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# Recent Decisions

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# RECENT DECISIONS

## CONSTITUTIONAL LAW — COMMERCE CLAUSE — STATE TAX ON INSTRUMENTALITIES OF FOREIGN COMMERCE INVALID WHEN TAX RESULTS IN MULTIPLE TAXATION AND IMPAIRS FEDERAL UNIFORMITY IN REGULATION OF FOREIGN TRADE

### I. FACTS AND HOLDING

Appellants,[1] six Japanese shipping companies, brought an action for refund of personal property taxes levied by the City and County of Los Angeles[2] against appellants' cargo shipping containers.[3] Pursuant to California's ad valorem property tax provisions,[4] several counties and cities levied property taxes on appellants' cargo shipping containers that were temporarily within the State.[5] The containers, and the vessels on which the containers were carried, were being used exclusively for hire in the transportation of cargo in foreign commerce.[6] Appellants paid a property tax levied by their home port of Japan on both the vessels and containers.[7]

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1. Appellants are incorporated under the laws of Japan and their principal places of business and commercial domiciles are located in that country.

2. Appellees, the City and County of Los Angeles, are political subdivisions of the State of California through which Appellants' containers pass intermittently in the course of international commerce.

3. "A container is a permanent reusable article of transport equipment . . . designed to facilitate the handling, loading, stowage aboard ship, carriage, discharge from ship, movement, and transfer of large numbers of packages." Simon, *The Law of Shipping Containers*, 5 J. MAR. L. & COM. 507, 513 (1974). Shipping containers are typically 8 feet high, 8 feet wide, and 8 to 40 feet long. *Id.* at 510. *See* Customs Convention on Containers, May 18, 1956, art. I(b), [1969] 20 U.S.T. 301, 304, T.I.A.S. No. 6634.

4. Property present in California on March 1 of any year is subject to ad valorem property tax. CAL. REV. & TAX. CODE §§ 117, 405, 2192 (West 1970 & Supp. 1978).

5. Although none of Appellants' containers are permanently located in California, a number of Appellants' containers were present in Appellees' jurisdictions on the lien dates in 1970, 1971, and 1972. It was stipulated that this number was fairly representative of the containers' "average presence" during each year. Appellees levied property taxes in excess of $550,000 on the assessed value of the containers present on March 1 of the three years in question. Japan Line, Ltd. v. County of Los Angeles, 99 S. Ct. 1813, 1815 (1979).

6. Each container is in constant transit except for time spent for repairs and loading and unloading of cargo. A container's average stay in the state in less than three weeks. *Id.*

7. *Id.* The trial court found that Japan taxes Appellants' containers at their

The Superior Court for the County of Los Angeles held that application of the property tax in derogation of the home port doctrine subjected international commerce to multiple taxation and was, therefore, unconstitutional under the commerce clause.[8] The California Court of Appeal, citing recent criticism of the home port doctrine by the California Supreme Court, reversed, holding that the possibility of double taxation of instrumentalities of foreign commerce could not limit local power to tax upon a nondiscriminatory apportioned basis.[9] The Supreme Court of California sustained the validity of the tax as applied, concluding that the possibility of double taxation was not attributable to discrimination by the taxing state, and thus had no role in commerce clause considerations of multiple burdens.[10] On appeal to the United States Supreme Court, *reversed*. *Held*: California's imposition of its apportioned ad valorem property tax on shipping containers owned, based, and registered in Japan, and used exclusively in international commerce, violates the commerce clause because the tax results in the multiple taxation of instrumentalities of international commerce and impairs federal uniformity in the regulation of foreign trade. *Japan Line, Ltd. v. County of Los Angeles,* 99 S. Ct. 1813 (1979).

## II. LEGAL BACKGROUND

The power of local authorities to levy property taxes on instrumentalities of commerce which come within their territorial limits

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full value. *See* Brief for United States as Amicus Curiae at 17a, 19 n.9.

8. The opinion of the Superior Court is not officially reported. Japan Line, Ltd. v. County of Los Angeles, Nos. SOC 25617, 27593 & 30557 (Superior Court of Los Angeles County). The court followed Scandanavian Airlines System, Inc. v. County of Los Angeles, 56 Cal.2d 11, 363 P.2d 25, 14 Cal. Rptr. 25, *cert. denied,* 368 U.S. 899 (1961). *See* note 13 *infra* & accompanying text.

9. Japan Line, Ltd. v. County of Los Angeles, 61 Cal. App.3d 562, 132 Cal. Rptr. 531 (1976). The court concluded that Scandanavian Airlines Systems, Inc. v. County of Los Angeles, 56 Cal.2d 11, 363 P.2d 25, 14 Cal. Rptr. 25, *cert. denied,* 368 U.S. 899 (1961), the case followed by the court below, had been effectively overruled. The California Supreme Court upheld the imposition of an apportioned property tax on domestically owned instrumentalities used in foreign commerce in Sea-Land Service, Inc. v. County of Alameda, 12 Cal.3d 772, 528 P.2d 56, 117 Cal. Rptr. 448 (1974) (domestically-owned containers used in interstate and foreign commerce held subject to apportioned property tax).

10. Japan Line, Ltd. v. County of Los Angeles, 20 Cal.3d 180, 571 P.2d 254, 141 Cal. Rptr. 905 (1977). The court deemed foreign ownership and use of containers irrelevant for purposes of constitutional analysis. *Id.* at 186, 571 P.2d at 257-58, 141 Cal. Rptr. at 908-09.

has long been the subject of judicial scrutiny. In early cases, the courts emphasized the exclusive fiscal jurisdiction of the home port of the instrumentality.[11] The home port doctrine was first enunciated in *Hays v. Pacific Mail S.S. Company*.[12] In *Hays*, the Supreme Court held that California could not tax ocean-going vessels, owned and registered in New York, that were temporarily located in California ports. The Court concluded that ships entering the ports of other states are immune from state control or taxation, and are subject only to the exclusive jurisdiction of the federal government to regulate commerce with foreign nations and between the states.[13] The Court later emphasized that the home port doctrine was not dependent upon actual taxation in the home port, but upon a concept of exclusive federal jurisdiction dictated by the necessity for national uniformity.[14] The home port doctrine thus empowered the state of domicile to tax in full and denied all other jurisdictions any power to tax instrumentalities of commerce. The home port doctrine was based on common law jurisdiction to tax.[15] In more recent decisions, however, courts have employed a commerce clause analysis when evaluating the power of local authorities to tax instrumentalities of commerce.[16] In construing the commerce power,[17] the Court has consistently held that the Constitution confers to immunity from state taxation and

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11. *See, e.g.*, Southern Pac. Co. v. Kentucky, 222 U.S. 63 (1911); Ayer & Lord Tie Co. v. Kentucky, 202 U.S. 409 (1906); Morgan v. Parham, 83 U.S. (16 Wall.) 471 (1873); St. Louis v. Ferry Co., 78 U.S. (11 Wall.) 423 (1871).

12. 58 U.S. (17 How.) 596 (1855).

13. *Id.*, at 598. California courts adopted the *Hays* doctrine. Scandanavian Airlines System, Inc. v. County of Los Angeles, 56 Cal.2d 11, 363 P.2d 25, 14 Cal. Rptr. 25, *cert. denied*, 368 U.S. 899 (1961) (under the home port doctrine, foreign-owned aircraft flown exclusively in international commerce could not be subjected to local personal property tax even on an apportioned basis). *See* California Shipping Co. v. City and County of San Francisco, 150 Cal. 145, 88 P. 704 (1907); Olson v. City and County of San Francisco, 148 Cal. 80 (1905); City and County of San Francisco v. Talbot, 63 Cal. 485 (1883); Sayles v. County of Los Angeles, 59 Cal. App.2d 295, 138 P.2d 768 (1943).

14. Morgan v. Parham, 83 U.S. (16 Wall.) 471, 478 (1873).

15. *See* 49 CAL. L. REV. 968, 970-71 (1961); Note, *State Taxation of International Air Transportation*, 11 STAN. L. REV. 518, 522 & n.19 (1959); Page, *Jurisdiction to Tax Tangible Moveables*, 1945 WIS. L. REV. 125, 143-44.

16. *See, e.g.*, Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1948); Pullman's Palace-Car Co. v. Pennsylvania, 141 U.S. 18 (1891); Sea-Land Service, Inc. v. County of Alameda, 12 Cal.3d 772, 528 P.2d 56, 117 Cal. Rptr. 448 (1974).

