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# Recent Decisions

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# RECENT DECISIONS

## IMMIGRATION—ENTRY—RESIDENT ALIEN WHO MAKES BRIEF VISIT OUTSIDE THE COUNTRY IS DEPORTABLE IF HE REENTERS UNITED STATES AT AN UNAUTHORIZED LOCATION WHILE AIDING ILLEGAL ALIENS TO ENTER

### I. FACTS AND HOLDING

Petitioner, a Mexican resident alien,[1] contests a deportation order by the Immigration and Naturalization Service (INS) issued after he was apprehended by INS officials upon his unauthorized reentry into the United States while allegedly aiding undocumented aliens[2] in making an illegal crossing into the United States.[3] Petitioner had traveled to Juarez, Mexico for a brief social visit. Although not personally involved, petitioner had knowledge of a travelling companion's plans to help undocumented aliens effect illegal entry into the United States.[4] Upon discovering that he did not have his alien registration card, petitioner decided to

1. Petitioner was admitted to the United States as a lawful resident alien in July 1979, and has since resided with his family in Anthony, New Mexico. Brief for Petitioner at 1, Laredo-Miranda v. Immigration & Naturalization Serv., 555 F.2d 1242 (5th Cir. 1977).

2. Undocumented aliens are nationals of other countries who have entered and remain in the United States without having obtained the proper documentation. Commentators are moving toward the use of the term "undocumented aliens" in place of "illegal aliens" in an effort both to describe accurately the legal status of those persons and to curtail the use of derogatory terms which have become associated with the term illegal alien. Salinas & Torres, *The Undocumented Mexican Alien: A Legal, Social and Economic Analysis,* 13 HOUS. L. REV. 863 n.1 (1976). *But see* Fogel, *Illegal Aliens: Economic Aspects and Public Policy Alternatives,* 15 SAN DIEGO L. REV. 63 n.1 (1977).

3. Petitioner was ordered deported for violation of section 241(a)(2) of the Immigration and Naturalization Act, 8 U.S.C. § 1251(a)(2) (1976), which subjects to deportation any alien who "entered the United States without inspection or at any time or place other than as designated by the Attorney General . . . ." Petitioner's actions in assisting the aliens have not been the subject of criminal prosecution. Laredo-Miranda v. Immigration & Naturalization Serv., 555 F.2d at 1247 (Wisdom, J., dissenting).

4. The INS did not contest petitioner's assertion that he had no intention of participating in the illegal crossing when he first entered Juarez. 555 F.2d at 1253 n.2.

Luis Salas, who made the plans to assist the aliens, has since been convicted of violating the immigration laws by aiding the illegal entry of aliens in this case. Brief for Respondent at 4, 555 F.2d at 1242.

cross with the undocumented aliens.[5] Petitioner was observed leading the undocumented aliens into the United States,[6] and all were arrested after crossing the border. Petitioner contested his deportation under the Immigration and Naturalization Act, asserting that his clandestine crossing did not constitute an "entry"[7] under the Act, and that therefore, he could not be subjected to deportation.[8] The immigration judge ordered petitioner deported for illegally entering the United States.[9] The Board of Immigration Appeals affirmed.[10] On appeal to the United States Court of Appeals for the Fifth Circuit, *affirmed. Held:* Where a resident alien reenters the United States at an unauthorized location while aiding the illegal entry of undocumented aliens, he meaningfully interrupts his permanent residence and is subject to deportation. *Laredo-Miranda v. Immigration and Naturalization Service,* 555 F.2d 1242 (5th Cir. 1977).

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5. Petitioner could have crossed at an authorized border station even though he did not have his alien registration card with him. It is seemingly common practice for resident aliens to present themselves at authorized locations without papers and still be allowed entry upon proper presentation of such by a third party. Yanez-Jacquez v. Immigration & Naturalization Serv., 444 F.2d 701, 702 (5th Cir. 1971).

6. The briefs of the petitioner and respondent in the instant case present some conflict as to petitioner's role in crossing the river. Petitioner's brief asserts that petitioner merely joined the aliens in the illegal crossing after he discovered that he did not have his alien registration card with him. Brief for Petitioner at 10-11. Respondent's brief attributes an active role to petitioner *(e.g.,* checking the route, watching for border patrols, leading the group in the crossing). Brief for Respondent at 3.

7. Petitioner relied primarily on the rule developed in Rosenberg v. Fleuti, 374 U.S. 449 (1963), discussed in section II *infra.*

8. Several sections of the Immigration and Naturalization Act, including the one under which petitioner was ordered deported, require proof that the alien "entered" the country as the Act defines that term, before the alien can be deported. *See, e.g.,* 8 U.S.C. §§ 1251(a)(4), (13) (1976).

9. *See* 8 U.S.C. § 1252 (1976) (establishing procedures to be used in the deportation of an alien). These procedures include a hearing before a special officer of the INS, appeals to the Immigration Board of Appeals, and subsequent appeals to the federal district court or directly to the federal court of appeals.

10. The Board did, however, grant petitioner's application for voluntary departure, which the immigration judge had denied. The Act provides for voluntary departure as a form of discretionary relief for the deportable alien. 8 U.S.C. § 1254(e) (1976). Voluntary departure carries less legal stigma than deportation, and if the alien pays his own expenses for the departure, he will have less difficulty reentering the United States lawfully. 2 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE, § 7.2a (rev. ed. 1977).

## II. LEGAL BACKGROUND

The first definition of "entry" was formulated by the judiciary. The rule was stringent and made any entry of an alien a new entry, under which the alien, whether legal or illegal, might suffer deportation.[11] Certain exceptions developed, however, to soften the harsh consequences of this restrictive rule.[12] Finally, in 1952, Congress enacted, in the Immigration and Naturalization Act, the first statutory definition of "entry."[13] Length of absence from the United States was not addressed in the new definition, nor have courts regarded this fact as bearing on whether an entry has been made.[14] The Supreme Court first reviewed a deportation order based on "entry" after a brief absence from the country in *Rosenberg v. Fleuti*.[15] Noting the short duration of the resident alien's trip outside the United States, the Court construed the provision on entry liberally. It held that the resident alien's trip was within the exception created in the Act's new definition, which exempted from the consequences of an "entry" a resident alien whose departure from the country was neither intended nor voluntary. The Court stated that a brief casual excursion by a resident alien outside the United States would not necessarily subject him

11. Volpe v. Smith, 289 U.S. 422, 425 (1933).

12. In Di Pasquale v. Karnuth, 158 F.2d 878 (2d Cir. 1947), the court denied a deportation order predicated on the finding that the resident alien had "entered" the country by taking an overnight sleeper from Buffalo to Detroit with a route through Canada. The court refused to attribute to the alien an intent to leave the country under such circumstances. In Delgadillo v. Carmichael, 332 U.S. 388 (1947), the Supreme Court denied deportation of a resident alien who involuntarily spent one week in Cuba when his merchant ship was torpedoed during World War II and he was taken to Cuba for medical treatment. The focus of these modifications of the *Volpe* rule was the lack of intent to leave or of conscious control over the act of leaving the country.

13. Pub. L. No. 82-414, 66 Stat. 163 (codified at 8 U.S.C. §§ 1101-503 (1976)). 8 U.S.C. § 1101(a)(13) (1976) reads, in part, as follows:

> The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary. . . .

14. Bonetti v. Rogers, 356 U.S. 691 (1958); Pimental-Navarro v. Del Guercio, 256 F.2d 877 (9th Cir. 1958).

15. 374 U.S. 449.

to the effects of an "entry" upon his return provided that the alien had no intent, prior to departure, to meaningfully interrupt his permanent residence.[16] While this holding reflected a new trend toward increased legal protection for resident aliens,[17] it was also arguably a broader definition of "entry" than Congress had intended in the 1952 Act. As the dissent in *Fleuti* stated, the statutory language "not intended" and "not voluntary" appear to be taken directly from two federal court opinions,[18] and legislative history regarding the provision mentions only those two cases as support for the provision.[19] Nonetheless, the holding in *Fleuti* has retained its vitality as precedent for intepreting "entry" under the Act. Several factors are listed in *Fleuti* as guides for assessing whether the resident alien has intended to make an entry, including length of absence,[20] purpose for leaving the country,[21] need for travel documents, and any "other possibly relevant factors" in a given case.[22] The major purposes of the *Fleuti* rule were the reinforcement of the idea that every reentry of a resident alien need

16. *Id.* at 462.

17. *Id.* at 460. *See also* Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); 1 C. GORDON & H. ROSENFELD, *supra* note 10, at §§ 4.3b, c.

18. Delgadillo v. Carmichael, 332 U.S. 388; Di Pasquale v. Karnuth, 158 F.2d 878; *see* note 12 *supra.*

19. H.R. REP. No. 1365, 82d Cong., 2d Sess. 32 (1952); S. REP. No. 1137, 82d Cong., 2d Sess. 4 (1952); DEP'T OF STATE REP., [1952] U.S. CODE CONG. & AD. NEWS 1683-84; *see* Gordon, *Recent Developments in Judicial Review of Immigration Cases,* 15 SAN DIEGO L. REV. 9, 18-19 (1977).

20. Seldom has the disposition of a case rested on this factor alone, even though an early commentator referred to the *Fleuti* rule as the "brevity of visit" exception to the stringent *Volpe* rule on entry. 52 GEO. L.J. 182, 186 (1963). Gambino v. Immigration & Naturalization Serv., 419 F.2d 1355 (2d Cir. 1970), *cert. denied,* 399 U.S. 905 (1970), invoked the *Fleuti* rule on the basis of a short visit outside the United States by the resident alien and then dismissed the case summarily, leaving the case as one of the few examples in which length of absence truly was a deciding factor in determining whether an entry has been made. In most other cases following *Fleuti,* length of absence is merely a triggering device which allows the court to scrutinize the other pertinent factors surrounding the entry.

21. "Another [factor] is the purpose of the visit, for if the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws, it would appear that the interruption of residence thereby occurring would properly be regarded as meaningful." Rosenberg v. Fleuti, 374 U.S. at 462.

22. The Supreme Court in *Fleuti* left to the lower courts the option of adding to the list of determinative factors. "[T]he operation of these and other possibly relevant factors remains to be developed 'by the gradual process of judicial inclusion and exclusion,' Davidson v. New Orleans, 96 U.S. 97, 104 . . . ." *Id.*

not be regarded as a new entry and the protection of the resident alien against "unsuspected risks and unintended consequences of . . . a wholly innocent action."[23] Of the factors identified in *Fleuti* for evaluating whether a resident alien's departure was intended, "purpose for departure" and "other possibly relevant factors" have occasioned the most discussion in the lower courts. Some courts have stated that the purpose can be determinative of the alien's intent regardless of whether it is formed prior to or after departure.[24] Other courts have not addressed the matter of when the purpose was formed, but have examined the purpose solely for its impact on the alien's lawful residence.[25] In *Yanez-Jacquez v. Immigration and Naturalization Service,*[26] the Fifth Circuit Court of Appeals acknowledged that there was formation of intent to commit a criminal act prior to departure yet held, nevertheless, that there had been no entry, because the evidence did not show an intent to disrupt permanent resident status.[27] On the other hand, in *Vargas-Banuelos v. Immigration and Naturalization Service,*[28] the Fifth Circuit dealt with the case of a resident alien who had originally entered the United States in 1963 and then had been convicted in 1970 of assisting the illegal entry of aliens and accepting pay for this assistance.[29] Had the court found that this illegal behavior and its resulting conviction constituted a significant disruption of the resident alien's lawful status, and thus a new entry in 1972, this resident alien would have been subject to deportation under that section of the Act which states that any resident alien who assists illegal entry of aliens for gain within five years of entry

23. *Id.*

24. Lozano-Giron v. Immigration & Naturalization Serv., 506 F.2d 1073, 1078-79 (7th Cir. 1974); Palatian v. Immigration & Naturalization Serv., 502 F.2d 1091 (9th Cir. 1974); Bilbao-Bastida v. Immigration & Naturalization Serv., 409 F.2d 820 (9th Cir. 1969).

