traversed waters outside the territorial limits of the United States.[27] Despite this increased jurisdiction, the ICC still did not require the filing of rail-water joint through rates. The ICC, however, traditionally accepted the filing of rail-water joint through rates for routes between inland points in the continental United States and points in Alaska and Hawaii.[28] After Alaska and Hawaii were admitted to Statehood,[29]

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ous paragraph describing the types of routes under ICC jurisdiction, the full text of which is as follows:

> [Transportation] from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.

25. 323 U.S. 612 (1945), in which the authority of the ICC to require a railroad to interchange its cars with a water carrier along the subject route was upheld.

26. *Id.* at 621.

27. *Id.* at 622. Specifically, the Court held that "there is . . . nothing in the [Interstate Commerce] Act to deny the Commission the same power over interstate rail-water transportation which passes through foreign waters, as . . . it enjoys where the transit is wholly within the territorial limits of the United States."

28. *See* Dempsey, *supra* note 2. The ICC required the filing of joint through rates, but recognized that it had no substantive regulatory jurisdiction over water carriers.

29. In the Alaska Statehood Act of 1958, 48 U.S.C. *preceding* § 21 (1976) and the Hawaii Statehood Act, 48 U.S.C. *preceding* § 491 (1976), Congress explicitly affirmed retention of FMC jurisdiction over water transportation on intermodal joint through routes between the two new states and the continental United

Congress amended the Interstate Commerce Act[30] to give the ICC exclusive jurisdiction over through intermodal transportation between the two outlying states and the continental United States.[31] The ICC then developed regulatory expertise over transportation by water carriers traditionally falling within FMC jurisdiction.[32] The ICC, however, continued to assert that it was not statutorily empowered to accept the filing of joint international tariffs between common carriers subject to its jurisdiction and ocean carriers subject to FMC jurisdiction.[33]

As a result of a continuing rulemaking proceeding,[34] in *Ex Parte 261, International Joint Rates and Through Routes,*[35] the ICC prescribed rules requiring the filing of joint international through rates with the ICC. The ICC asserted substantive regulatory power over only the domestic portion of such routes, expressly denying any intention to assert jurisdiction or substantive regulation of the ocean portion of the rates.[36] The Court of Appeals for the District of Columbia Circuit upheld this procedure in *Commonwealth of Pennsylvania v. ICC.*[37]

Congress recently recodified the Interstate Commerce Act[38] in order to restate, in comprehensive form, but without substantive change, the original Act and related laws.[39] The language in sec-

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States. *See* Dempsey, *supra* note 2, at 547.

30. 49 U.S.C. § 316(c) (1976).

31. *See* Pipe Line Mach. & Equip., Various States to Alaska, 349 I.C.C. 799, 806 (1975); Joint Rail-Water Rates to Hawaii, Matson Nav. Co., 351 I.C.C. 213, 217 (1975). *See also* Dempsey, *supra* note 2, at 548.

32. *See* Dempsey, *supra* note 2, at 548 n.166.

33. *Id.* at 548.

34. The rulemaking proceeding is reported at 351 I.C.C. 490 (1976); 350 I.C.C. 361 (1975); 346 I.C.C. 688 (1974); 341 I.C.C. 246 (1972); and 337 I.C.C. 625 (1970).

35. Ex Parte 261, In the Matter of Tariffs Containing Joint Rates and Through Routes for the Transportation of Property Between Points in the United States and Points in Foreign Countries, was reported on at each of the citations in note 34, *supra.*

36. 351 I.C.C. 490, 491 (1976).

37. 561 F.2d 278 (D.C. Cir. 1977).

38. 49 U.S.C.A. §§ 10101-11916 (1979).

39. Recodification of the Interstate Commerce Act and related laws was effected by the Revised Interstate Commerce Act, Pub. L. No. 95-473, 92 Stat. 1337 (1978). Section 1 of the Act effects the recodification, section 2 effects certain technical and conforming changes in related laws, section 3(a) provides that "Sections 1 and 2 of this Act restate, without substantive change, laws enacted before May 16, 1978, that were replaced by those sections. Those sections may

tion 1 limiting ICC jurisdiction to transportation "within the United States," however, has been changed. The ICC now has jurisdiction over rail and water carriers transporting under an arrangement for continuous shipment with the United States between a state and a territory or possession of the United States.[40] Since recodification of the Interstate Commerce Act was enacted in 1979, the instant case is the first to interpret substantive regulatory jurisdiction in its new form.

III. The Instant Opinion

Presented with the first opportunity to construe the Interstate Commerce Act recodification, the instant court analyzed the prerecodification language in order to determine congressional intent[41] with respect to the proscription against construing the Act as effecting substantive change.[42] The court found that the recodification of sections 1(1),[43] 6(1),[44] and 15(1)[45] explicitly granted the ICC substantive regulatory jurisdiction over joint through rates involving both rail and water segments of transportation between Puerto Rico and inland points in the United States.[46] Applying this analysis, the court construed the effect of the recodification of section 1.[47] FMC argued that ICC jurisdiction under the recodification was limited to regulation of transportation "in the United States,"[48] with United States defined as

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not be construed as making a substantive change in the laws replaced." *Id.*, 92 Stat. 1466. *See also* H.R. Rep. No. 98, 95th Cong., 2d Sess. 4, *reprinted in* [1978] U.S. Code Cong. & Ad. News 3009, 3013.

40. 49 U.S.C.A. § 10501(a)(2)(C) (1979).

41. 602 F.2d at 383, n.18.

42. *See* note 39, *supra.*

43. 49 U.S.C.A. § 10501 (1979).

44. 49 U.S.C.A. § 10762(a)(1) (1979).