17. U.S. CONST. art. I, § 8, cl.3 provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . . ."

that "interstate commerce must bear its fair share of the state tax burden."[18] This rule applies to instrumentalities of commerce and courts have sustained property taxes levied on various forms of transportation equipment.[19] Thus, as a rule for the taxation of transitory instrumentalities of commerce, the home port doctrine has gradually yielded to a rule of fair apportionment among the states. The apportionment doctrine authorizes apportioned property taxation in each jurisdiction in which a vehicle of interstate commerce travels.[20] The apportionment doctrine was first applied to vehicles of interstate commerce traveling by land,[21] and later extended to vessels operating exclusively in inland waters.[22] In *Complete Auto Transit, Inc. v. Brady,*[23] the Court announced standards for determining the constitutional validity of a state tax on instrumentalities of interstate commerce. The Court held that no impermissible burden on interstate commerce will be found if the state tax: (1) is applied to an activity with a substantial nexus with the taxing State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State.[24] In contrast to the evolution of a definite standard for evaluating the constitutional validity of state taxation of instrumentalities of interstate commerce, the Court has consistently distinguished the case of foreign commerce without

18. Washington Revenue Dept. v. Ass'n of Wash. Stevedoring Cos., 435 U.S. 734, 750 (1978).

19. *See, e.g.,* Braniff Airways, Inc. v. Nebraska State Board, 347 U.S. 590 (1954) (domestic aircraft); Ott v. Mississippi Valley Barge Line, 336 U.S. 169 (1948) (barges operating on inland waterways); Pullman's Palace-Car Co. v. Pennsylvania, 141 U.S. 18 (1891) (railroad rolling stock); Sea-Land Service, Inc. v. County of Alameda, 12 Cal.3d 772, 528 P.2d 56, 117 Cal. Rptr. 448 (1974) (cargo containers); Flying Tiger Line, Inc. v. County of Los Angeles, 51 Cal.2d 314, 333 P. 323 (1958) (domestic aircraft).

20. Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905); Union Refrigerator Transit Co. v. Lynch, 177 U.S. 149 (1900); American Refrigerator Transit Co. v. Hall, 174 U.S. 70 (1899).

21. Pullman's Palace-Car Co. v. Pennsylvania, 141 U.S. 18 (1891).

22. Ott v. Mississippi Valley Barge Line, 336 U.S. 169 (1948).

23. 430 U.S. 274, *reh. denied,* 430 U.S. 976 (1977).

24. 430 U.S. at 279. In the interstate commerce context, the Court has evidenced its willingness to allow states considerable leeway in developing apportionment formulae. In Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978), the Court upheld Iowa's single-factor income tax apportionment formula, even though it created a possibility of multiple taxation because of the use of three-factor formulae by other states. The Court noted that the commerce clause does not call for mathematical exactness nor for the rigid application of a particular formula; only if the resulting valuation is palpably excessive will it be set aside. 437 U.S. at 274.

enunciating clear constitutional standards.[25] When reviewing attempts to tax instrumentalities of foreign commerce, the Court has focused on the risk of multiple taxation and the need for federal uniformity in the regulation of foreign commerce. It is well-established that multiple taxation may violate the commerce clause.[26] Although apportionment in interstate commerce means "multiple burdens logically cannot occur,"[27] the same solution is not available in the context of international commerce. The Court has recognized that in the absence of an authoritative tribunal capable of enforcing full apportionment, a state tax, even though apportioned, may subject foreign commerce to the risk of double taxation in violation of the commerce clause.[28] The overriding concern of the Court in reviewing state attempts to tax instrumentalities of foreign commerce has been the preservation of national uniformity. The objective of federal uniformity has been consistently recognized in the field of international relations.[29] In the import-export context, the Court has noted the Framers' principal concern that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments."[30]

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25. *See, e.g.,* Braniff Airways, Inc. v. Nebraska State Board, 347 U.S. at 600 (approving apportioned tax on domestic aircraft, but distinguishing vessels operating in international waters); Ott v. Mississippi Valley Barge Line, 336 U.S. at 173-74 (approving apportioned tax on barges operating in inland waters, but not reaching the issue of the taxability of international commerce); Pullman's Palace-Car Co. v. Pennsylvania, 141 U.S. at 23-24 (approving apportioned tax on railroad rolling stock, but distinguishing vessels engaged in interstate or foreign commerce in international waters).

26. Evco v. Jones, 409 U.S. 91, 94 (1972); Central R. Co. v. Pennsylvania, 370 U.S. 607, 612 (1962); Standard Oil Co. v. Peck, 342 U.S. 382, 384-85 (1952); Ott v. Mississippi Valley Barge Line, 336 U.S. at 174; J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 311 (1938).

27. Washington Revenue Dept. v. Ass'n of Wash. Stevedoring Cos., 435 U.S. at 746-47.

28. Evco v. Jones, 409 U.S. at 94 (*quoting* J.D. Adams Mfg. Co. v. Storen, 304 U.S. at 311).

29. *See, e.g.,* Henderson v. Mayor of New York, 92 U.S. 259, 273 (1876) (regulation "must of necessity be national in its character" when it affects "a subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected."); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 319 (1851) ("Whatever subjects of this [the commercial] power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.").

30. Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976). It has been suggested that decisions under the import-export clause provide a proper analogy for

Conventions and treaties to which the United States is a party also reflect a national policy aimed at removing local impediments to the use of shipping containers and other instrumentalities in international commerce.[31] Because of the paramount need for national uniformity in dealing with other nations, the Court has traditionally upheld the exclusive jurisdiction of the federal government in the regulation of foreign commerce.[32] The concept of exclusive federal jurisdiction is based on several factors. It has been suggested that the Framers of the Constitution intended the scope of the foreign commerce power to be greater than that of interstate commerce.[33] Also cited is the possibility of retaliation by nations disadvantaged by state actions.[34] Differing levels of state taxation could trigger automatic retaliation by those nations whose tax statutes operate on the basis of reciprocity.[35] The leading cases illustrate

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commerce clause analysis because of the similarity in policies underlying the constitutional provisions. *See* Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment,* 25 MINN. L. REV. 432, 448-57, 470-73.

31. *See, e.g.,* Convention for the Avoidance of Double Taxation, United States-Japan, Mar. 8, 1971, [1972] 23 U.S.T. 967, 1084-85, T.I.A.S. No. 7365 (income "derived by a resident of a Contracting State . . . from the use, maintenance, and lease of containers and related equipment . . . in connection with the operation in international traffic of ships or aircraft . . . is exempt from tax in the other Contracting State."); Customs Convention on Containers, [1969] 20 U.S.T. at 304 (containers are granted "temporary admission free of import . . . prohibitions and restrictions," provided they are used exclusively in foreign commerce and are subject to re-exportation); Treaty of Friendship, Commerce and Navigation Between the United States of America and Japan, Apr. 2, 1953, [1953] 4 U.S.T. 2063, T.I.A.S. No. 2863 (according Japan "most favored nation" status).

32. Board of Trustees v. United States, 289 U.S. 48, 59 (1933); Bowman v. Chicago & N.R. Co., 125 U.S. 465, 482 (1888); Henderson v. Mayor of New York, 92 U.S. 259, 273 (1876); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 28-29 (1824) (Johnson, J., concurring); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

33. *See* Note, *State Taxation of International Air Carriers,* 57 NW. U. L. REV. 92, 101 & n.42 (1962); Note, 11 STAN. L. REV., *supra* note 15, at 525-26 & n.29; Abel, *supra* note 30 at 465-75. *See also* THE FEDERALIST No. 42, at 279-83 (J. Cooke ed. 1961) (J. Madison); 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 478 (1911) (J. Madison).

34. *See, e.g.,* Chy Lung v. Freeman, 92 U.S. 275, 279 (1876) (invalidating California's bond requirement for Chinese immigrants because of fear of economic or military retaliation against United States).

35. *See, e.g.,* Vermogensteuergesetz (VSTG) § 2, § 3, *republished in* I Bundesgesetzblatt (BGBl) 949 (Apr. 23, 1974) (providing exemption for foreign-owned instrumentalities of commerce only if owner's country grants a reciprocal exemp-

the concerns generated by state attempts to tax instrumentalities of foreign commerce, but the Court has yet to articulate a constitutional standard for evaluating the validity of a state tax imposed on foreign-owned instrumentalities of international commerce.