25. Martin-Mendoza v. Immigration & Naturalization Serv., 499 F.2d 918 (9th Cir. 1974), *cert. denied,* 419 U.S. 1113 (1975).

26. 440 F.2d 701 (5th Cir. 1971).

27. The resident alien had entered Mexico, armed with an ice pick, for the purpose of seeking revenge on assailants who had robbed and assaulted him the day before. His search for his assailants was unsuccessful and he thereafter reentered the United States at an unauthorized location. 440 F.2d at 701-02.

28. 466 F.2d 1371 (5th Cir. 1972).

29. *Id.* at 1371-72. The resident alien had originally left the country to visit relatives in Mexico. While in Mexico he agreed to assist aliens to enter the United States illegally, and he accepted payment from the aliens for this assistance which involved arranging transportation and the like. He then reentered the United States at an authorized checkpoint, contacting the aliens once again after they had entered illegally.

is deportable.[30] The Fifth Circuit held, however, that the resident alien had not made a new entry, and was thus not deportable, because it had not been shown that the resident alien had formed an intent to commit the criminal act prior to departure.[31] Power of the courts to consider other relevant factors has by necessity differed from case to case, but certain "other possibly relevant factors" considered in decisions since *Fleuti* can be classified. Factors often used in favor of the resident alien's position include: permanent ties to the United States;[32] a trip for vacation or legitimate business purposes;[33] and the nature of the environment to which the alien would be deported.[34] Factors which can work to the alien's disfavor include: undesirable character as manifested by actions contrary to United States' policies or laws but not related to immigration policies and laws;[35] lack of ties to this country;[36] and travel to a prohibited area.[37] The alien's receipt of the benefit of the rule, therefore, will be controlled not by the length of his stay but by the purpose of the trip and other factors peculiar to the case that the court might deem relevant. The petitioner's trip in the instant case was brief and originally for lawful purposes, but his decision to join with and assist undocumented aliens as they crossed illegally into the United States brought before the court consideration of petitioner's actions and purpose in relation to his permanent residence status.

## III. THE INSTANT DECISION

The court of appeals affirmed that petitioner's entry into the country was an entry under the Act, thus making petitioner sub-

30. 8 U.S.C. § 1251(a)(13) (1976). This section provides that any alien is deportable who, "prior to, or at the time of any entry or at any time within five years after any entry, shall have, knowingly and for gain . . . assisted, abetted, or aided any other alien to enter . . . the United States in violation of law. . . ."

31. 466 F.2d at 1374.

32. *E.g.*, lengthy residence in the United States, marriage to a citizen of the United States, employment or business in the United States, or habitation with family in the United States. *See* Vargas-Banuelos v. Immigration & Naturalization Serv., 466 F.2d 1371.

33. *See* Itzcourtz v. Selective Serv. Local Bd. No. 6, 447 F.2d 888 (2d Cir. 1971).

34. Lozano-Giron v. Immigration & Naturalization Serv., 506 F.2d at 1077-78.

35. Bufalino v. Immigration & Naturalization Serv., 473 F.2d 728 (3d Cir. 1973); Gambino v. Immigration & Naturalization Serv., 419 F.2d 1355.

36. Lozano-Giron v. Immigration & Naturalization Serv., 506 F.2d at 1077-78.

ject to deportation. The court found that petitioner's reentry did not fall within the exception provided for resident aliens under the statutory definition of entry. The court noted that petitioner's actions in reentering the country while helping undocumented aliens to enter illegally constituted a clear intent to meaningfully interrupt his permanent residence. The court observed that *Yanez-Jacquez* fully supported petitioner's position that a clandestine border crossing, by itself, would not be determinative in showing that he had interrupted his lawful residence.[38] The court also agreed with petitioner that under *Vargas-Banuelos* an intent to aid illegal aliens, formed after leaving the country for a short social visit, was not sufficient to make petitioner's reentry an entry under the Act. Since both a surreptitious entry and assistance to illegal aliens were present, however, in petitioner's case, and since *Fleuti* allowed that "other possibly relevant factors" might determine whether a resident alien's departure had interrupted his permanent residence, the court chose to look further. In so doing, it found that how and where petitioner reentered and when his intent was formed were not, by themselves, the deciding elements. The court noted that it was not concerned with petitioner's manner of crossing into the United States, but with his aid to the aliens entering illegally combined with his covert crossing. The court stated that its holding would have been no different had the petitioner presented himself with proper identification at the border station while transporting the aliens in the trunk of his car. Thus, the court viewed the simultaneity of the crossing and the assistance to the aliens as sufficient indication that petitioner had intended to interrupt his residence. In this way, the court reasoned that although it was not necessarily adhering to the specific language of *Fleuti, i.e.,* "purpose of leaving the country," it was, nonetheless, following the spirit of *Fleuti.* Since petitioner had acted contrary to immigration laws and policy, he was not in the class of resident aliens protected by the *Fleuti* rule. The petitioner was therefore in violation of the Act because he had assisted undocumented aliens to enter illegally while he surreptiously reentered the United States by the same illegal route. The dissenting judge, finding no prior criminal purpose nor any prior intent to disrupt permanent resi-

37. Bilbao-Bastida v. Immigration & Naturalization Serv., 409 F.2d 820.

38. The INS argued in the instant case that any resident alien who crosses into the United States at an unauthorized location should be held to have made an "entry" under the Act. The court disagreed, noting that although such a rule would be helpful to INS personnel in their enforcement of immigration laws, *Yanez-Jacquez* required a less stringent reading of the Act. 555 F.2d at 1245 n.6.

dent status, determined that petitioner had not made an entry under the Act.

## IV. COMMENT

Under the decision in the instant case a resident alien who actively assists the illegal entry of undocumented aliens is deportable even though the resident alien is not paid for this assistance. In reaching the conclusion that an active but unpaid role in aiding illegal entry into this country is the equivalent of intent to meaningfully interrupt residence, the Fifth Circuit Court of Appeals has altered the *Fleuti* rule. It has moved towards a less restrictive reading of *Fleuti,* which allows the court more flexibility in determining whether there has been an entry for the purposes of the Act. The instant court declined to consider when the purpose of departure was formed. Instead it considered only the purpose of the trip itself, as defined by the actions of the resident alien while travelling, and whether this purpose indicated an intent to interrupt residence.[39] This innovation runs counter to the court's interpretation of *Fleuti* in *Vargas-Banuelos.* The instant court distinguished the situation of the petitioner in *Vargas-Banuelos* from the situation of petitioner in the instant case by pointing out that Vargas-Banuelos's assistance to the aliens had not included participating in the illegal crossing but that he had entered legally. However, the court in *Vargas-Banuelos* specified that the resident alien's intent at the time of departure was a deciding factor and that a finding of no criminal purpose prior to departure meant no new entry under the Act. Thus, the instant court's disregard of when the petitioner made his decision to aid the undocumented aliens is difficult to reconcile with *Vargas-Banuelos.* On the other hand, this reinterpretation of the *Fleuti* rule does seem to be in accord with *Yanez-Jacquez.* In that case the Fifth Circuit examined the alien's purpose more for its overall impact on choice of residence, and, in its conclusion of "no entry," disregarded a prior criminal intent which was unrelated to specific immigration laws or policy. If the Fifth Circuit has indeed settled on the *Yanez-Jacquez* line of authority with this decision, it is apparent that a resident alien's actions will receive considerably more scrutiny when such actions contravene immigration law and/or policy. Given the large num-

39. Other circuits have also adopted this less restrictive reading of *Fleuti. See* Cuevas-Cuevas v. Immigration & Naturalization Serv., 523 F.2d 883 (9th Cir. 1975); Lozano-Giron v. Immigration & Naturalization Serv., 506 F.2d 1073; Palatian v. Immigration & Naturalization Serv., 502 F.2d 1091.

bers of undocumented aliens crossing into the United States[40] and the myriad problems attendant thereto, the more stringent standard applied in the instant decision may be warranted, especially in a jurisdiction likely to feel the direct impact of such an influx. In finding a new entry by equating assistance to illlegally entering aliens with an intent to interrupt permanent resident status, the instant court did not deal with the issue of whether the petitioner had assisted for gain. The *Fleuti* rule, as well as the statutory definition of entry, were designed to protect persons whose actions reflect an intent to continue residence in this country and who could not have anticipated that their actions would lead to the risk of losing that lawful status.[41] Arguably, petitioner could have assessed the risk he was taking and could have anticipated that his actions might jeopardize his status. This would put him outside the protection of *Fleuti.* The difficulty remains, however, that the law establishes aiding and abetting for gain as a deportable offence and not assistance without pay. Early criticisms of *Fleuti* characterized that decision as judicial intervention in the making of immigration law and policy,[42] the exclusive province of Congress. Assuming this criticism to be valid, where the Supreme Court in *Fleuti* went beyond what Congress legislated, the instant court goes even further. To use *Fleuti* and the exception in the provision on entry as tools to deport resident aliens arguably distorts their purpose and underscores the need for a revision of pertinent sections of the Act to more accurately reflect current immigration policies.

*Kate Eyler*

40. The undocumented aliens in the United States come from several countries, but the majority are from Latin America, and of that group, a high percentage are from Mexico. STAFF OF HOUSE COMM. ON THE JUDICIARY, 95TH CONG., 1ST SESS., ILLEGAL ALIENS: ANALYSIS AND BACKGROUND 5-9 (Comm. Print 1977); Salinas & Torres, *supra* note 2; Newsweek, July 4, 1977, at 15; U.S. News & World Rep., April 25, 1977, at 33.

41. President's Message to Congress on Undocumented Aliens, [1977] U.S. CODE CONG. & AD. NEWS 2716, *reprinted in* H.R. Doc. No. 202, 95th Cong., 1st Sess. (1977).

42. *See* 52 GEO. L.J. 182 (1963); 38 TUL. L. REV. 210 (1963). By contrast, recent favorable discussion describes *Fleuti* as the Supreme Court's modification of the immigration statute. Gordon, *supra* note 19, at 18.

**INTERNATIONAL BANKING—BANKRUPTCY—WHEN FOREIGN LAW PROHIBITS A FOREIGN BANKING CORPORATION FROM SUPPLYING REQUIRED CREDITORS LIST, CHAPTER XI PETITION SHOULD NOT BE DISMISSED AS INHERENTLY DEFECTIVE**

## I. FACTS AND HOLDING

Two American banks,[1] creditors of Banque de Financement, S.A. (Finabank), a Swiss banking corporation,[2] moved to dismiss Finabank's debtor's petition filed under Chapter XI of the Bankruptcy Act (Act).[3] Finabank became insolvent in December 1974 and initiated action in Switzerland the following month to attempt to effect rehabilitation.[4] In January 1975, Finabank's American creditors commenced breach of contract actions and obtained orders of attachment on funds that Finabank had on deposit in New York.[5] In May 1975, shortly before the expiration of the four-month limitation period for the avoidance of a preferential transfer[6] with regard to one of the attachments, Finabank filed for a Chapter XI arrangement. The debtor, however, never filed the required plan of arrangement[7] with the American court, nor did it disclose[8] the

1. First National Bank of Boston and Chase Manhattan Bank, N.A.

2. Finabank neither maintains an office nor does business in the United States.

3. Bankruptcy Act §§ 301-99, 11 U.S.C. §§ 701-99 (1976).

4. In January 1975, Finabank filed a petition for a "sursis bancaire," a maturity postponement, in Geneva. This resulted in an interlocutory moratorium period and the appointment of a provisional commissioner to evaluate Finabank's financial condition and the possibility of rehabilitation. When the outlook for recovery worsened, Finabank was permitted in July 1975, to substitute a petition for a "sursis concordataire," a banking moratorium. In July 1976, it was determined that rehabilitation was no longer a viable alternative, and in December 1976, Finabank's liquidation was ordered.