45. 49 U.S.C.A. 10704(a)(1) (1979).

46. 602 F.2d at 385. As stated on page 5, *supra,* the ICC has jurisdiction over transportation between a state and a place in a territory or possession of the United States. Although the cases are inconsistent in their labeling of Puerto Rico, the courts have referred to Puerto Rico as a "territory," (DeLima v. Bidwell, 182 U.S. 1 (1901)), "quasi-territory," (Benedicto v. West India and Panama Telegraph Co., 256 F.2d 417 (1st Cir. 1919)), or "organized territory," (Kopel v. Bingham, 211 U.S. 468 (1909)). The court found that, whatever the appellation, the territorial status of Puerto Rico is well established. 602 F.2d at 385, n.26.

47. 602 F.2d at 386. The court found that the FMC's challenge to jurisdiction based on recodification of section 1 was a plausible objection.

48. 49 U.S.C.A. § 10501(a)(2) (1979).

the states of the United States and the District of Columbia.[49] The court, however, found that accepting FMC construction of the recodification limitation clause would restrict the ICC from asserting jurisdiction over any route that crossed the "high seas."[50] The court posited two objections to the FMC construction.[51] First, the court noted that the limitation clause has been construed only to restrict the ICC from asserting jurisdiction over foreign carriers within foreign countries.[52] Because the court gave the recodification limitation clause the same construction as the original limitation clause in section 1,[53] the court found express Supreme Court approval of substantive ICC regulation of rail-water joint through routes passing through international waters in *United States v. Pennsylvania Railway Co.*[54] The court determined that the regulatory power upheld in *Pennsylvania Railway* pertained to the instant case because substantive regulation of both routes was subject to the same limitation.[55] Second, the instant court asserted that the revised statute, examined in light of pre-recodification language, did not support the FMC construction.[56] The court found that the section 1 clause was ambiguous and inapplicable to some of the routes in the clause it modified.[57] The court also found that while the recodification authors intended that the limitation clause should apply to each of the descriptive clauses, both common sense and legislative history militate against this construction.[58] In light of the explicit congressional intent that the recodification did not substantively

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49. 49 U.S.C.A. § 10102(24) (1979).

50. 602 F.2d at 387. The court found that the "high seas" are international space over which no country has dominion.

51. *Id.* at 387-92.

52. *Id.* at 389. *See also id.* at 389, n.46.

53. *Id.* at 391-92.

54. 323 U.S. 612 (1945). *See* n.4, *supra.*

55. 602 F.2d at 392.

56. *Id.* at 387.

57. *Id.* at 388. The pre-recodification clause is found at 49 U.S.C. § 1(1)(c) (1976) and provides for jurisdiction over transportation

> [f]rom one State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation or transmission takes place within the United States.

58. 602 F.2d at 388.

alter any provision or meaning of the original statute, the instant court determined that the limitation clause was inapplicable to the route in question.[59] Distinguishing ICC jurisdiction from FMC jurisdiction, the court found that FMC regulatory expertise and jurisdiction is limited to single rate, all-water transportation between United States ports and ports in territories, possessions, foreign countries, or other states, as well as all-water through rates.[60] The court further noted that FMC jurisdiction is specifically limited to routes over which the ICC does not have jurisdiction.[61] Finally, the court held that the statutes creating FMC and ICC jurisdiction, read together, confer exclusive and plenary ICC jurisdiction over the route in question.[62]

IV. COMMENT

The instant decision is significant both for the court's method of analyzing the recodified Interstate Commerce Act and for the specific result. The method of analysis is significant because, in this case of first impression, the court was free to define an original method of analysis to apply to the recodified Act. The court disregarded the change in language of the recodification which, on its face, seems to deny ICC jurisdiction over the route in question, and reinstated pre-recodification interpretation of the Act as the proper framework for analysis.[63] The court used the most reasonable method of analysis. An interpretation that the recodification created a new jurisdictional scheme would deny the ICC jurisdiction it has traditionally exercised. Also, the court's

59. *Id.* at 392. The court concluded that the only purpose served by limiting ICC jurisdiction is to avoid conflicts between the United States and foreign countries.

60. *Id.* at 386, 394.

61. *Id.* at 395. The court discussed FMC statutory powers at length, but this discussion was dicta.

62. *Id.* at 381. The court also stated policy considerations behind the decision. Among these policy considerations were the express congressional provision for ICC jurisdiction over analogous joint through routes between the continental United States and Alaska or Hawaii; the greater efficiencies and benefits to be derived from single agency regulation of transportation to the full extent of offered service in the domestic offshore trades; and the absence of any showing that the FMC is more qualified than the ICC to regulate the route in question. *Id.* at 399-400.

63. In fact, the court referred to the more familiar pre-recodification sections in the text of the opinion, relegating the recodification sections to footnotes.

method complied with the admonition against the recodification effecting substantive change. Use of the court's interpretation of the recodified Act will prevent jurisdictional chaos and permit government regulatory bodies to maintain their traditional jurisdiction. The specific result in the case is important because the court upheld the exclusive jurisdiction of the ICC over joint through routes between a point in the United States and an outlying possession, territory, or state. This reaffirmed ICC jurisdiction to the full extent asserted under *Ex Parte 261*.[64] Under the instant decision, regulation of transportation is further consolidated into one administrative agency. Consolidation will lead to greater administrative efficiency and allow the ICC to develop a transportation system to meet the needs of an expanding international economy.

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64. In *Commonwealth of Pennsylvania v. ICC, supra* note 15, the court was confronted with the question of filing tariffs for international joint through routes. The ICC did not attempt to assert substantive regulatory jurisdiction over the marine segment of the route, recognizing that it fell with FMC jurisdiction.