## III. The Instant Opinion

In the instant opinion,[36] the Court summarily rejected the home port doctrine as a proper tool of commerce clause analysis,[37] turning instead to the analysis of the commerce clause employed in the context of interstate commerce. After reviewing the standards enunciated in *Complete Auto* for state taxation of instrumentalities of interstate commerce,[38] the Court rejected appellees' assertions that the commerce clause analysis is equally viable in the context of either interstate or foreign commerce, and concluded that a more extensive constitutional inquiry is required when a state seeks to tax instrumentalities of foreign commerce.[39] The Court identified two considerations in addition to those articulated in *Complete Auto,*[40] for evaluating the constitutionality of a tax on instrumentalities of foreign commerce: (1) the enhanced risk of multiple taxation, and (2) the impairment of federal uniformity in the regulation of foreign commerce.[41] According to the Court, the basis for its approval of apportioned property taxation in the context of interstate commerce has been the Court's ability to enforce full apportionment by all potential taxing entities.[42] The Court recognized, however, that no tribunal can ensure full apportion-

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tion for German-owned instrumentalities).

36. The Court found it had jurisdiction to review under 28 U.S.C. § 1257(2) because the California Supreme Court had sustained the validity of California's ad valorem property tax against Appellants' contention that the tax as applied was repugnant to the commerce clause and various treaties. 99 S. Ct. at 1817.

37. The Court noted that the home port doctrine was "anachronistic," and may even have been "abandoned." *Id.* at 1819 (*quoting* Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 320 (1944) (Stone, C.J., dissenting)).

38. 99 S. Ct. at 1819.

39. *Id.* at 1820.

40. *See* text accompanying note 24 *supra.*

41. 99 S. Ct. at 1820-21. The Court limited its inquiry to the question of whether foreign-owned instrumentalities used exclusively in international commerce may be subjected to apportioned property taxation by a State. The Court did not consider the taxability of foreign-owned instrumentalities engaged in interstate commerce, or of domestically owned instrumentalities engaged in foreign commerce. 99 S. Ct. at 1819 n.7.

42. 99 S. Ct. at 1821. *See* note 27 *supra* & accompanying text.

ment when one of the taxing entities is a foreign nation. Therefore, the Court asserted that a state tax, even though apportioned to reflect an instrumentality's presence within the State, may violate the commerce clause by subjecting foreign commerce to the risk of multiple tax burdens.[43] The Court emphasized the need for federal uniformity in the regulation of foreign commerce.[44] The Court concluded that despite the formal parallelism of the constitutional grants, the Framers intended the scope of the foreign commerce power to be greater than that of interstate commerce.[45] Additionally, the Court noted that cases stressing the need for national uniformity in dealing with other nations echo this distinction, especially cases arising under the import-export clause.[46] The Court found that even assuming the California tax satisfied the requirements of *Complete Auto,* the tax could not withstand scrutiny under either of the two additional tests announced by the Court.[47] First, the Court determined that California's tax failed under the multiple burdens test because Japan has the right and power to tax the containers in full. Further, the Court found that California's tax actually resulted in multiple taxation because appellants paid a tax in Japan on their containers.[48] Second, the Court found

43. 99 S. Ct. at 1821. *See* note 28 *supra* & accompanying text.

44. 99 S. Ct. at 1821-22. *See* notes 29-32 *supra.* The Court identified several ways in which state taxation of instrumentalities of foreign commerce may frustrate the achievement of federal uniformity, including: the possibility of international disputes over reconciling apportionment formulae; retaliation against American-owned instrumentalities present in jurisdictions disadvantaged by the levy; and, varying degrees of multiple taxation among the states preventing the nation from "speaking with one voice" in regulating foreign commerce. 99 S. Ct. at 1822-23.

45. 99 S. Ct. at 1821. *See* note 33 *supra* & accompanying text.

46. 99 S. Ct. at 1821-22. The Court found the need for federal uniformity to be no less paramount under the commerce clause, noting the similarity in policies underlying the import-export and commerce clauses. *See* notes 30 & 33 *supra* & accompanying text.

47. 99 S. Ct. at 1823.

48. *Id.* Because California's tax created actual multiple taxation, the Court did not decide "under what circumstances the mere *risk* of multiple taxation would invalidate a state tax, or whether this risk would be evaluated differently in foreign, as opposed to interstate, commerce." *Id.* at n.17. The Court distinguished Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978), on three grounds: (1) only the possibility of multiple taxation was involved, not actual multiple taxation; (2) mathematical imprecision in apportionment formulae posed the risk of multiple taxation, not lack of apportionment; and (3) the Moorman case involved interstate commerce, not the more sensitive area of foreign commerce. *Id.* at 1825. For a discussion of *Moorman see* note 24 *supra.*

that California's tax failed to satisfy the national uniformity requirement. The Court noted the desirability of national uniformity in international commerce, as evidenced by the Customs Convention on Containers to which the United States and Japan are parties[49] and concluded that California, by its unilateral acts, cannot be permitted to impede the Nation's conduct of its foreign relations and foreign trade.[50]

## IV. COMMENT

The instant opinion provides a constitutional standard for evaluating the validity of a state tax imposed on instrumentalities of foreign commerce by extending the interstate commerce model developed in *Complete Auto*.[51] In formulating the additional considerations required in the context of foreign commerce, the Court adopted the same factors traditionally employed by courts in assessing the power of local authorities to tax instrumentalities of commerce.[52] The courts have consistently focused on the risk of multiple taxation and the need for exclusive federal jurisdiction to ensure federal uniformity in the regulation of foreign commerce.[53] The instant decision combines these traditional considerations with the test developed for interstate commerce to produce a much needed constitutional standard for assessing the validity of a state tax on instrumentalities of foreign commerce. The Court's holding is, however, very narrow. Because there was actual multiple taxation in this case, the Court did not consider the circumstances under which the mere risk of multiple taxation would invalidate a state tax.[54] The Court also limited its inquiry to foreign-owned instrumentalities operating exclusively in international commerce, without addressing issues raised by both foreign-owned instrumentalities operating in interstate commerce, and domestically-owned

49. 99 S. Ct. at 1823-24. *See* note 31 *supra* & accompanying text.

50. 99 S. Ct. at 1824. Justice Rehnquist dissented, adopting the rationale of the unanimous opinion of the Supreme Court of California. *See* note *supra* & accompanying text.

51. *See* text accompanying notes 24 & 41 *supra*.

52. For example, although the Court rejected the home port doctrine as a tool of commerce clause analysis, it adopted considerations traditionally recognized as underpinnings of that doctrine. *See* notes 13 & 14 *supra* & accompanying text. *See also* Scandanavian Airlines System, Inc. v. County of Los Angeles, 56 Cal.2d at 19-26, 363 P.2d at 29-33, 14 Cal. Rptr. at 29-33.

53. *See* notes 26, 29, 30 & 32 *supra* & accompanying text.

54. *See* note 48 *supra*.

instrumentalities operating in foreign commerce.[55] The instant decision, however, will have a significant impact on states in which instrumentalities of foreign commerce are temporarily located. Additionally, the Court rejected policy arguments raised by appellees based on the loss of revenue for services rendered by the state, without indicating when these reasons might become so compelling that they would require a different result.[56] The Court simply advised that these arguments were addressed to the wrong forum, while recognizing the existence of a federal remedy.[57]

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55. *See* note 41 *supra*. The California Supreme Court, however, has upheld the imposition of apportioned state taxation on domestically owned instrumentalities. *See* note 9 *supra*.

56. 99 S. Ct. at 1825-26. The Court merely suggested that the cost of these services may be recouped in part through other types of levies, such as user fees. *Id.*

57. *Id.*

# IMMIGRATION—LAWFUL UNRELINQUISHED DOMICILE—DEPORTABLE RESIDENT ALIEN MUST ACCUMULATE SEVEN YEARS OF LAWFUL DOMICILE SUBSEQUENT TO ADMISSION FOR PERMANENT RESIDENCE TO BE ELIGIBLE FOR DISCRETIONARY RELIEF

## I. FACTS AND HOLDING

Petitioner, a resident alien of Mexican nationality convicted of knowingly inducing the entry of two illegal aliens into the United States,[1] petitioned for review of an order by the Board of Immigration Appeals (BIA)[2] denying him discretionary relief from deportation[3] under § 212(c) of the Immigration and Nationality Act (INA).[4] Petitioner illegally entered the United States in 1969,[5] and was apprehended and given leave to voluntarily depart[6] shortly after his marriage to his common law wife.[7] The Immigration and

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1. Knowingly inducing the entry of illegal aliens into the U.S. is a deportable offense, 8 U.S.C. § 1324(a)(4) (1976), and petitioner was sentenced to two consecutive three-year terms in prison.