5. Finabank's American creditors claimed a total of $9,667,375 in their January 1975, suits against the Swiss banking corporation. Orders of attachment were issued on $12,500,000 which Finabank had on deposit with a New York City bank.

6. Section 60(a)(1) of the Bankruptcy Act defines preferential transfer as

> A . . . transfer, . . . , of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, . . . , the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

11 U.S.C. § 96a(1) (1976).

7. Section 306 of the Bankruptcy Act provides that an "'arrangement' shall mean any plan of a debtor for the settlement satisfaction, or extension of the time of payment of his unsecured debts, upon any terms." 11 U.S.C. § 706 (1976).

8. While Finabank disclosed the names of the domestic and foreign banks which were its creditors, it did not state the names and addresses of individual depositors.

requisite list of creditors,[9] asserting that to do so would violate Swiss law.[10] The bankruptcy court held that because the debtor in the instant case could not comply with the basic provisions of the Act, the court's inherent power to dismiss such a petition should be exercised.[11] The United States District Court for the Southern District of New York affirmed. On appeal to the United States Court of Appeals for the Second Circuit, *reversed and remanded.*[12] *Held:* When foreign law prohibits a foreign banking corporation from supplying the list of creditors required in a Chapter XI petition, and when possible substitutes for satisfaction of the creditors list exist, the foreign banking corporation's petition is not inherently defective and should not be dismissed under the inherent power of the bankruptcy court. *Banque de Financement, S.A. v. First National Bank,* 568 F.2d 911 (2d Cir. 1977).

## II. LEGAL BACKGROUND

The United States Constitution grants Congress the power to

9. Section 324(1) of the Bankruptcy Act provides that a petition must be accompanied by

> a statement of the executory contracts of the debtor, and the schedules and statement of affairs, if not previously filed: *Provided, however,* That if the debtor files with the petition a list of his creditors and their addresses and a summary of his assets and liabilities, the court may, on application by the debtor, grant for cause shown further time, not exceeding ten days, for filing the statement of the executory contracts and the schedules and statement of affairs . . . .

11 U.S.C. § 724(1) (1976).

Bankruptcy Rule 11-11 provides that "[t]he debtor shall file with the court schedules of all his debts and all his property, a statement of his affairs, and a statement of his executory contracts . . . ."

10. Swiss banking secrecy laws contain criminal penalties prohibiting the disclosure of information concerning a bank's creditors or depositors to a foreign court, even during bankruptcy proceedings.

11. The bankruptcy court held also that Finabank could not seek relief under the Bankruptcy Act because it was a "banking corporation" within the meaning of Bankruptcy Act § 4(a), 11 U.S.C. § 22(a) (1976), and thus ineligible. On appeal to federal district court, however, this issue was foreclosed by *In re* Israel-British Bank (London), Ltd., 536 F.2d 509 (2d Cir. 1976), *cert. denied,* 429 U.S. 978 (1976), which had earlier held that within the meaning of Bankruptcy Act § 4(a), a foreign bank is not considered a "banking corporation."

12. The case was reversed and remanded with instructions for the bankruptcy court to provide "an evidentiary hearing on the present viability of an administration under the Bankruptcy Act in this country," including the possible alternatives to a complete list of creditors. Banque de Financement, S.A. v. First National Bank, 568 F.2d 911, 922 (2d Cir. 1977).

promulgate uniform bankruptcy legislation.[13] In 1898 Congress passed the National Bankruptcy Act[14] to establish a uniform system of bankruptcy,[15] secure equal distribution of assets among creditors,[16] and to discharge the bankrupt from his financial obligations.[17] The Chandler Act of 1938[18] revised the Bankruptcy Act, and added the Chapter XI proceedings.[19] The purpose of a petition under Chapter XI is to provide an arrangement for the extension of payment deadlines, or for the satisfaction or settlement of unsecured debts.[20] In *SEC v. United States Realty & Improvement Co.*,[21] the Supreme Court held that bankruptcy courts have inherent power to dismiss a Chapter XI petition. The Court noted that a bankruptcy court, as a court of equity,[22] could dismiss such a petition in order to allow the party to seek more appropriate relief under Chapter X,[23] even in the absence of any Chapter XI provision specifically authorizing dismissal.[24] *Ira Haupt & Co. v.*

13. U.S. CONST. art. I, § 8, cl. 4. Individual states, however, may enact bankruptcy laws which are operative within their own boundaries if they do not conflict with federal statutes. International Shoe Co. v. Pinkus, 278 U.S. 261, 263-64 (1929).

14. Act of July 1, 1898, ch. 541, 30 Stat. 544 (current version at 11 U.S.C. §§ 1-1103 (1976)).

15. Hisey v. Lewis-Gale Hospital, 27 F. Supp. 20, 24 (W.D. Va. 1939).

16. *In re* Rubins, 74 F.2d 432, 433 (7th Cir. 1934), *cert. denied,* 295 U.S. 758 (1935).

17. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

18. 52 Stat. 840 (1938) (codified in scattered sections of 11 U.S.C.).

19. *See* Countryman, *A History of American Bankruptcy Law,* 81 COM. L.J. 226, 231 (1976).

20. 8 W. COLLIER, COLLIER ON BANKRUPTCY ¶ 1.02 at 5 (14th ed. 1978) [hereinafter cited as COLLIER]. In contrast, the ordinary bankruptcy case, handled under Chapters I-VII of the Act, seeks "an adjudication in bankruptcy and in which the estate is administered for the purposes of liquidation and distribution." *Id.*

21. 310 U.S. 434 (1940).

22. "A bankruptcy court is a court of equity, . . . and is guided by equitable doctrines and principles except in so far as they are inconsistent with the Act . . . . a court of equity may in its discretion in the exercise of the jurisdiction committed to it grant or deny relief upon performance of a condition which will safeguard the public interest. It may in the public interest, even withhold relief altogether . . . ." *Id.* at 455.

23. 11 U.S.C. §§ 501-676 (1976).

24. That a bankruptcy court has inherent power to dismiss a Chapter XI petition in order to remit the bankrupt to more appropriate Chapter X relief was reiterated four years later in Mecca Temple of Ancient Arabic Order of Nobles of Mystic Shrine v. Darrock, 142 F.2d 869 (2d Cir. 1944), *cert. denied,* 323 U.S. 784 (1944).

*Klebanow*[25] extended the power of the bankruptcy court to dismiss Chapter XI petitions to cases where no prospect of rehabilitation existed under the Chapter XI petition, and where ordinary bankruptcy appeared to be the appropriate remedy.[26] The dismissal power is limited, however, by the express terms of section 376 of the Bankruptcy Act[27] and Bankruptcy Rule 11-42(b),[28] which cover most dismissals resulting from circumstances arising after a Chapter XI petition is filed. When a statutory dismissal is rendered under section 376 or Rule 11-42(b), a hearing on notice to the interested parties is required,[29] and the dismissal must be "in the best interest of the estate."[30] In contrast, the inherent power of the

25. 348 F.2d 907 (1965).

26. *Id.* at 908.

27. Section 376 of the Bankruptcy Act provides in relevant part:

> If the statement of the executory contracts and the schedules and statement of affairs . . . or if an arrangement is not proposed in the manner and within the time fixed by the court, or if an arrangement is withdrawn or abandoned prior to its acceptance . . . the court shall—
>
> . . . .
>
> (2) . . . enter an order, upon hearing after notice to the debtor, the creditors, and such other persons as the court may direct, either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this title or dismissing the proceeding under this chapter, whichever in the opinion of the court may be in the interest of the creditors: *Provided, however,* That an order adjuding the debtor a bankrupt may be entered without such hearing upon the debtor's consent.

11 U.S.C. § 776 (1976).

28. Bankruptcy Rule 11-42(b) provides:

> The court shall enter an order, after hearing on such notice as it may direct, dismissing the case, or adjudicating the debtor a bankrupt if he has not previously been so adjudged, or directing that the bankruptcy case proceed, whichever may be in the best interest of the estate—
>
> (1) for want of prosecution; or
>
> (2) for failure to comply with an order under Rule 11-20(d) for indemnification; or
>
> (3) if confirmation of a plan is denied; or
>
> (4) if confirmation is revoked for fraud and a modified plan is not confirmed pursuant to Rule 11-41; or
>
> (5) where the court has retained jurisdiction after confirmation of a plan:
>
> (A) if the debtor defaults in any of the terms of the plan; or
>
> (B) if a plan terminates by reason of the happening of a condition specified therein.
>
> The court may reopen the case, if necessary, for the purpose of entering an order under this subdivision.

29. *See* note 27 *supra.*

30. *See* note 28 *supra.*

bankruptcy court may be exercised sua sponte,[31] without giving notice.[32] Since the mandatory requirement for filing a complete list of creditors expressed in section 324(1) of the Act and Rule 11-11[33] is not covered by section 376 or Rule 11-42(b), dismissal for noncompliance with the creditors list requirement falls under the inherent power of a bankruptcy court. Historically, the requirement for a list of creditors has been strictly enforced.[34] *In re Everick Art Corp.*[35] held that creditors with disputed claims could not be omitted from the requisite list.[36] Another federal court of appeals[37] concluded that an attorney is not permitted to exclude creditors owing him fees on the ground that it would violate the attorney-client privilege.[38] Further, in *In re Free*[39] a federal district court held that the fact that a debtor's records are in disarray can not excuse noncompliance with all the terms of the required disclosure of creditors.[40] The policy behind this need for strict compliance is that a complete list of creditors informs the court of all persons entitled to notification, all claims against the debtor, and the considerations upon which the debts rest.[41] This requirement also limits the effect of the discharge of the bankrupt to those notified or with knowledge of the particular proceeding.[42] There is no express exemption from the creditors list requirement for the administration of assets located in the United States ancillary to an administration of assets in a foreign domicile. Ancillary administration was contemplated by the 1898 Act[43] and is presently covered by section 2(a)(1) of the Bankruptcy Act.[44] Under section 2(a)(22)[45]

31. *See In re* Ettinger, 76 F.2d 741, 742 (2d Cir. 1935).
32. *See* 8 COLLIER, *supra* note 20, ¶ 4.12 at 414 n.2.
33. *See* note 9 *supra.*
34. *See* Carolina Motor Express Lines, Inc. v. Blue & White Service, Inc., 192 F.2d 89, 92 (7th Cir. 1951). *But cf. In re* De Soto Crude Oil Purchasing Corp., 35 F. Supp. 1, 6-7 (W.D. La. 1940) (where a list of creditors was not available when the voluntary petition was filed, a late filing of the list was excused).
35. 39 F.2d 765 (2d Cir. 1930).
36. *Id.* at 767.
37. *In re* Semel, 411 F.2d 195 (3d Cir. 1969), *cert. denied,* 396 U.S. 905 (1969).
38. *Id.* at 197.
39. 38 F. Supp. 316 (D. Conn. 1941).
40. *Id.* at 317.
41. 1A COLLIER, *supra* note 20, ¶ 7.11(2) at 990.
42. *Id.*
43. *See* Nadelmann, *The National Bankruptcy Act and the Conflict of Laws,* 59 HARV. L. REV. 1025, 1035-39 (1946).
44. Section 2(a)(1) of the Bankruptcy Act provides:
[C]ourts of bankruptcy . . . are hereby invested, within their respective territorial limits as now established, or as they may hereafter be changed,

and Bankruptcy Rule 119,[46] a court may dismiss the ancillary proceeding, or suspend it and allow assets in the United States to be administered according to the proceeding in the foreign domicile. It is essential, however, that bankruptcy courts exhibit flexibility in deciding whether to dismiss a Chapter XI proceeding.[47] This flexibility should be aimed at reaching the *Israel-British Bank* goal of equality of distribution of assets in an international context.[48] Until the instant case, however, the creditors list requirement in a Chapter XI petition had never been challenged on the ground that disclosure by a foreign bank was precluded by foreign law.