2. The BIA is a quasi-judicial body existing by the grace of the Attorney General. The Attorney General is charged with the administration and enforcement of the Immigration and Nationality Act (INA) and can delegate his powers and duties to any employee of either the Immigration and Naturalization Service (INS) or the Department of Justice. INA § 103(a), 8 U.S.C. § 1103(a) (1976). *See generally* GORDON & ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 1.10b (rev. ed. 1977).

3. More than 700 grounds for the deportation of an alien from the U.S. exist today. *See generally* J. WASSERMAN, IMMIGRATION LAW AND PRACTICE 143 (1973).

4. INA § 212(c), 8 U.S.C. § 1182(c) (1970) provides:

> (c) Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)-(25), (30), and (31), of subsection (a) of this section. Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title.

5. Petitioner's initial illegal entry into the U.S. occurred in 1963. In November, 1969, the INS apprehended petitioner and gave him leave to voluntarily depart at government expense, as provided in 8 U.S.C. § 1252(g) (1976). Petitioner left the country and illegally returned the following day. Since this second illegal entry, petitioner has not been outside of the United States.

6. Voluntary departure is a form of discretionary relief for a deportable alien, carrying less stigma than deportation. 8 U.S.C. § 1254(e) (1976). *See* GORDON & ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 7.2a (rev. ed. 1977).

7. Petitioner's spouse was admitted for permanent residence in 1963, following her marriage to a U.S. citizen. She divorced her first husband the following year.

Naturalization Service (INS) granted a series of extensions of petitioner's voluntary departure date pending receipt of a permanent visa. On April 7, 1972, the permanent visa was granted. Petitioner's conviction occurred in August of 1975. The INS argued, relying on *Matter of Anwo,*[8] that petitioner failed to fulfill one of the three requirements of § 212(c),[9] and was thus ineligible for discretionary relief from deportation. Specifically, the INS alleged petitioner was ineligible for relief as he had not maintained a "lawful unrelinquished domicile of seven consecutive years."[10] Petitioner, conceding deportability, relies on *Lok v. INS*[11] to contend: (1) admission for permanent residence is not the same as lawful domicile; (2) the seven year period of domicile began to run in 1969, when he last entered the United States; and (3) disparate application of § 212(c) relief by the INS in the Second Circuit and the Ninth Circuit violated his equal protection rights as embodied in the fifth amendment due process clause.[12] The immigration judge denied petitioner's request for discretionary relief and the BIA affirmed. On appeal to the United States Court of Appeals for the Ninth Circuit, *affirmed. Held:* When a resident alien commits a deportable offense, he must have accumulated seven years of lawful unrelinquished domicile subsequent to his admission for permanent residence to be eligible for § 212(c) discretionary relief, and disparate application of the § 212(c) requirement by the INS between two circuit courts does not violate an alien's equal protection rights as long as a rational basis for the INS actions exists. *Castillo-Felix v. INS,* 601 F.2d 459 (9th Cir. 1979).

## II. LEGAL BACKGROUND

The origin of § 212(c) is in the Seventh Proviso[13] to section three

8. No. 2604 (BIA 1977), *aff'd sub nom.* Anwo v. INS, 607 F.2d 435 (D.C. Cir. 1979).

9. Section 212(c) literally applies only to aliens who are: (1) "lawfully admitted for permanent residence," (2) returning to a "lawful unrelinquished domicile of seven consecutive years," and who (3) "temporarily proceeded abroad voluntarily and not under an order of deportation." *See* note 4 *supra.*

10. INA § 212(c), 8 U.S.C. § 1182(c) (1970).

11. 548 F.2d 37 (2d Cir. 1977). *See* notes 28, 28a *infra* & accompanying text.

12. The INS is following the *Lok* interpretation of § 212(c) in the Second Circuit, while continuing to require the seven year lawful residency requirement be accumulated subsequent to a lawful entry in all other circuits.

13. Act of Feb. 5, 1917, Pub. L. No. 301, ch. 29, § 3, 39 Stat. 875 provided that "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of

of the Immigration Act of 1917 (Seventh Proviso). Although this section was initially intended to apply only to exclusion proceedings, the BIA extended the Seventh Proviso to deportation proceedings in which the alien had departed and returned to the United States subsequent to he time the ground for deportation arose.[14] The Board further expanded the Seventh Proviso to include aliens who had no left the country subsequent to the conviction that gave rise to deportation.[15] In 1952, INA § 212(c)[16] replaced the Seventh Proviso. The following year, relying heavily on the legislative history of § 212(c),[17] the BIA construed the "lawful unrelinquished

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the Secretary of Labor, and under such conditions as he may prescribe."

14. *In re* L, 1 I.&N. Dec. 1 (1940). The BIA said that a strict construction of the Seventh Proviso would be "capricious and whimsical," and viewed the exercise of discretion as a *nunc pro tunc* correction of the record of entry. *Id.* at 5-6.

15. *In re* A, 2 I.&N. Dec. 459 (1946); *In re* C, 1 I.&N. Dec. 631 (1943).

16. Act of June 27, 1952, Pub. L. No. 414, ch. 477, § 212, 66 Stat. 182 (codified at 8 U.S.C. § 1182(c) (1976). *See* note 4 *supra.*

17. The BIA's reliance on the legislative history of § 212(c) may be overextended, as the history also supports the opposing argument. By rejecting a more specific domicile requirement, the Congressional intent may have been that a lawful entry need not precede the seven years of unrelinquished domicile. The Senate history provides, in relevant part:

> The suggestion was made that if the words "established after a lawful entry for permanent residence" were inserted in the seventh proviso to qualify the domicile of the alien it would effectively eliminate practically all of the objectionable features, and at the same time the Attorney General would be left with sufficient discretionary authority to admit any lawful resident aliens returning from a temporary visit abroad to a lawful domicile of seven consecutive years.
>
> The subcommittee recommends that the proviso should be limited to aliens who have the status of lawful permanent residence who are returning to a lawful domicile of seven consecutive years after a temporary absence abroad.

S. REP. No. 1515, 81st Cong., 2d Sess. 384 (1950). The history in the House of Representatives is similarly unclear:

> Under present law, in the case of an alien returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years, he may be admitted in the discretion of the Attorney General under such circumstances as the Attorney General may prescribe. Under existing law the Attorney General is thus empowered to waive the grounds of exclusion in the case of an alien returning under the specified circumstances even though the alien had never been lawfully admitted to the United States. The comparable discretionary authority invested in the Attorney General in section 212(c) of the bill is limited to cases where the alien has been previously admitted for lawful permanent residence and has proceeded abroad voluntarily and not under order of deportation.

H. R. REP. No. 1365, 82d Cong., 2d Sess. 51 (1952).

domicile" requirement as demanding the accumulation of seven years of domicile subsequent to a lawful entry.[18] The BIA continued to expand § 212(c) relief, applying it to a § 241(a)(1) deportation proceeding[19] and a § 245 adjustment of status proceeding.[20] In *In re Arias-Uribe*,[21] however, the BIA abruptly ended its expansive interpretive trend in a § 241(a)(11) deportation proceeding[22] when it refused to extend § 212(c) relief to an otherwise eligible alien who had not left the country since his narcotics conviction.[23] This strict interpretation of § 212(c), upheld by the Ninth Circuit,[24] was substantially relaxed in *Francis v. INS*,[25] a Second Circuit decision holding the third § 212(c) requirement[26] applicable not only to aliens who temporarily proceed abroad, but also to non-departing aliens.[27] The *Francis* court held the BIA interpretation of § 212(c) unconstitutional, noting that as Congress' purpose in passing § 212(c) was to provide flexibility in the law, no reason existed for making petitioner's failure to travel abroad the crucial factor in determining whether petitioner would

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18. *In re* S, 5 I.&N. Dec. 116 (1953). Equating the terms "lawfully admitted for permanent residence" and "lawful unrelinquished domicile," the BIA specifically held:

> [W]e construe [§ 212(c)] to mean that the alien must not only have been lawfully admitted for permanent residence but must have resided in this country for 7 consecutive years subsequent to such lawful admission for permanent residence; and that not only the admission must be lawful but that the period of residence must be lawful.

*Id.* at 118.

19. *In re* G.A., 7 I.&N. Dec. 274 (1956) (Alien who had temporarily left the country entitled to § 212(c) relief in a deportation proceeding). The BIA relied on the expansive interpretation of § 212(c) used in *In re* L, 1 I.&N. Dec. 1 (1940). *See* note 14 *supra.*

20. *In re* Smith, 11 I.&N. Dec. 325 (1965) (§ 212(c) relief held available to an alien requesting an adjustment of status under INA § 245, 8 U.S.C. § 1255, even when alien is not returning to the U.S. after voluntary departure).