## III. THE INSTANT OPINION

After concluding that Finabank had in fact attempted rehabilitation,[49] the court in the instant case addressed the bank's failure

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with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, . . . to—

(1) Adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or for a longer portion of the proceding six months than in any other jurisdiction, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdiction, or in any cases transferred to them pursuant to this title . . . .

11 U.S.C. § 11(a)(1).

45. Bankruptcy Act § 2(a)(22), 11 U.S.C. § 11(a)(22) (1976) provides that a United States bankruptcy court may "[e]xercise, withhold, or suspend the exercise of jurisdiction, having regard to the rights or convenience of local creditors and to all other relevant circumstances, where a bankrupt has been adjudged bankrupt by a court of competent jurisdiction without the United States."

46. Bankruptcy Rule 119 provides:

When a proceeding for the purpose of the liquidation or rehabilitation of his estate has been commenced by or against a bankrupt in a court of competent jurisdiction without the United States, the court of bankruptcy may, after hearing on notice to the petitioner or petitioners and such other persons as it may direct, having regard to the rights and convenience of local creditors and other relevant circumstances, dismiss a case or suspend the proceedings therein under such terms as may be appropriate.

47. "Assumption of control over the local assets is not excluded nor is recognition of the effects of the foreign domiciliary proceeding barred. If sufficient flexibility is maintained in the use of both, all possible situations can be covered adequately. Flexibility is needed on the part of the courts especially in deciding whether a local proceeding shall take place." Nadelmann, *Compositions—Reorganizations and Arrangements—In the Conflict of Laws*, 61 HARV. L. REV. 804, 835 (1948).

48. *In re* Israel-British Bank (London), Ltd., 536 F.2d 509, 513 (2d Cir. 1976), *cert. denied*, 429 U.S. 978 (1976).

49. The court stated that because the Chapter XI petition was ancillary to

to file a complete list of creditors pursuant to section 324(1) of the Bankruptcy Act. The court stated that because this requirement is mandatory and backed by persuasive policy, Chapter XI relief could be denied when there was noncompliance. The court noted, however, the countervailing consideration that the Bankruptcy Act specifically contemplated proceedings to obtain administration of assets in the United States ancillary to administration in a foreign country. In addition, the court recognized that these particular proceedings serve to foster equal distribution of assets among creditors and function as an instrument to set aside preferences. The court further suggested that in order to promote the *Israel-British Bank* goal of equal distribution of assets in an international context, it initially must be recognized that international bankruptcies create complications not contemplated by the Act. The court stressed that flexibility must be exhibited in response to these problems. While acknowledging that the orderly administration of the Act should not be sacrificed for flexibility in international affairs, the court insisted that the instant case differed in two respects from cases in which the requirement of a complete list of creditors has been strictly enforced. First, the court stated that Finabank offered a valid reason—conflict with Swiss criminal law—why it should be exempted from the creditors list requirement. Second, the court remarked that the instant case offered possible substitutes for the required list.[50] The court noted that the issue in the instant case was not considered by the drafters of the creditors list requirement because that requirement long predated the Act's recognition of domestic proceedings ancillary to foreign bankruptcies.[51] Therefore, the court determined that neither sec-

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proceedings in Switzerland, events in that nation should be examined to determine whether rehabilitation was in fact attempted. The court noted that since rehabilitation was not abandoned until a year after the Chapter XI petition was filed, Finabank had no real choice except to delay filing a plan of arrangement in the United States. *See* note 4 *supra.*

50. Finabank, claiming that a complete list of creditors was in the possession of a Swiss court, proposed two alternatives to satisfy the creditors list requirement. First, by utilizing section 2(a)(22) and Bankruptcy Rule 119, the bankruptcy court could set aside the attachments, suspend the proceedings, and permit the Swiss proceeding to administer the assets located in the United States. Second, a full administration could take place in the United States in coordination with the Swiss proceeding. The Swiss court would notify and allow depositors, if they so desired, to appear in the United States proceeding. The assets would then be marshalled in Switzerland and would be distributed pro rata, taking into account the recoveries of the creditors appearing in the United States. 568 F.2d at 919-20.

51. While the creditors list requirement predates the 1898 Act, first appearing

tion 324(1) of the Bankruptcy Act nor Bankruptcy Rule 11-11 precluded consideration of alternatives to the creditors list in an international context. The court noted that strict enforcement of the creditors list requirement in the instant case would eliminate the possibility of alternatives leading to equal distribution of assets. Thus, the court found that when foreign law prevents a foreign bank from supplying the requisite list of creditors in a Chapter XI petition where possible substitutes for the list exist, a petition is not inherently defective and should not be summarily dismissed.[52]

## IV. COMMENT

The instant case is the first to consider whether dismissal of a Chapter XI petition is proper where disclosure of the list of creditors is precluded by foreign law in a United States bankruptcy proceeding ancillary to an action in another country. The court's opinion exhibited an understanding of the delicacy of international legal affairs in its examination of the ultimate impact on Finabank's worldwide creditors, instead of resorting merely to strict statutory construction and enforcement. The court noted that some complexities of international bankruptcy were not contemplated by the drafters of the Bankruptcy Act[53] and responded with a flexible stance towards mandatory requirements in the Chapter XI petition. This flexibility was properly aimed towards achieving the *Israel-British Bank* goal of equality of asset distribution in an international context. To have denied the possibility of alternatives to the creditors list in the instant case would have foreclosed the *Israel-British Bank* ideal, since compliance was precluded by Swiss law and would therefore have resulted in denial of relief. On the other hand, although the policy and conclusions of the court were valid, its acceptance of substitutes for the creditors list would have been more valuable as precedent and would interfere less with the "orderly administration of the Act," if the court had defined more precisely what types of alternatives would suffice. A

in Bankruptcy Act of 1867, ch. 176, § 11, 14 Stat. 517, domestic proceedings ancillary to foreign bankruptcies were not made possible until the promulgation of the 1898 Act. *See* Nadelmann, *supra* note 43, at 1035-39.

52. Two other grounds for dismissal were also denied by the court. First, the argument that dismissal or suspension should be considered with regard to the rights and convenience of local creditors was held ineffective in the instant case. Second, in view of the absence of a showing that the dismissal would be in the estate's best interest, dismissal was not warranted for lack of prosecution. 568 F.2d at 920-22.

53. *See* note 51 *supra.*

logical rule for the acceptability of substitutes would have been to require that the alternatives adequately protect the policy interests which were behind the Act's creditors list requirement. Such alternatives, under this guideline, would therefore have to insure that all interested parties were notified of all claims. In addition, only parties notified or with actual knowledge would be required to have their claims discharged by the proceeding. Thus, while the result in the instant case exhibits the flexibility demanded by the complexity of international bankruptcy proceedings, there must be future clarification of the realities of implementing acceptable alternatives.

*Margaret Helen Young*

# TRANSPORTATION—INTERSTATE COMMERCE ACT—THE ICC HAS JURISDICTION TO REQUIRE THE FILING OF JOINT INTERNATIONAL THROUGH RATES WITH A SEPARATE STATEMENT OF THE DOMESTIC PORTION

## I. FACTS AND HOLDING

*Ex Parte No. 261, International Joint Rates and Through Routes,*[1] a January 1976 decision of the Interstate Commerce Commission (ICC), changed ICC policy by prescribing rules[2] requiring the filing of voluntarily established joint through rates[3] for international transportation participated in by both domestic rail, motor, or water carriers regulated by the ICC and ocean carriers regulated by the Federal Maritime Commission (FMC). The rules require a separate statement of the inland and ocean portion of the joint through rate, although the ICC limits its substantive regulation of the single-factor joint land/ocean rate to the domestic portion. Petitioner, the Commonwealth of Pennsylvania, challenged the assertion of ICC jurisdiction to require joint through rates for filing and the agency's decision to limit its substantive regulation to the domestic portion of the rates.[4] On appeal to the Court of Appeals for the District of Columbia Circuit, *affirmed. Held:* The ICC has jurisdiction under the Interstate Commerce Act to require the filing of joint international through rates voluntarily established by

1. 351 I.C.C. 490 (1976).

2. 49 C.F.R. §§ 1300.0-10.33 (1977).

3. "A joint through rate is a single charge published by one carrier and concurred in by connecting carriers as the rate that will apply on 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, 281-82 (D.C. Cir. 1977), *cert. denied,* ___ U.S. ___, 98 S. Ct. 723, 54 L.Ed.2d 754 (1978). Each carrier retains a "division" of the joint rate agreed upon. Proportional rates differ in that they are rates published by a single carrier or mode of carrier and are applicable only to that part of the through movement handled by the publishing carrier itself. Combinations of these proportional rates constitute the through rate. This through rate, however, unlike the joint through rate, is not published as a single rate in one tariff. *Id.* at 282.

4. Petitioner alleged that the new joint through rate tariffs would cause economic harm due to the diversion of business from the Philadelphia port area. Intervenors on the side of the petitioner were: the State of Texas, Delaware River Port Authority, City of Philadelphia, Philadelphia Port Corp., Port of Philadelphia Marine Terminal Assoc., Philadelphia Marine Trade Assoc., and the Philadelphia District Counsel of the International Longshoreman's Association. Intervenors on the side of the respondents (the ICC and the United States) were: the Federal Maritime Commission, Pacific Westbound Conference, The Japan/Korea-Atlantic & Gulf Freight Conference, and IML Freight, Inc.

domestic rail, motor, and water carriers with ocean carriers, and may require a separate statement of the domestic portion. *Commonwealth of Pennsylvania v. ICC,* 561 F.2d 278 (D.C. Cir. 1977).

## II. LEGAL BACKGROUND

Part I of the Interstate Commerce Act[5] deals with the regulation of railroads. Section 1(1),[6] as amended by the Transportation Act of 1920,[7] specifies the parties subject to regulation under Part I, including carriers engaged in transportation partly by rail and partly by water under an arrangement for a continuous shipment between any place in the United States and a foreign country, "but only insofar as such transportation . . . takes place within the United States."[8] Prior to amendment, section 1(1) differed in that it specified carriers utilizing such arrangements for transportation between a domestic point and an adjacent foreign country.[9] Section 1(2) defines the subject matter jurisdiction of the ICC, giving it jurisdiction over the transportation described in section 1(1).[10] Section 6(1) provides for the filing of tariffs on joint through rates between railroads and carriers by water[11] and section 6(12) speaks of "arrangements with any water carrier operating from a port in the United States to a foreign country . . . for the handling of through business between interior points . . . and such foreign country . . . . "[12] Part III[13] of the Act deals with the regulation of

5. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (1887) (codified in scattered sections of 49 U.S.C.).

6. 49 U.S.C. § 1(1) (1970).

7. Transportation Act of 1920, § 400, 41 Stat. 474 (1920).

8. 49 U.S.C. § 1(1) (1970) (emphasis added). This limitation is repeated in the relevant provisions of Parts II and III of the Act. *See* 49 U.S.C. §§ 303(a)(11), 902(i)(2) (1970).

9. Section 1 had 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 . . . .

Act of June 18, 1910, Pub. L. No. 61-218, § 7, 36 Stat. 544 (1910) (emphasis added).

10. 49 U.S.C. § 1(2) (1970).

11. *Id.* § 6(1).

12. *Id.* § 6(12).

motor carriers and therefore controls joint rates entered into between domestic motor carriers and ocean carriers. Section 302(a)[14] confers jurisdiction over transportation in foreign commerce, defined in section 303(a)(11)[15] to include transportation partly by motor vehicle and partly by water between any place in the United States and any place in a foreign country. Section 316(c)[16] provides that motor carriers may establish through routes and joint rates with, among others, common carriers by water. A 1962 amendment to this section[17] gave the ICC jurisdiction over joint motor-ocean rates between Alaska and Hawaii and the remaining forty-eight states. Section 317(a)[18] provides that every motor carrier *shall* file with the ICC tariffs showing all rates in connection with through routes involving foreign commerce. Part III[19] of the Act controls joint rates in foreign commerce with domestic water carriers. Section 902(i) defines foreign commerce transportation subject to regulation under Part III as including transportation wholly by water between a place inside and a place outside the United States.[20] Section 905(b), dealing specifically with the establishment of joint through routes, provides that common carriers by water may establish joint through routes and rates with common carriers by water engaged in transportation between Alaska and Hawaii and the other forty-eight states, but does not authorize such arrangements with other carriers in foreign commerce.[21] Section 906(a)[22] requires the filing of all such joint rates with the ICC and section 904(a)[23] empowers the ICC to make the rules and regulations necessary to carry out the provisions of the Act. *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.*[24] set the ICC's long-standing policy on filing of joint international through rate tariffs.

13. *Id.* §§ 301-27 (1970 & Supp. V 1975).
14. *Id.* § 302(a) (1970).
15. *Id.* § 303(a)(11).
16. *Id.* § 316(c).
17. Act of Aug. 24, 1962, Pub. L. No. 87-595, § 1, 76 Stat. 397 (1962) (amending 49 U.S.C. § 316(c) (1952)).
18. 49 U.S.C. § 317(a) (1970).
19. *Id.* §§ 901-23 (1970 & Supp. V 1975).
20. *Id.* § 902(i) (1970). The section 902(i) definition includes such transportation but only insofar as such transportation takes place prior to transshipment at a domestic point for movement to a place outside the United States or from one domestic point to another after transshipment at a point within the United States in a movement from a place outside. *Id.*
21. *Id.* § 905(b).
22. *Id.* § 906(a).
23. *Id.* § 904(a).
24. 13 I.C.C. 266 (1908).

After concluding that the "adjacent" language of section 1[25] precluded ICC jurisdiction over joint international through rates involving transportation with nonadjacent foreign countries, the Commission found that section 6 contemplated the filing of only those joint rates made between two or more carriers designated in section 1 as being subject to ICC regulation.[26] In *Motor Carrier Operations in the State of Hawaii,*[27] the ICC reiterated its position in holding that it was without jurisdiction to approve the establishment of through routes and joint rates between FMC-regulated ocean carriers and Hawaiian motor carriers. A series of Supreme Court cases concerning adjacent foreign countries and a single mode of transport—rail—did not question, however, the ICC's acceptance of the joint rate tariffs for filing. In *News Syndicate Co. v. New York Central Railroad Co.,*[28] the Court held that the ICC had jurisdiction to determine the reasonableness of joint rates involving transportation between United States and Canadian points. *Lewis-Simas-Jones Co. v. Southern Pacific Co.,*[29] which concerned transportation between United States and Mexican points, followed *News Syndicate Co.* in permitting the ICC to determine in its entirety, the reasonableness of the joint rate. In *H.K. Porter Co. v. Central Vermont Railway,*[30] the Court rejected the district court's conclusion that the ICC was attempting to regulate Canadian railroad transportation, since the ICC order ran only against the United States railroads, and only to the extent that the objectionable transportation took place within the United States. In *Canada Packers, Ltd. v. Atchison, Topeka & Santa Fe Railway,*[31] the Court ruled that the ICC had jurisdiction to determine the reasonableness of joint freight rates for transportation taking place in Canada and hence was empowered to order reparations with regard to the Canadian portion of the trip.[32]

## III. THE INSTANT DECISION

In the instant case the court affirmed that the ICC had jurisdiction to accept filing for tariffs on joint international through rates. The court focuses its attention first on the rail-ocean paradigm,

25. *See* note 9 *supra.*
26. 13 I.C.C. at 280.
27. 84 M.C.C. 6 (1960).
28. 275 U.S. 179 (1927).
29. 282 U.S. 654 (1931).
30. 366 U.S. 272 (1961) (joint through rates which the ICC found prejudicial).
31. 385 U.S. 182 (1966).
32. *Id.* at 183.

concluding that the explicit language of section 1(1) conferred jurisdiction over the domestic portion of through routes involving foreign commerce.[33] Pointing out that a joint through rate was one of the "arrangements" for continuous carriage under a joint through route, the court concluded that the ICC rule with respect to rail-ocean joint tariffs was a proper exercise of ICC authority. In addition to finding that section 6(12) contemplated joint rail-ocean through routes,[34] the court bolstered its conclusion with an analysis of legislative history. The court pointed out that whatever support *Cosmopolitan Shipping* derived from the "adjacent" language of former section 1(1) had been eliminated with the amendment of that section by the Transportaion Act of 1920.[35] The court acknowledged that the ICC had long refused to accept joint through rate tariffs with respect to nonadjacent foreign countries, but observed that the ICC itself had described this restriction as self-imposed.[36] The court supported its construction of the statute by citing *Canada Packers* in which the Supreme Court upheld the ICC's practice of accepting joint rate all-rail tariffs to Canadian points. Since the "adjacent" language of section 1(1) had been eliminated, the holding supported acceptance of tariffs involving nonadjacent foreign countries as well. Turning next to the motor-ocean paradigm, the court found that, taken together, sections

33. Section 1(1) provides that the provisions of Part I apply to common carriers engaged in:

> (a) 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 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.

49 U.S.C. § 1(1) (1970).

34. Section 6(12) provides:

> If any common carrier subject to this Act enters into arrangments with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Commission may by order require such common carrier to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country.

*Id.* § 6(12).

35. *See* notes 9 & 33 *supra.*

36. Ex Parte No. 261, International Joint Rates and Through Routes, 337 I.C.C. 625, 629 (1970).

302(a), 303(a)(11), 316(c) and 317(a) constituted an explicit conferral of ICC jurisdiction to accept such tariffs for filing.[37] In the process, the court found it necessary to analyze two points concerning the language of section 303(a)(11). First, the court found that the structure of the provisions made it clear that the section's reference to water carriers is a reference to FMC-regulated carriers operating in foreign commerce. Second, foreign commerce jurisdiction under Part II is as broad as that under Part I since its definition in section 303(a)(11) tracks the language of section 1(1). The court then considered petitioner's assertion that, absent an amendment covering foreign commerce similar to the 1962 amendment to section 316(c), the ICC did not have joint rate authority over foreign commerce. The court found the argument to be without merit. It reasoned that, because the 1962 amendment not only conferred on the ICC authority to accept joint rates for filing, but also gave the Commission the power of substantive regulation over such rates, ousting FMC jurisdiction, that similar legislative authority was not necessary for its action here. Furthermore, insofar as the 1962 amendment may represent congressional intent merely to permit the filing of joint motor-ocean Alaska and Hawaii rates, this legislation could be explained as merely one way of changing agency practice rather than as ratification of the ICC's restrictive policy decision. The water-ocean paradigm presented greater difficulty. After examining sections 902(i), 905(b) and 906(a), the court concluded that the only material difference between Part III of the Act and Parts I and II is that section 905(b) does not *explicitly* authorize domestic water carriers voluntarily to enter into joint rates with water carriers in foreign commerce.[38] After noting that

37. Section 302(a) gives the ICC jurisdiction over "the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce . . . . " 49 U.S.C. § 302(a) (1970). Section 303(a)(11) defines foreign commerce as: "commerce, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water, (A) between any place in the United States and any place in a foreign country . . . ." *Id.* § 303(a)(11).

Section 316(c) provides that "[c]ommon carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water . . . . " *Id.* § 316(c).

Section 317(a) provides that "[e]very common carrier by motor vehicle shall file with the Commission . . . tariffs showing all the rates . . . in connection [with] . . . foreign commerce . . . between points on its own route and points on the route of any other such carrier . . . when a through route and joint rate shall have been established." *Id.* § 317(a).

38. Section 902(i) defines foreign commerce transportation subject to Part III to include transportation:

nothing in Part III prohibited the filing of such tariffs, the court concluded that this congressional silence should not be held to preclude such filings since Congress provided, pursuant to section 902(i), that ICC-regulated water carriers were subject to ICC jurisdiction in performing the domestic portion of movements in foreign commerce. Section 302(i), together with section 904 rulemaking power provided, in the court's view, ample authority for the ICC's action. The court found both the ICC's limitation of its substantive regulation and its separate statement requirement valid in light of the Act's express limitations on jurisdiction and the ICC's rulemaking power under section 904(a).[39] Thus the ICC may require the filing of joint international through rates with a separate statement of the domestic portion.

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(3) Wholly by water, or partly by water and partly by railroad or motor vehicle, from or to a place in the United States to or from a place outside the United States, but only (A) insofar as such transportation by rail or by motor vehicle takes place within the United States, and (B) in the case of a movement to a place outside the United States, but insofar as such transportation by water takes place from any place in the United States to any other place therein *prior to transshipment at a place within the United States for movement to a place outside thereof,* and, in the case of a movement from a place outside the United States, only insofar as such transportation by water takes place from any place in the United States to any other place therein after transshipment at a place within the United States in a movement from a place outside thereof.

*Id.* § 902(i) (emphasis added).

Section 905(b) provides that:

It shall be the *duty* of *common carriers by water* to establish reasonable through routes with *other such carriers* and with common carriers by railroad . . . . Common carriers by water may establish reasonable through routes and rates . . . with common carriers by motor vehicle. Common carriers by water subject to this chapter may also establish reasonable through routes and joint rates . . . with common carriers by water subject to the Shipping Act, 1916, as amended, or the Intercoastal Shipping Act, 1933, as amended . . . engaged in the transportation of property in interstate or foreign commerce between Alaska or Hawaii . . . and . . . the other States . . . .

*Id.* § 905(b) (emphasis added).

Section 906(a) requires all joint rates to be filed with the ICC. *Id.* § 906(a).

39. Section 904(a) provides that: "[i]t shall be the duty of the Commission to administer the provisions of this chapter, and to this end the Commission shall have authority to make and amend such general or special rules and regulations and to issue such orders as may be necessary to carry out such provisions." *Id.* § 904(a).

## IV. COMMENT

The instant case represents a change in long-standing ICC policy at once consistent with its statutory groundwork, yet with potentially drastic economic impact. In the final analysis, the issues were whether the subsequent legislation represented a congressional expression of its earlier intent and, if so, what that intent was. Faced with conflicting inferences,[40] the court made its determination, one which can not be rejected as clearly erroneous. The court's conclusion with respect to the rail-ocean paradigm has a strong foundation in the statutory provisions. The court concluded that the elimination of section 1(1) "adjacent" language removed any doubt with respect to the jurisdiction contemplated by section 6(12). Construction of Part II properly demanded more attention. The court's conclusion with regard to the motor-ocean paradigm appears reasonable despite the court's failure to specify the precise feature of section 303(a)(11)'s structure supporting its conclusion that the section's reference to water carriers is a reference to FMC-regulated carriers operating in foreign commerce. Petitioner's argument based on the 1962 amendment, clearly having merit, was adequately met by the court. While accepting the conclusion with respect to the water-ocean paradigm, one may question the court's cursory treatment of competing considerations. It could be argued that section 905(b) dealing *specifically* with the establishment of through routes and rates was controlling despite both the wider grant of general jurisdiction pursuant to section 902(i) and the section 904 rulemaking power. The question concerning the establishment of such through routes and the filing of such tariffs might not have entered the minds of the legislature at the time of enactment.[41] The statement of the Act's broad purpose in furtherance of the public interest, in conjunction with the grant of general

40. Note that the amendment was a response to a request from the ICC for such jurisdiction. Ex Parte No. 261, International Joint Rates and Through Routes, 337 I.C.C. 625, 630 (1970). The legislative history gives little assistance in determining the intent of the legislature. *See* S. REP. No. 1799, 87th Cong., 2d Sess. (1962), *reprinted in* [1962] U.S. CODE CONG. & AD. NEWS 2160.