21. 13 I.&N. Dec. 696 (1971), *aff'd*, 466 F.2d 1198 (9th Cir. 1972). *See also* Dunn v. INS, 499 F.2d 856 (9th Cir. 1974), *cert. denied*, 419 U.S. 1106 (1975).

22. 8 U.S.C. § 1251(a)(11) (1970). Section 241(a)(11) provides for the deportation of certain narcotics dealers.

23. 13 I.&N. Dec. at 700. The BIA specifically noted that the "requirement that an alien must have 'temporrily proceeded abroad voluntarily . . .' makes it clear the Congress curtailed our authority for the advance exercise of section 212(c) relief in a deportation proceeding." *Id.*

24. *See* note 21 *supra.*

25. 532 F.2d 268 (2d Cir. 1976).

26. *See* note 9 *supra.*

27. *See* note 15 *supra* & accompanying text.

remain in the United States.[28] The Second Circuit continued this liberal construction of § 212(c) in *Lok v. INS*,[29] striking down the BIA's strict interpretation of the domicile requirement[30] and holding the 1953 BIA decision in *In re S*[31] erroneous.[32] In ascertaining the intent of the legislature through the statutory interpretation process, the courts are presented with the option of continuing to expand or restrict the future scope of § 212(c) discretionary relief.

## III. The Instant Decision

In the instant case, the court noted the judicial expansion of § 212(c) relief to deportation proceedings,[33] yet determined that the statutory requirements for obtaining such relief should be narrowly construed.[34] Relying on *Matter of Anwo*,[35] the court held that the INS interpretation of § 212(c), requiring that the seven years of unrelinquished domicile be accumulated subsequent to admission for permanent residence, should prevail.[36] Although applying the analytical framework used by the Second Circuit in *Lok*[37] the instant court disagreed with *Lok*'s ultimate conclusion. Looking first to the statutory language of § 212(c),[38] the instant court concluded that the statutory mandate was ambiguous.[39] The court thus rejected the *Lok* court's rationale that as the phrase "admitted for permanent residence"[40] was specifically defined elsewhere in the INA, and as "lawful unrelinquished domicile" was nowhere defined, the two phrases were clearly different in meaning.[41] The

28. 532 F.2d at 273.
29. 548 F.2d 37 (2d Cir. 1977).
30. *Lok* held petitioner eligible for § 212(c) relief even though petitioner had not accumulated seven years of residence in the United States subsequent to his admission to permanent resident alien status. *Id.* at 41.
31. 5 I.&N. Dec. 116 (1953). *See* note 18 *supra.*
32. 548 F.2d at 40-41.
33. *See* note 14 *supra.*
34. Castillo-Felix v. INS, 601 F.2d 459, 466 (9th Cir. 1979).
35. No. 2604 (BIA 1977) (interim decision), *aff'd sub nom.* Anwo v. INA, 607 F.2d 435 (D.C. Cir. 1979).
36. 601 F.2d at 462-63.
37. 548 F.2d 37 (2d Cir. 1977).
38. *See* note 4 *supra.*
39. 601 F.2d at 464.
40. "The term 'lawfully admitted for permanent residence' means that the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. § 1101(a)(20) (1976).
41. Lok v. INS, 548 F.2d at 40.

instant court next looked to the legislative history of § 212(c).[42] In contrast to the *Lok* court, which viewed the rejection of a more specific version of § 212(c) by the Senate Judiciary Committee[43] as strong evidence favoring an expansive reading of § 212(c),[44] the instant court found the legislative history speculative and the Congressional intent unclear.[45] The instant court next noted that deference should be given to the interpretation of an Act by the agency responsible for administering it.[46] The court ultimately disagreed with the *Lok* court's finding that the INS interpretation of § 212(c) relief must be overturned as it was inconsistent with the statutory mandate and frustrated Congressional policy.[47] Due to the persuasiveness of the INS justifications for its policy,[48] the instant court, citing *Baur v. Mathews,*[49] determined that only a clear showing of contrary Congressional intent would justify overruling the INS interpretation of § 212(c).[50] Finally, the instant court dismissed the equal protection challenge to the disparate application of § 212(c) by reasoning that since the right of a permanent resident alien to remain in the United States has never been deemed a fundamental right,[51] inconsistent action by the INS between the circuits would be upheld so long as a rational basis for such action existed.[52] Noting the independence of federal appellate courts, the instant court upheld the behavior of the INS as a rational attempt to comply with the mandates of each circuit.[53]

Judge Takasugi, in a lengthy dissent, reasoned that § 212(c)

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42. *See* note 17 *supra.*
43. *See id.*
44. 548 F.2d at 40-41.
45. 601 F.2d at 464.
46. *Id. See* Udall v. Tallman, 380 U.S. 1, 16 (1965) (deference is usually accorded the agency responsible for the administration of an Act).
47. In overturning the INS interpretation of § 212(c), the *Lok* court relied on NLRB v. Brown, 380 U.S. 278, 290-92 (1965), for the principle that administrative decisions which are inconsistent with a statutory mandate or which frustrate the congressional policy underlying the legislation must be set aside. 548 F.2d at 40.
48. The major tenets of the INS argument are as follows: (1) That § 212(c) was clearly designed to serve as a limitation on the Seventh Proviso regarding the eligibility of aliens; and (2) that a liberal reading of § 212(c) would undermine § 244(a), 8 U.S.C. § 1254(a), a suspension of deportation provisions imposing strict qualitative requirements. 601 F.2d at 465-66.
49. 578 F.2d 228, 233 (9th Cir. 1978).
50. 601 F.2d at 465.
51. *See* Francis v. INS, 532 F.2d 268, 272 (2d Cir. 1976).
52. 601 F.2d at 467.
53. *Id.*

relief was designed to aid *all* worthy individuals who had maintained seven consecutive years of residency in the United States regardless of when permanent resident status was acquired.[54] Takasugi explained that rejection of harsher language by the Senate Judiciary Committee in 1950 is illustrative of congressional awareness that the emotional, familial, and financial repercussions of deportation applied to all resident aliens.[55] Noting that deportation statutes are to be construed in favor of the alien,[56] the dissent argued that upon achieving permanent resident alien status, an alien's last entry into the country retroactively becomes his first day of lawful residency under the general doctrine of *nunc pro tunc*.[57]

## IV. COMMENT

The instant court's interpretation of § 212(c) represents a major retreat from a historical trend favoring a more liberal interpretation of the section, and may severely narrow the availability of discretionary relief in deportation proceedings. The long-standing trend of construing § 212(c) in light of the humanitarian purpose embodied in the Seventh Proviso[58] has been broken. Thus, although a BIA decision expanding the scope of the Seventh Proviso to include deportation proceedings[59] was relied on to similarly expand the scope of § 212(c),[60] and although a BIA decision holding Seventh Proviso relief available to resident aliens who had not left the country subsequent to the conviction giving rise to deportation[61] was relied on to similarly expand § 212(c) relief to include non-departing aliens,[62] the instant court deemed itself bound to rigidly construe the technical requirements of § 212(c). Despite the ambiguity of the Congressional intent underlying § 212(c), it is clear that Congress did intend the section to serve as a limitation on the class of aliens eligible for such relief.[63] These limitations

54. *Id.* at 468 (Takasugi, J. dissenting).
55. *Id.*
56. *Id.* at 468-69. *See* Lennon v. INS, 527 F.2d 187, 193 (2d Cir. 1975) (deportation statutes, when ambiguous, must be construed in favor of the alien).
57. 601 F.2d at 470-71 (Takasugi, J. dissenting). *See also* note 14 *supra.*
58. *See* note 13 *supra.*
59. *See* text accompanying note 14 *supra.*
60. *See* note 19 *supra* & accompanying text.
61. *In re* A, 2 I.&N. Dec. 459 (1946).
62. Francis v. INS, 532 F.2d 268 (2d Cir. 1976).
63. *See* note 17 *supra.*

must not be mechanistically applied, however, but must instead be applied in a consistent, rational fashion in view of the severe repercussions that deportation has upon the alien and his family.[64] The liberal interpretation which courts, including the Ninth Circuit, have given another deportation relief section illustrates this point. Section 244(a), unlike § 212(c), is a suspension of deportation provision which imposes strict qualitative requirements on the alien. One of these requirements is that an alien lawfully admitted for permanent residence be continuously present in this country for seven years prior to application for discretionary relief.[65] Despite this literal requirement, brief trips outside the United States have been held *not* to break the continuity of the seven year period.[66] Under this application of § 244(a), aliens returning from a brief sojourn outside of the country are eligible for discretionary relief as non-departing aliens. The liberal construction given § 244(a) should similarly be given § 212(c) when, as here, a resident alien has spent a substantial number of years building ties in this country.[67] In view of the large number of illegal aliens continually entering the United States,[68] the *nunc pro tunc* argument advanced by Judge Takasugi in his dissenting opinion appears to be the most workable solution.[69] Under this view, the last entry of an alien into the United States would become the first day of lawful residence upon achieving permanent resident status. Furthermore, a finding that a resident alien is eligible for § 212(c) relief does not mean that such relief will necessarily be forthcoming.[70] Ultimately, a

64. "Deportation is a sanction which in severity surpasses all but the most Draconian criminal penalties." Lok v. INS, 548 F.2d at 39.