41. Some courts have held that the failure to provide for a particular situation constitutes a *casus omissus* which can not be remedied by judicial addition. In such cases the courts can only look to the words used and from these endeavor to ascertain legislative intent. *In re* Election of Executive Officers, 31 Neb. 262, 47 N.W. 923 (1891) (*casus omissus* only if the contingency absolutely escaped the attention of the legislature); Rice v. Denny Roll & Panel Co., 199 N.C. 154, 154 S.E. 69 (1930) (distinction between liberal construction based on a statute's "true meaning" and engrafting something that has been omitted); Bartron v. Codington County, 68 S.D. 309, 2 N.W.2d 337 (1942); Wisconsin *ex rel.* Reynolds v.

jurisdiction pursuant to section 905(b) and the grant of section 904 rulemaking power, however, negates the inference that the ICC's power to require the filing of international water-ocean joint through rate tariffs was absent from legislative contemplation at the time of enactment.[42] The court's conclusion concerning the ICC's limitation of its substantive regulation and its requirement of a separate statement of the domestic portion of the rate is firmly anchored in the language of the statute and supported by the language of *Canada Packers.* Of no small importance, moreover, is the avoidance of jurisdictional conflict between the ICC and FMC. Analysis of the decision in light of the important policy which it promotes reveals, moreover, the legitimacy of the court's conclusion.[43] Joint rates enable a shipper to contract with a single carrier for the movement of goods from the point of origin to the ultimate destination. These rates are usually lower than the sum of the participating carriers' local rates. In addition, joint rates have advantages over proportional rates. Their distinguishing feature is that the total transportation charge is published as a single rate in one tariff, resulting in the simplification of routing, documentation, and calculation of charges and billing. Such efficiencies, in a world where foreign trade balances are critical, stimulate the coordination and integration of intermodal services. Containerization, the singular recent breakthrough in international transport,[44] has greatly enhanced the feasibility of intermodal operations and consequently the importance of international joint through rates. That these efficiencies are not merely speculative is evidenced by the filing pursuant to special permission obtained on a case-by-case basis of numerous joint international through rate tariffs even prior to the ICC's 1976 decision *Ex Parte No.261.*[45] The instant decision facilitates national transportation policy without doing violence to

Smith, 22 Wisc.2d 516, 126 N.W.2d 215 (1964). This contention appears even stronger in light of the general rule that grants of power are to be strictly construed. Douglass v. City of Los Angeles, 5 Cal. 2d 123, 53 P.2d 353 (1935).

42. An exception to the general rule on the construction of grants of power is sometimes made where administrative powers have been granted to effectuate broad regulatory programs essential to the public welfare. ICC v. Goodrich Transit Co., 244 U.S. 194 (1912); ICC v. Baird, 194 U.S. 25 (1904).

43. *See* Ex Parte No. 261, International Joint Rates and Through Routes, 337 I.C.C. 625 (1970); Peavy & Schmeltzer, *Prospects and Problems of the Container Revolution,* 1 J. MAR. L. & COM. 203, 211 (1970); Ullman, *The ICC's Decision in Ex Parte 261—Its Residual Value,* 4 J. MAR. L. & COM. 455 (1973); Note, *Legal and Regulatory Aspects of the Container Revolution,* 57 GEO. L. J. 533 (1969).

44. *See* Peavy & Schmeltzer, note 43 *supra*; Note, note 43 *supra.*

45. 341 I.C.C. 246, 247 (1972).

a second congressional scheme, thereby enhancing the prospects for increased coordination between the ICC and FMC, as well as improved transportation.

*B. Rowland Heyward*

## TREATY INTERPRETATION—STATUS OF FORCES AGREEMENT—THE UNITED STATES MILITARY MAY DRAFT AND ENFORCE REGULATIONS CURTAILING FIRST AMENDMENT FREEDOM OF SPEECH OF MILITARY PERSONNEL WHERE NECESSARY TO ENSURE COMPLIANCE WITH UNITED STATES TREATY OBLIGATIONS

### I. FACTS AND HOLDING

Plaintiff, Thomas S. Culver, a former United States Air Force captain, brought an action to set aside his court-martial conviction.[1] In May 1971 Culver, a captain in the Judge Advocate General's Corps stationed in Suffolk, England, organized[2] and participated in a protest of 200 United States military and civilian personnel against United States involvement in the Vietnam War. The protest culminated in the presentation to representatives at the United States embassy in London of petitions signed by Air Force personnel opposing the war. Plaintiff was thereafter tried and convicted by general court-martial of conduct unbecoming an officer and a gentleman.[3] The court-martial board found that plaintiff had violated and had solicited other military personnel to violate a general Air Force Regulation AFR 35-15, ¶ 3e(3)(b)(8),[4] which prohibits Air Force personnel stationed in foreign countries from participating in demonstrations.[5] Upon approval of the court-martial judgment by the Commander of the Third

1. Culver v. Secretary of the Air Force, 389 F. Supp. 331 (D.D.C. 1975), *aff'd*, 559 F.2d 622 (D.C. Cir. 1977).

2. During May 1971, Thomas Culver distributed leaflets to military personnel which read in part:

> People Emerging Against Corrupt Establishments . . . The Third Airforce [sic] G.I.'s are uniting to express our disapproval of the war in Vietnam. Antiwar petitions are circulating. Sign one now! But don't stop there. Come with us when we exercise our constitutional rights and present the petitions to the U.S. Ambassadors at the U.S. Embassy who must send them to Washington . . . .

559 F.2d at 625 (quoting Culver's leaflets).

3. Uniform Code of Military Justice, art. 133, 10 U.S.C. § 933 (1976) provides: "Any commissioned officer . . . who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."

4. "Members of the Air Force are prohibited from participating in demonstrations when: (a) On duty. (b) In a foreign country. (c) In uniform in violation of AFM 35-10. (d) Their activities constitute a breach of law and order. (e) Violence is likely to result." 559 F.2d at 623 (quoting AFR 35-15, ¶ 3e(3)(b)(8)).

5. The leaflets distributed by plaintiff-appellant commented upon the applicability of AFR 35-15 to the protest in the instant case:

> Some people have asked me if the presentation on the 31st will be legal. The answer is that it will be. It is clear that under AFR 35-15 it is an offense to attend a demonstration in a country other than the U.S. But this will

Air Force and by the Judge Advocate General of the Air Force,[6] plaintiff filed suit in district court, collaterally attacking the court-martial conviction and requesting injunctive and compensatory relief.[7] Plaintiff's contention at trial was that the Air Force regulation upon which his conviction was based was unconstitutionally vague and overbroad, and that the protest gathering and presentation of petitions against the Vietnam War was not a demonstration under AFR 35-15.[8] The United States District Court for the District of Columbia dismissed plaintiff's suit upon a motion for summary judgment by the defendant, the Secretary of the Air Force.[9] On appeal to the United States Court of Appeals for the District of Columbia, *affirmed. Held:* Plaintiff's conviction was proper. A gathering of United States military personnel stationed in England to protest the Vietnam War is a "demonstration" within the meaning of Air Force Regulation AFR 35-15, and the term "demonstration" as used in the regulation is neither unconstitutionally vague nor overbroad. *Culver v. Secretary of the Air Force*, 559 F.2d 622 (D.C. Cir. 1977).

## II. LEGAL BACKGROUND

Claims of statutory vagueness and overbreadth which have arisen in the context of the United States military have historically been judged by a less rigid standard than similar claims arising in the private sector. Thus, the Supreme Court in *Burns v. Wilson,*[10] held that the rights of men in the armed forces must be conditioned upon "certain overriding demands of discipline and duty,"[11] and further in *Parker v. Levy,*[12] held that where a soldier had been

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not be a demonstration. . . . All we are doing is exercising a right that we have as Americans, to present our petition to the government and to have a party. . . . The plain fact is that there is nothing wrong with circulating the petition unless you call doing so a demonstration. That requires a stretch of the verbiage that even a court-martial would find difficult to make. Even if that stretch is made, you run smack into the First Amendment to the Constitution . . . .

*Id.* at 625 (quoting Culver's leaflets).

6. 10 U.S.C. § 869 (1976).

7. 389 F. Supp. 331.

8. *Id.* at 332.

9. The Secretary of the Air Force is a party to this action because he possesses statutory authority to void court-martial convictions and sentences. 559 F.2d at 623.

10. 346 U.S. 137 (1953).

11. *Id.* at 140.

12. 417 U.S. 733 (1974).

court-martialed for "conduct unbecoming an officer and a gentlemen,"[13] the statute under which the soldier was convicted would be unconstitutionally void for vagueness only if the individual was unable to reasonably understand that his conduct was proscribed by the statute.[14] The Court in *Parker* acknowledged that analysis of a claim of unconstitutional vagueness, where the statute in question is a military one, involves the consideration of factors not present in an ordinary vagueness analysis. The Court wrote:

> The effect of these constructions of [the statutory articles in question] by the Court of Military Appeals and by other military authorities has been twofold: It has narrowed the very broad reach of the literal language of the articles, and at the same time has supplied considerable specificity by way of examples of the conduct which they cover. It would be idle to pretend that there are not areas within the general confines of the articles' language which have been left vague despite these narrowing constructions. But even though sizable areas of uncertainty as to the coverage of the articles may remain after their official interpretation by authoritative military sources, further content may be supplied even in these areas by less formalized custom and usage.[15]

Although the United States Supreme Court has stated that a greater degree of precision is required in drafting legislation to regulate freedom of expression,[16] the Court in *Parker* determined that Congress must be permitted greater breadth and flexibility when prescribing such rules governing the military.[17] As to questions of overbreadth in violation of the first amendment, United States courts have long held that first amendment protections require a different application in the context of the military community. The United States Court of Military Appeals explained the distinction in the case of *United States v. Priest,*[18] stating that while contemptous or disrespectful speech is tolerable in the civil-

13. 10 U.S.C. § 933 (1976).

14. 417 U.S. at 755-57. The Court in *Parker* wrote:

> For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter. But each of these differentiations relates to how strict a test of vagueness shall be applied in judging a particular criminal statute.

*Id.* at 756.

15. *Id.* at 754.

16. Smith v. Goguen, 415 U.S. 566, 573 (1972).

17. Parker v. Levy, 417 U.S. at 756.

18. United States v. Priest, 21 C.M.A. 564, 45 C.M.R. 338 (1972).

ian community, additional considerations must be weighed in determining the limits of permissible speech in the military community. The court stated:

> The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civilian population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.[19]

Both of the issues in the instant case, vagueness and overbreadth, revolved around the definition of the term "demonstration" within AFR 35-15, in relation to article II of the Status of Forces Agreement of the North Atlantic Treaty Organization (NATO-SOFA).[20] Article II of NATO-SOFA requires military personnel in a foreign country to "abstain from . . . any political activity in the receiving state."[21] Although no court has delineated the limitations of the ban on political activity provided for under article II, the commentators and the scant legislative history which exists suggest that although the proscription on political activity is extremely broad, it is nevertheless limited. The NATO-SOFA preliminary working group study stated that:

> the article is one of the Agreement's expressions of the mutual respect which the signatory States hold for each other . . . . It is a justifiable recognition of the fact that Visiting Forces must not jeopardize *the political security of a host State* and should not fail to exert an active effort to live in harmony with the people and the laws of the receiving State.[22]

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19. *Id.* at 570, 45 C.M.R. at 344.

20. Agreement on Status of Forces, June 19, 1951, [1953] 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 [hereinafter cited as NATO-SOFA]. At trial the Prosecutor states: "The Government does not contend that AFR 35-15 was written with a view toward enforcing Article II [of NATO-SOFA]; we submit, however, that it does provide a method for the Department of Defense to enforce within its system of justice, violation of that Article of that NATO/SOFA Agreement." 559 F.2d at 640 n.19.

21. Article II of NATO-SOFA, *supra* note 20, at 1796, provides:

> It is the duty of a force and its civilian component and the members thereof as well as their dependents to respect the law of the receiving State, and to abstain from any activity inconsistent with the spirit of the present Agreement, and, in particular, from any political activity in the receiving State. It is also the duty of the sending State to take necessary measures to that end.

22. S. LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 100 (1971) (emphasis added); *see* G. DRAPER, CIVILIANS AND THE NATO STA-

In the case of *United States v. Alexander*,[23] the United States Court of Military Appeals analyzed an Army regulation similar to AFR 35-15 in its proscription of foreign demonstrations,[24] finding that the regulation was intended to maintain the army's neutrality within the host country.[25] In the case of *Greer v. Spock*[26] the United States Supreme Court held that military authorities in the United States have some authority to restrict the political activities of both military and civilian personnel on domestic military bases.[27] Thus the United States military has been accorded considerable discretion by the courts in the drafting of regulations which may proscribe or curtail first amendment freedoms of both military and civilian personnel within its control. This judicial latitude appears particularly wide where such personnel are stationed in a foreign state. In the case of *Carlson v. Schlesinger*,[28] the Supreme Court determined that a military regulation which curtailed the time, place, and manner of the exercise of first amendment freedom of speech by military personnel stationed in Vietnam during the Vietnam War was proper, stating that "[b]ecause judges are ill-equipped to second guess command decisions made under the difficult circumstances of maintaining morale and discipline in a combat zone, . . . [the courts] should not upset such determinations unless the military's infringement upon first amendment rights is manifestly unrelated to legitimate military interests."[29]

## III. The Instant Opinion

The instant court determined that plaintiff's court-martial con-

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TUS OF FORCES AGREEMENT 69 (1966).

Draper states: "Whether or not that prohibition embraces political activity concerned with the politics of the sending State as well as those of the receiving State is not altogether clear, but the wording of the Article is sufficiently wide, it is thought, to include both forms of activity."

23. 22 C.M.A. 485, 47 C.M.R. 786 (1973).

24. Army Regulation 600-20 provides that "[p]articipation in picket lines or any other public demonstrations . . . is prohibited . . . (d) when [members of the Army] are in a foreign country." The court in *Alexander* further states that the regulation is a penal statute to be narrowly and strictly construed. Any doubt about the application of the regulation must be resolved in favor of the accused. *Id.* at 487, 47 C.M.R. at 788; *see* United States v. Baker, 18 C.M.A. 504, 40 C.M.R. 216 (1969); United States v. Schweitzer, 14 C.M.A. 39, 33 C.M.R. 251 (1963).

25. United States v. Alexander, 22 C.M.A. at 486-87, 47 C.M.R. at 787-88.

26. 424 U.S. 828 (1976).

27. *Id.* at 836-49.

28. 511 F.2d 1327 (D.C. Cir. 1975).

29. *Id.* at 1333.

viction was proper, inasmuch as plaintiff had engaged in conduct proscribed by a constitutionally valid Air Force regulation. With respect to the claim that AFR 35-15[30] was unconstitutionally vague, Judge Christensen, writing for the court, determined that the term "demonstration" as used in the regulation is adequately defined in light of its relationship to article II of the NATO-SOFA agreement, by the context of "protest and dissent" in which the term appears in the regulation, and by the ordinary usage of the term. The court concluded further that the interest of the military in drafting and enforcing regulations to ensure compliance with United States treaty obligations is one to be accorded significant judicial deference. The court stated:

> The appellant reads altogether too narrowly the interest of the military in complying with the treaty obligation of the United States to avoid intervention in political affairs through its military forces. It would be unseemly and possibly disruptive—or at least the military had the right to consider it so—for members of the military to engage in demonstrations in the host country no matter what political interest was being pressed.[31]

With respect to the question of vagueness, Judge Leventhal in a concurring opinion determined that the term "demonstration" had been adequately defined in the case of *United States v. Alexander*[32] and that plaintiff had been given adequate notice that his contemplated conduct was prohibited under the definition adopted by the *Alexander* court and by the common usage of the term. As to the claim that the regulation was overbroad and violated plaintiff's freedom of speech, the court held that the military had acted within its discretion in drafting AFR 35-15, even though it provided a blanket proscription of demonstrations in foreign host countries. The court found that, insofar as the regulation was drafted to ensure the enforcement of article II of NATO-SOFA, the proscription of "any political activity in the receiving State" was justified.[33] The court paid special attention to the subject of the demonstration, finding that avoidance of a protest against the Vietnam War was well within the military's control under the treaty as a potential embarrassment to the foreign host country.[34]

30. *See* text of AFR 35-15 ¶ 3e(3)(b)(8) at note 4 *supra.*

31. 559 F.2d at 628.

32. Judge Leventhal writes: "The essence of 'demonstration' is the overt display to the public of 'demonstrative' expression or activity." 559 F.2d at 631 (concurring opinion).

33. *Id.* at 628.

34. *Id.*

In his concurring opinion, Judge Leventhal concluded that military personnel must sacrifice to some extent their constitutional freedom of speech, particularly when they are located in a foreign state. That opinion was based primarily upon a broad interpretation of the Supreme Court's decision in *Parker v. Levy,* in which the Court determined that "the special mission and structure of the armed forces may require restrictions unacceptable elsewhere in society."[35] The concurrence concluded that the interest of political expression must yield to other needs of the military community.[36]

Chief Judge Bazelon, in a lengthy dissent, reasoned, however, that the regulation, AFR 35-15, should have been held unconstitutional, both on grounds of vagueness and overbreadth. To the claim that plaintiff's due process rights were violated by virtue of the vagueness of the regulation, the dissent found that the activities of plaintiff in merely organizing the formal presentation of petitions opposing the Vietnam War to embassy representatives presented a classic example of the vagueness of the term "demonstration" in the regulation. The dissent further concluded that the application of the regulation, both generally and to the instant case, was an abridgement of first amendment freedom of speech, adding that such an absolute ban on free expression has never been upheld by the United States Supreme Court. The dissent stated that the judicial deference accorded to the military by the instant decision is based upon a misreading of the Supreme Court decision in *Parker v. Levy*. The dissent would have held that *Parker* merely restricts standing to challenge military regulations on the basis of vagueness or overbreadth, and in no way warrants a more deferential standard of review. The dissent further concluded that to the extent that AFR 35-15 is an enforcement tool of article II of NATO-SOFA, the blanket proscription of article II upon all political activity in a foreign host state should not be interpreted literally. To do so, the dissent maintained, would raise serious first amendment questions with respect to proscribing such political activities as voting rights and political discussions of American military personnel stationed abroad. Judge Bazelon would have interpreted the treaty provision as proscribing conduct only in the event that the demonstration in question interfered with local politics or offended the foreign host government.

35. 559 F.2d at 631 (citing Parker v. Levy, 417 U.S. at 758).
36. *Id.* at 632.

## IV. COMMENT

The decision in the instant case accords the military almost unlimited discretion to determine the limits of first amendment rights of military personnel stationed in a foreign host state which is a NATO-SOFA signatory. The decision is based upon an analysis of the relationship between the regulation, AFR 35-15, and article II of NATO-SOFA, which nominally proscribes all political activity by military personnel stationed in a foreign NATO country. Even the dissent recognized that such a treaty obligation must "weigh heavily in any first amendment balance."[37] This is a case of first impression with respect to the breadth of interpretation of the NATO-SOFA article II prohibition upon all political activity. All of the judges in the instant case recognized at least inferentially that some limitations must necessarily exist upon the blanket proscription provided in article II of NATO-SOFA.[38] The true issue thus became one of the proper degree of judicial deference. The court held that the judicial deference to the military in its determination of methods to ensure complaince with United States treaty obligations will weigh very heavily in the balance against potential deprivations of first amendment freedoms.[39] By what standard the military is to discern a proscribed "demonstration" from a statutorily permissible expression the court does not attempt to determine. It is left to the military to determine the proper limits of first amendment freedoms of military personnel, with the courts applying an extremely weak rational basis test to justify whatever the military decides. Although such a division of authority may at first glance appear harsh, the court has merely recognized the enormous difficulties which a contrary result might create. The military must be given wide latitude in drafting regulations to ensure compliance with United States treaty obligations. To narrow the military's discretion in this area could jeopardize not only the scope of extant treaty obligations, but perhaps even the existence of future

37. *Id.* at 636 n.6.

38. Judge Christensen spoke of a distinction between "demonstration" and "presentation," with the latter being permissible under the regulation (and apparently under the treaty as well). *Id.* at 626-28. Judge Leventhal in concurrence inferred a limitation by stating that the treaty seemed to contemplate a "kind of prophylactic ban on political 'demonstration' . . . that operates on inherently conspicuous and attention-getting activity." *Id.* at 632 n.2. Judge Bazelon concluded in dissent that where a tradeoff is required between the first amendment and the treaty obligation, all doubt should be resolved in favor of free speech. *Id.* at 642.

39. 559 F.2d at 628.

treaty obligations as well. The Supreme Court's decision in the case of *Parker v. Levy* is considered in detail in each of the opinions in the instant case, and may be subject to the very limited interpretation which the dissent would place upon it. The Court in *Parker* may well have intended nothing more than to restrict standing of military personnel to challenge military regulations on the basis of first amendment claims. Even in so limited a context, however, the present holding is clearly consistent with the spirit of the *Parker* decision. The *Parker* Court, whether as a part of its holding or merely in dicta, articulated clearly its belief that the military must be accorded great deference in limiting first amendment freedoms of military personnel. The instant case is significant in that it delineates one specific area (*i.e.*, where United States treaty obligations are at issue) in which great judicial deference will be accorded to the military.

*Gary I. Christian*

**WARSAW CONVENTION**—CAUSE OF ACTION—ARTICLE 17 OF THE WARSAW CONVENTION CREATES AN INDEPENDENT CAUSE OF ACTION FOR WRONGFUL DEATH OR PHYSICAL INJURY

## I. FACTS AND HOLDING

Plaintiff, on behalf of his deceased wife, brought an action[1] against British European Airways and Hawker Siddeley Aviation, Ltd.,[2] under the Warsaw Convention[3] for wrongful death and baggage loss arising from an air crash. On June 18, 1972 a British European Airways flight from London to Brussels stalled shortly after takeoff from London's Heathrow Airport and crashed into a field near Staines, England killing all 112 passengers. In the complaint, plaintiff invoked articles 17 and 18(1) of the Warsaw Convention[4] for wrongful death and baggage loss and asserted federal jurisdiction based on diversity.[5] Defendant alleged the district

1. Abraham Benjamins, plaintiff, and Hilde Benjamins, his deceased wife, were Dutch citizens permanently residing in California. Plaintiff brought suit as representative of his wife's estate, on behalf of himself and his children by Hilde Benjamins.