65. INA § 244(a)(1) specifically provides that an alien lawfully admitted for permanent residence have "been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application." 8 U.S.C. § 1254(a)(1) (1976).

66. Yanez-Jacquez v. INS, 440 F.2d 701 (5th Cir. 1971); Git Foo Wong v. INS, 358 F.2d 151 (9th Cir. 1966); *In re* Harrison, 13 I.&N. Dec. 540 (1970). *But see* Heitland v. INS, 551 F.2d 495 (2d Cir. 1977) (continuity of residence broken when there was an original illegal entry, a departure, and a deceptive reentry).

67. Petitioner had spent 13 years in the United States prior to his conviction, is married to a permanent resident alien, and has five children—all of whom were born here. Castillo-Felix v. INS, 601 F.2d at 459-461.

68. *See* STAFF OF HOUSE COMM. ON THE JUDICIARY, 95TH CONG., 1ST SESS., ILLEGAL ALIENS: ANALYSIS AND BACKGROUND 5-9 (Comm. Print 1977).

69. The BIA advanced a *nunc pro tunc* rationale for expanding § 212(c) relief as early as 1940. *See* note 14 *supra.*

70. As discretionary relief is exercised on a case by case basis, an alien's eligibility for such relief does not mean a favorable exercise of such relief will be

strict construction of § 212(c), like a strict construction of the Seventh Proviso, would indeed be "capricious and whimsical."[71]

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made. *See* Accardi v. Shaughnessy, 347 U.S. 260 (1954); Asimakopoulos v. INS, 445 F.2d 1362 (9th Cir. 1971).

71. *In re* L, 1 I.&N. Dec. at 5-6. *See* note 14 *supra.*

## LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT—MANUFACTURER MAY SUE STEVEDORE FOR INDEMNIFICATION FROM LIABILITY ARISING OUT OF LONGSHOREMEN'S INJURIES—THEORY OF EQUITABLE CREDIT DOES NOT APPLY TO THE LHWCA

### I. FACTS AND HOLDING

Defendant and third-party plaintiff,[1] a manufacturer, sought recovery from third-party defendant,[2] a stevedoring company, for fifty percent of a judgment rendered against the manufacturer in a personal injury suit brought by plaintiffs.[3] The accident occurred when a hydrocrane, manufactured by defendant, went out of control while being driven down a ramp into the hold of a vessel.[4] The hydrocrane killed one longshoreman and injured another. Plaintiffs recovered compensation benefits from the stevedore, their employer, under the Longshoremen and Harbor Workers' Compensation Act (LHWCA).[5] In addition, they brought suit against the manufacturer for damages allegedly caused by the negligent manufacture of the hydrocrane. The manufacturer impleaded the stevedore, seeking indemnification for its liability to plaintiffs, alleging that the stevedore's negligence in the accident[6] constituted a breach of the warranty of workmanlike performance implied in the contract between the stevedore and the vessel.[7] As a third-party beneficiary of the contract, the manufacturer sued for damages resulting from the breach. The stevedore asserted that section 905 of the LHWCA, as amended in 1972,[8] barred suits for indemni-

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1. Bucyrus-Erie Co.
2. Atlantic Container Line, Ltd.
3. Plaintiffs are an injured longshoreman and the wife and estate of a deceased longshoreman.
4. The S.S. Atlantic Causeway.
5. 33 U.S.C. §§ 901-950 (1976).
6. The jury found that the stevedore negligently provided an incompetent driver for the hydrocrane.
7. In Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956), the Supreme Court implied a warranty of workmanlike performance in a contract between a stevedore and a vessel. *See* notes 19-21, *infra,* and accompanying text.
8. 33 U.S.C. § 905(a) in relevant part provides:

> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . .

fication by third parties against compensation-paying employers. The district court rejected this contention, holding that while the LHWCA immunized the stevedore from liability for contribution, it did not preclude a suit for partial indemnification. The district court ruled that the manufacturer was entitled to indemnification either as a third-party beneficiary of the stevedore's contract with the vessel or based upon a theory of quasi-contract. As a result of the jury's determination that the stevedore and the manufacturer were equally responsible for the accident, the district court ordered the stevedore to pay fifty percent of the judgment against the manufacturer. On appeal by the stevedore,[9] the manufacturer further contended that if it could not recover indemnification, its liability to plaintiffs should be reduced by fifty percent on the basis of an equitable credit.[10] The Second Circuit Court of Appeals *reversed with dismissal of the third-party complaint. Held*: Although the LHWCA does not bar an action for indemnification brought by a manufacturer against a stevedore with whom the manufacturer is found jointly responsible for an injury to the stevedore's employee, the manufacturer is not a third-party beneficiary of the contract between the stevedore and the vessel; furthermore, the LHWCA does not contemplate a reduction in a third-party's liability on the basis of an equitable credit. *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714 (2d Cir. 1978).

## II. LEGAL BACKGROUND

The Longshoremen and Harbor Workers' Compensation Act[11] is the federal workmen's compensation law for longshoremen and

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33 U.S.C. § 905(b) in relevant part provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party . . . and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.

9. The manufacturer failed to cross-appeal against the original plaintiffs. *See* text accompanying note 45, *infra*.

10. An equitable credit would reduce the manufacturer's liability by treating the plaintiff's original claim under the LHWCA as an effective settlement of that portion of the damages attributable to the stevedore's negligence, *i.e.*, fifty percent. The manufacturer's liability is then limited to the remaining damages. *See* notes 33-34, *infra*, and accompanying text.

11. 33 U.S.C. §§ 901-950 (1976). Congress enacted the LHWCA in 1927, patterning it on the New York Workmen's Compensation Law.

harbor workers who are not covered by state compensation laws.[12] The employer's liability to the employee or his or her representative arising out of a work-related injury is limited to compensation payments made under the LHWCA.[13] This exclusivity provision, however, does not prohibit the injured longshoreman from bringing suits against parties other than his employer.[14] In 1946, the Supreme Court in *Seas Shipping Co. v. Sieracki,*[15] allowed injured longshoremen to recover against a vessel for breach of the vessel's warranty of seaworthiness.[16] Actions based on the breach of this warranty do not require proof of negligence; merely establishing the existence of an unseaworthy condition that caused the accident will sustain recovery.[17] By easing the longshoreman's burden of proof, *Sieracki* increased the likelihood of success in third-party actions against vessels. As a result, *Sieracki* shifted a major portion of the burden of compensating injured longshoremen from stevedores to vessels. Efforts of shipowners to shift the liability back to the stevedores initially failed.[18] In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.,*[19] the Supreme Court ruled that there could be no contribution in non-collision maritime cases.[20] Thus, even when a stevedore was concurrently negligent in

12. The Supreme Court, in Southern Pacific Co. v. Jensen, 244 U.S 205 (1917), held that states have no power to compensate by statute injuries occurring on navigable waters. The Supreme Court subsequently struck down as an unconstitutional delegation of power congressional legislation granting the states power to provide compensation for injuries occurring on navigable waters. Washington v. Dawson & Co., 264 U.S. 219 (1924); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920).

13. *See* note 8, *supra,* for the text of section 905.

14. Prior to 1959, the LHWCA allowed the injured employee either to receive compensation benefits or to bring a third party suit. The 1959 amendments permitted the employee to bring a third party action without foregoing compensation. 33 U.S.C. § 933 (1976); S. REP. No. 428, 86th Cong., 1st Sess. 1-2, *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 2134, 2134-35.

15. 328 U.S. 85 (1946).

16. The unseaworthiness doctrine implies a warranty by shipowners to the seamen that the vessel is seaworthy. *See* G. GILMORE & C. BLACK, LAW OF ADMIRALTY 383-404 (2d ed. 1975).

17. "The liability is neither limited by conceptions of negligence nor contractual duty. It is a form of absolute duty owing to all within the range of its humanitarian policy." 328 U.S. at 94-95.

18. *See* Gorman, *The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments,* 6 J. MAR. L. & COM. 14 (1974).

19. 342 U.S. 282 (1952).

20. Other efforts to shift liability were equally unavailing. In Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953), the vessel argued that its liability to the

causing an injury, a vessel found liable under the unseaworthiness doctrine could not institute a contribution proceeding.[21] In *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*,[22] however, the Supreme Court recognized a theory that would shift liability back to the negligent stevedore. In *Ryan*, the Court implied a warranty of workmanlike performance into the contract between the stevedore and the vessel.[23] By treating the stevedore's negligence as a breach of this warranty, a vessel could recover at least partial indemnification for compensation paid to the injured employee. Distinguishing it from the tort-based contribution theory barred by *Halcyon*,[24] the Court interpreted the warranty as a form of indemnification. Subsequent cases extended the *Ryan* indemnity doctrine to parties not in privity to the warranty agreement.[25] Responding to adverse effects of the *Sieracki-Ryan* development, Congress amended the LHWCA in 1972.[26] The amendments overruled *Sieracki* by remov-

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employee should be reduced by the amount of compensation paid by the stevedore under the LHWCA. The Supreme Court held, however, that any reduction in the vessel's liability is a form of contribution and is therefore barred by *Halcyon*. *Id.* at 408. Furthermore, the Court found this proposal inconsistent with LHWCA section 933, which grants the employer a lien to recover compensation payments it made to the employee out of the employee's third-party recovery, 346 U.S. at 412.

21. For example, in Alaska Steamship Co., Inc. v. Petterson, 347 U.S. 396 (1954), a stevedoring company in charge of a vessel carelessly mishandled oil, resulting in injury to an employee. Although the negligence of the stevedore created the unseaworthy condition, the vessel owner was liable and the stevedore completely escaped liability.

22. 350 U.S. 124 (1956).

23. The Court compared the stevedore's warranty "to a manufacturer's warranty of the soundness of its manufactured product." *Id.* at 133-34.

24. The ship owner's action here is not founded upon a tort or upon any duty which the stevedoring contractor owes to its employee. The third party complaint is grounded upon the contractor's breach of its purely consensual obligations *owing to the shipowner* to stow the cargo in a reasonably safe manner.

*Id.* at 131-32.

25. In both Crumady v. The J.H. Fisser, 358 U.S. 423 (1959), and Waterman S.S. Corp. v. Dugan & McNamara, Inc., 364 U.S. 421 (1960), the vessel recovered indemnity as a third-party beneficiary of the warranty between the stevedore and a charterer and consignee respectively.

26. The House Education and Labor Committee heard testimony indicating that a result of *Sieracki* and *Ryan*, the volume of third party litigation substantially increased. Although the frequency of injuries declined and benefits remained stable, third party litigation increased overall insurance costs. H.R. REP. No. 1441, 92d Cong., 2d Sess. 4-8, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4698, 4701-05.

ing unseaworthiness as a basis for a longshoreman's recovery against a vessel.[27] Congress also overruled *Ryan* by voiding all agreements and warranties between a stevedore and a vessel insofar as they indemnify the vessel for third-party actions.[28] Recognizing that inadequate awards under the LHWCA may have precipitated the judicial responses in *Sieracki* and *Ryan*, Congress substantially increased the benefits available under the LHWCA. Two problem areas remain in the wake of the 1972 amendments, however. First, LHWCA section 905(b) voids only indemnity contracts between a stevedore and a vessel; no reference is made concerning the validity of indemnity agreements between stevedores and non-vessels.[29] In spite of the specific language in section 905(b), some courts have interpreted it as a bar to suits for indemnity by non-vesels as well as vessels, reasoning that Congress intended the 1972 amendments to curtail circuitous actions spawned by the *Sieracki* and *Ryan* decisions.[30] Other courts, reading the section literally, have refused to hold that compensation-paying employers are protected from non-vessels seeking indemnity.[31] Another judicial approach accepts the literal construction of section 905(b), but denies any recovery based upon a *Ryan* indemnity theory.[32] Sec-

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27. The House Committee concluded that the rationale for the seaworthiness doctrine, "long sea voyages and duties of obedience to orders not generally required of other workers," was inapplicable to longshoremen. H.R. REP. No. 1441, 92d Cong., 2d Sess. 6, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4698, 4703.

28. The House Committee stated that since unseaworthiness actions were no longer available, the *Ryan* warranty was unnecessary. H.R. REP. No. 1441, 92d Cong., 2d Sess. 7, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4698, 4704.

29. 33 U.S.C. § 905(b).

30. Spadola v. Viking Yacht Co., 441 F. Supp. 798 (S.D.N.Y. 1977). *Spadola* utilized the rationale developed in Lucas v. "Brinknes" Schiffahrts Ges., 379 F. Supp. 759, 767 (E.D. Pa. 1973), in which the court determined that the overriding concern of Congress in passing the 1972 amendments was "to insulate the . . . employer from any liability other than that provided by the Act." Because third party suits for contribution divert funds otherwise available for compensation, they should be barred.

31. Gould v. General Mills, Inc., 411 F. Supp. 798 (S.D.N.Y. 1977). *Gould* extends a cause of action to any third party not within the definition of vessel found at 1 U.S.C. § 3. *See* note 45, *infra*, for the text of 1 U.S.C. § 3. In Brkaric v. Star Iron & Steel Co., 409 F. Supp. 516, 521 (E.D.N.Y. 1976), the court said that the 1972 amendments were a compromise between stevedores, their employees, and ship owners, leaving the rights of other parties unaffected.

32. S.S. Seatrain Louisiana v. California Stevedore and Ballast Co., 424 F. Supp. 180 (N.D. Cal. 1976). According to the *Seatrain* court, the 1972 amendments do not merely prohibit vessels from seeking indemnification in personal

ond, since the demise of *Ryan*, it is possible for a negligent third party to be held liable for the entire amount of damages to an injured longshoreman, even though the employer is concurrently negligent. To remedy this perceived inequity, the District of Columbia Court of Appeals in *Murray v. United States*[33] introduced the doctrine of equitable credit into federal workmen's compensation law. By accepting compensation from the employer under the LHWCA, the employee is held to have settled half of his claim.[34] Consequently, any judgment against a third party is reduced by one-half. Criticism of the *Murray* credit focused on the impairment of the employer's right to recovery in a third party suit.[35] The Fourth Circuit, responding to this criticism, modified the *Murray* credit in *Edmonds v. Compagnie Generale Transatlantique*[36] by requiring the third party to pay both its percentage of damages plus the amount of compensation payments made by the employer.[37] The Ninth Circuit[38] comprehensively criticized and rejected both proposals on three grounds: (1) An equitable credit would tend to negate the congressional intention of avoiding direct

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injury suits involving employees, but void the *Ryan* warranty itself. A non-vessel claiming as a beneficiary of the *Ryan* warranty is a beneficiary of a nullity. Recovery is available on a separate agreement for indemnification between a stevedore and a non-vessel.

33. 132 U.S. App. D.C. 91, 405 F.2d 1361 (1968). *Murray* involved injuries to a government employee covered by the Federal Employees' Compensation Act. In Dawson v. Contractors Transport Corp., 151 U.S. App. D.C. 401, 467 F.2d 727 (1972), the court held that the *Murray* rationale applied equally to the LHWCA, which is the applicable workmen's compensation statute in the District of Columbia.

34. The *Murray* credit is based on the tort theory,

> that where one joint tortfeasor causing injury compromises the claim, the other tortfeasor, though unable to obtain contribution because the settling tortfeasor had "bought his peace," is nonetheless protected by having his tort judgment reduced by one-half, on the theory that one-half of the claim was sold by the victim when he executed the settlement.

405 F.2d at 1365.

35. *See* note 20, *supra*.

36. 558 F.2d 186 (4th Cir. 1977). Upon rehearing en banc, the Fourth Circuit reaffirmed its earlier decision pertaining to proportionate fault but did not award the plaintiff the additional amount of damages equal to the employer's compensation lien. It avoided the question of the lien on the grounds that the employer was not a party to the action. 577 F.2d 1153, 1156 (1978).

37. The employer would then recover amounts it previously paid from the employee.

38. Dodge v. Mitsui Shintaku Ginko K.K. Tokyo, 528 F.2d 669 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 1685 (1976).

or indirect third-party actions;[39] (2) the equitable credit merely shifts the inequities from the third party to the injured employee;[40] and (3) the solution is one for Congress, not the courts, to devise.[41] Subsequent to the decision in the instant case, the Supreme Court resolved the split in the circuits by overruling the Fouth Circuit's holding in *Edmonds*.[42] The Supreme Court held that the 1972 amendments to the LHWCA did not evidence congressional intent to introduce the rule of proportionate fault into admiralty law. The Court noted that because the judiciary created the maritime rule making each joint tortfeasor liable for the full amount of damages, it would normally have the power to change or abolish the rule.[43] The Court reasoned, however, that the 1972 amendments to the LHWCA created a balance of rights and liabilities among the affected maritime groups in reliance upon the traditional rule.[44] To overturn the rule would upset the balance achieved by Congress. While the Supreme Court decision in *Edmonds* apparently forecloses consideration of theories of proportionate fault under the LHWCA, it does not explicitly treat the use of a proportionate fault theory when a non-maritime party is involved.

## III. The Instant Opinion

In the instant case the Second Circuit held that LHWCA section 905(b) does not bar suit by non-vessels seeking indemnity from employers who paid compensation under the LHWCA. According to the court, the term "vessel," as used in section 905(b), has a specific statutory definition.[45] Extending the application of section 905(b) beyond that definition is therefore precluded. Furthermore, the court found nothing in the logic or legislative history of the LHWCA to support expansion. Vessels, in giving up their right to

39. *Id.* at 672.

40. *Id.*

41. *Id.*

42. Edmonds v. Compagnie Generale Atlantique, 47 U.S.L.W. 4868 (U.S. June 27, 1979).

43. *Id.* at 4872. In *The Atlas*, the Supreme Court adopted into admiralty law the common law rule that a plaintiff has a cause of action for the full amount of damages against only one of several tortfeasors.

44. "Once Congress has relied upon conditions that the courts have created, we are not as free as we would otherwise be to change them." 47 U.S.L.W. at 4872.

45. 1 U.S.C. § 3 provides that "[t]he word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

indemnification, received as a *quid pro quo* the congressional prohibition on longshoremen's suits based upon unseaworthiness.[46] Non-vessles, having received no comparable *quid pro quo,* did not give up any rights, including the right to indemnification.[47] Nevertheless, the court found that the manufacturer, even if viewed as a consignor of goods, could not sue as a third-party beneficiary of an implied warranty agreement between the vessel and the stevedore.[48] The court noted that third-party beneficiary actions based upon a stevedore's implied warranty have succeeded only when the third party had a close working relationship with the stevedore.[49] A consignor of goods is too remotely related to the transaction to have been contemplated by the contracting parties as a third-party beneficiary. Finally, the court stated that the issue of the equitable credit should have been raised on a cross-appeal against the original plaintiffs and therefore dismissed that claim.[50] In dictum, however, the court proceeded to reject the *Murray* credit as developed by the District of Columbia Circuit.[51] The court reasoned that *Murray's* reduction of the third party's liability to its proportionate share impairs the employer's right to recoup compensation payments out of any subsequent recovery by an employee in a third party suit.[52]

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46. 579 F.2d at 721.

47. The legislative history gives no indication that Congress ever discussed indemnification rights of non-vessels. In the instant case the stevedore unsuccessfully argued that had Congress considered the issue, it would have barred non-vessel rights of indemnification on the ground that the 1972 amendments were designed to avoid the circuitous three-party lawsuits created by *Ryan* and *Sieracki.* 579 F.2d at 721. *See also,* Lucas v. "Brinknes" Schiffahrts Ges., 379 F. Supp. 759 (E.D. Pa. 1973).

48. The court found that the manufacturer was not an intended beneficiary of the warranty. *See* RESTATEMENT (SECOND) OF CONTRACTS § 133(1) (Tent. Draft No. 4 1968).

49. To date, only vessels and employees of vessels have recovered as third-party beneficiaries of the stevedore's warranty. This situation typically arises when a non-vessel, such as a shipyard or a charterer, contracts for the stevedore's services. Since the services are to be performed on board a vessel, any breach of the warranty is likely to result in damage to the vessel. Thus, the warranty is said to be for the vessel's protection and benefit. 579 F.2d at 722-23 (collecting cases).

50. In effect, the manufacturer attempted to reduce the plaintiffs' recovery on appeal without making the plaintiffs a party to the appeal. *Id.* at 725.

51. Murray v. United States, 132 U.S. App. D.C. 91, 405 F.2d 1361 (1968). *See* text accompanying notes 20, 33, 34, *supra.*

52. 579 F.2d at 725-26. *See* 342 U.S. at 282; note 20 *supra,* and accompanying text.

## IV. COMMENT

From an equitable standpoint, the Second Circuit is clearly dissatisfied with the result it reaches.[53] A partically negligent party must pay the entire amount of damages, while an equally negligent employer completely escapes liability.[54] Yet to impose an equitable credit upon the employee, as proposed by the District of Columbia and Fourth Circuits, merely rearranges the inequities. As the court points out, no rational basis exists for reducing the plaintiff's recovery.[55] The court prefers a solution in which the third-party defendant is adjudged liable *in toto* and then receives contribution from the negligent employer up to, but not exceeding, the amount of the employer's compensation payments.[56] This proposal allows a more equitable allocation of damages, preserves the employee's right to bring third-party actions,[57] and limits the stevedore's liability to the payments agreed upon in the LHWCA.[58] The court did not adopt the proposal in the instant case because *Halcyon*[59] interprets the LHWCA as prohibiting contribution from a stevedore to a third party. Moreover, the subsequent Supreme Court decision in *Edmonds*[60] indicates that it will not entertain theories of proportionate fault when liability is based upon the 1972 amendments. Nevertheless, the Second Circuit's proposal should not be discarded lightly. In both *Halcyon* and *Edmonds* the Supreme Court eschewed judicial intervention because Congress was the appropriate forum for accommodating the interests of the various maritime groups.[61] While this rationale clearly applies to disputes among maritime groups, it has little force when applied to non-maritime parties with nó political impact on the LHWCA, such as manufac-

53. 579 F.2d at 725.

54. Under LHWCA section 933, the stevedore will be reimbursed out of the plaintiffs' recovery for any compensation it paid to the plaintiffs. *See* note 20, *supra.*

55. 579 F.2d at 725 and 726 n.8.

56. *Id.* at 726 n.8.

57. *See* note 11, *supra.*

58. 579 F.2d at 726 n.8.

59. 342 U.S. 282 (1952). The court also relied on Pope & Talbot v. Hawn, 346 U.S. 406 (1953).

60. 47 U.S.L.W. 4868 (June 26, 1979). *See* 47 U.S.L.W. at 4872; text accompanying notes 38, 39, 40.

61. "We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interest of these groups." 342 U.S. at 286. *See* note 39, *supra,* for the view of the Supreme Court in *Edmonds.*

turers.[62] Thus, it is not inconsistent with either *Halcyon* or *Edmonds* to grant non-maritime third parties a right of contribution against a stevedore. Furthermore, there are compelling reasons supporting judicial intervention in this circumstance. Federal courts have historically exercised a special responsibility for admiralty law.[63] They should not hesitate to make their own judgments on an issue that Congress has not explicitly or implicitly considered. Second, the minimal impact of non-maritime interest groups on the LHWCA renders a congressional remedy highly improbable. Third, even when maritime interest groups are involved, political resolutions to LHWCA problems have proved difficult to achieve. For example, Congress considered the question of inadequate LHWCA benefits for twelve years before enacting the 1972 amendments.[64] In light of the above, the courts must accept their responsibility as the only institution practically capable of filling the remaining gaps in the LHWCA.

*J. Andrew Hoyal, II*

62. Among the groups with interests in the LHWCA are carriers, shippers, employees, casualty insurance companies, and stevedoring companies. 342 U.S. at 286.

63. United States v. Reliable Transfer Co., 421 U.S. 397, 409 (1975). "This Court, in other appropriate contexts, has not hesitated to overrule an earlier decision and settle a matter of continuing concern, even though relief might have been obtained by legislation. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 n.1 (Brandeis, J., dissenting) (collecting cases)." *Id.* at 409 n.15 (majority opinion).

64. H.R. REP. No. 1441, 92d Cong., 2d Sess. 5, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4698, 4703.