2. Defendants were British corporations with their principal places of business in the United Kingdom.

3. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1929) [hereinafter cited as Warsaw Convention]. The Convention was the product of two international conferences, held in Paris in 1925 and Warsaw in 1929, and preparatory work done by the Comité International Technique d'Experts Juridiques Aériens (CITEJA). The Convention was drafted to create a uniform international air liability law with limited potential liability for the carrier. The United States Senate ratified the Warsaw Convention on June 15, 1934.

The Warsaw Convention is applicable to this proceeding because the ticket was purchased by Mrs. Benjamins in Los Angeles; the flight constitutes "international transportation" within the meaning of article 1 of the Convention, and both the United States and the United Kingdom are "High Contracting Parties."

4. Article 17 provides:

> The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 18(1) provides:

> The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air.

5. Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978).

court lacked subject matter jurisdiction because the complaint failed to state a proper cause of action.[6] The district court agreed with defendant and dismissed the case.[7] Plaintiff amended the complaint and asserted federal jurisdiction based on a general federal question arising under a treaty[8] and the Alien Tort Claims Act.[9] The district court ruled that plaintiff's suit did not arise under a treaty of the United States because the Warsaw Convention fails to create a cause of action, but instead, merely sets forth rules that govern the procedures and remedies available once a cause of action exists in "domestic law."[10] On appeal to the United States Court of Appeals for the Second Circuit, *reversed and remanded. Held:* The Warsaw Convention is universally applicable international air law that is the source of an independent cause of action for wrongful death or physical injury occuring on any international flight covered by the Convention. *Benjamins v. British European Airways,* 572 F.2d 913 (2d Cir. 1978).

## II. LEGAL BACKGROUND

The intent of the drafters of the Warsaw Convention was to create a uniform air carrier liability law to govern the "interrelated transportation of persons, baggage, or goods performed by aircraft for hire."[11] The Convention derived most of its legal doctrines from prior drafts of an international air carrier law by the Comité International Technique d'Experts Juridiques Aériens (CITEJA).[12] After debate over whether a cause of action could be created

6. *Id.* at 915.

7. *Id.*

8. 28 U.S.C. § 1331(a) (1976) provides in pertinent part: "The District Court shall have original jurisdiction of all civil actions where in the matter in controversy . . . arises under the . . . treaties of the United States."

9. 28 U.S.C. § 1350 (1976). The Alien Tort Claims Act gives District Courts original jurisdiction of any civil action brought by an alien for a tort committed in violation of the law of nations or a treaty of the United States.

10. 572 F.2d at 915.

11. Calkins, *The Cause of Action Under the Warsaw Convention—Part I,* 26 J. AIR L. & COMM. 217 (1959); Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 HARV. L. REV. 497 (1967); Orr, *The Warsaw Convention,* 31 VA. L. REV. 423, 426 (1945).

12. The CITEJA proposal was the product of a number of prepatory studies. The first rough draft of an international air law was submitted by the French government to an international conference in Paris on October 26, 1925. The conference created a commission to review the proposal. The commission redrafted the proposal numerous times between 1925 and 1928, at which time it was finalized at the CITEJA meeting in May 1928 at Madrid. *See* Calkins, *supra* note 11, at 218.

through an international convention, CITEJA decided that a carrier would be liable for damages due to wrongful death or physical injury,[13] and that any liability action brought against a carrier must be based on CITEJA rules.[14] The Warsaw Convention accepted the CITEJA draft as their source document. It is evident from the legislative history of the Warsaw Convention that the cause of action issue was never directly addressed.[15] The resulting language in the Convention fails to clarify the question.[16] However, the accompanying documents and language of the Convention evidence the drafters' intent to create an independent cause of action against an air carrier for any damage sustained.[17] Furthermore, common law countries such as Great Britain and Canada, both High Signatories to the Convention, accept the apparent underlying notion of a right of action inherent in the Convention and passed legislation to insure such a reading.[18] The first decision on point in the United States was a New York case, *Wyman v. Pan American Airways, Inc.*,[19] in which the Court held, counter to the existing international interpretations, that the Warsaw Convention merely creates a presumption of liability on the part of the carrier and does not create any new substantive rights of action.[20] Another New York case, *Garcia v. Pan American Airways, Inc.*,[21]

13. The carrier liability for wrongful death or injury was covered in article 22(a) of the CITEJA draft which provides: " 'The Carrier shall be liable for damage during the carriage: (a) In case of death, wounding or other physical bodily injury of every description suffered by a traveler.' " Calkins, *supra* note 11, at 221.

14. CITEJA, Minutes and Documents, 3d Session at 53-54, *quoted in* Calkins, *supra* note 11, at 226.

15. The issue of a cause of action for damages was discussed in general terms throughout the Convention. *See generally* Calkins, note 11 *supra*.

16. *See* Warsaw Convention, *supra* note 3, art. 17, *quoted in* note 4 *supra*.

17. *See* Second International Conference on Private Air Law, Minutes and Documents, at 44 (Warsaw Oct. 4-12, 1929), *quoted in* Calkins, *supra* note 11, at 233-34. For a discussion of whether the treaty created a cause of action, see Lowenfeld & Mendelsohn, *supra* note 11, at 516-19.

18. Carriage by Air Act, 1939, 3 Geo. 6, c.12 (Canada); Carriage by Air Act, 1932, 22 & 23 Geo. 5, c.36, § 1(4) (England).

19. 181 Misc. 963, 43 N.Y.S.2d 420 (Sup. Ct. 1943), *aff'd mem.*, 267 App. Div. 947, 48 N.Y.S.2d 459 (1st Dep't 1944), *cert. denied*, 324 U.S. 882 (1944). The case involved a Pan American flight that disappeared without a trace over the South Pacific on June 29, 1938.

20. 181 Misc. at 965, 43 N.Y.S.2d at 423. The court based this decision on the case of Choy v. Pan American Airways, [1942] U.S. Av. Rep. 93 (S.D.N.Y. 1941). *Choy* was a liability action brought under the Death on the High Seas Act, 46 U.S.C. §§ 761-768 (1970), not the Warsaw Convention.

21. 269 App. Div. 287, 55 N.Y.S.2d 317 (2d Dep't 1945). The plaintiffs brought an action for wrongful death and baggage loss under the Warsaw Convention as

reversed the conclusion in *Wyman,* holding that the Warsaw Convention does create rights of action against an international air carrier.[22] The court reasoned that the Warsaw Convention, as a treaty, constitutes a federal law that overrides state law,[23] and therefore, it supersedes the tort liability doctine that a cause of action is controlled by lex loci delicti,[24] and not lex fori.[25] *Salamon v. Koninklijke Luchtvaart Maatschappij*[26] further interpreted the language of article 17 of the Convention as providing a cause of action for wrongful death or personal injury on any flight covered by the Convention.[27] Thus, the New York state courts reconciled the problem by harmonizing their interpretation with other Warsaw Convention adherents. Two federal cases in the Second Circuit, however, denied the existence of a cause of action in the Warsaw Convention. *Komlos v. Compagnie Nationale Air France*[28] reiterated the *Wyman* court's view that the Convention creates a presumption of liability, not a cause of action. Further, since the cause off action is governed by lex loci delicti, it is limited by the liability provisions of the Convention. The court relied heavily on a letter from Secretary of State Cordell Hull to President Franklin Roosevelt which stated that the Warsaw Convention creates a "presumption of liability against the aerial carrier."[29] The court in

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the result of a Pan American flight crashing into the Tagus River at Lisbon, Portugal on February 22, 1943.

22. The court stated, in pertinent part: "One is not bound to seek redress in the courts of this country. . . . But if he institutes action here, the law which we will apply is that set forth by the terms of the convention, even though it be inconsistent with the law of the place." *Id.* at 292, 55 N.Y.S.2d at 321.

23. *Id.; see* U.S. CONST. art. VI, cl.2.

24. Lex loci delicti is defined as "[t]he law of the place where the . . . wrong took place." BLACK'S LAW DICTIONARY 1056 (4th ed. 1968).

25. Lex fori is defined as "[t]he law of the forum . . . ." *Id.* at 1055.

26. 107 N.Y.S.2d 768 (Sup. Ct. 1951), *aff'd mem.,* 281 App. Div. 965, 120 N.Y.S.2d 917 (1st Dep't 1953). This was wrongful death action resulting from the crash of a Koninklijke Luchtvaart Maatschappij, N.V. (Royal Dutch Airlines) flight between Amsterdam and New York.

27. The court stated that the article 17 language clearly places the liability for wounding or death of a passenger upon the carrier, adding that, "If the Convention did not create a cause of action in Article 17, it is difficult to understand just what Article 17 did do." *Id.* at 773.

28. 111 F. Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds,* 209 F.2d 436 (2d Cir. 1953), *cert. denied,* 348 U.S. 820 (1954). This case was a wrongful death action resulting from the crash of a Compagnie Nationale Air France (Air France) flight from Paris to New York on the island of San Miguel, Azores, Republic of Protugal.

29. The letter from Secretary of State Hull recommended the acceptance of the Warsaw Convention. The pertinent parts provide:

*Noel v. Linea Aeropostal Venezolana*[30] relied on *Komlos,* and rejected plintiff's claim that article 17 creates an "independent right of action."[31] The court reasoned that article 17 only creates a "uniformity of procedure and remedies," leaving it to "local law" to govern whether a cause of action is available to the injured passenger.[32] The Second Circuit had unequivocally rejected the Warsaw Convention as the source of an independent cause of action for wrongful death of a passenger on an international flight. Subsequent cases in both the Second and Ninth Circuits have adhered to the rule in *Komlos* and *Noel* that a wrongful death or physical injury action must be based on local law and not on the Convention.[33] Congress, in response to criticism of the *Komlos* and *Noel* decisions, proposed legislation to create a cause of action arising out of the Convention, but the proposal was never enacted.[34]

## III. The Instant Opinion

In the instant case, the court initially addressed the question of whether any court in the United States has jurisdiction to hear the case in the "international or treaty sense."[35] The court viewed

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> The effect of Article 17 (ch. III) of the Convention is to create a presumption of liability against the aerial carrier on the mere happening of an accident occasioning injury or death of a passenger. . . . [T]he burden is upon the carrier to show that the injury or death has not been the result of negligence on the part of the carrier. . . . [T]he principle of placing the burden on the carrier to show lack of negligence in international air transportation in order to escape liability, seems to be reasonable in view of the difficulty which a passenger has in establishing the cause of an accident in air transportation.

[1934] U.S. Av. Rep. 240, 243 (quoting letter from Secretary of State Cordell Hull to President Franklin D. Roosevelt).

30. 144 F. Supp. 359 (S.D.N.Y. 1956), *aff'd,* 247 F.2d 677 (2d Cir. 1957), *cert. denied,* 355 U.S. 907 (1957). This was an action for wrongful death arising out of the crash into the sea approximately 30 miles from New Jersey of a Linea Aeropostal Venezolana flight from New York to Caracas. 247 F.2d at 678.

31. 247 F.2d at 679.

32. *Id.*

33. *See* Maugnie v. Compagnie Nationale Air France, 549 F.2d 1256, 1258 (9th Cir. 1977), *cert. denied,* 431 U.S. 974 (1977); Scott v. Middle East Airlines Co., 240 F. Supp. 1, 4-5 (S.D.N.Y. 1965); Bergeron v. Koninklijke Luchtvaart Maatschappij, N.V., 188 F. Supp. 594, 596-97 (S.D.N.Y. 1960).

34. H.R. 8386, 89th Cong., 1st Sess. (1965); S. 2032, 89th Cong., 1st Sess. (1965).

35. Benjamins v. British European Airways, 572 F.2d 913, 915 (2d Cir. 1978) (citing Smith v. Canadian Pacific Airways, Ltd., 452 F.2d 798, 800 (2d Cir. 1971)).

article 28(1) of the Convention as controlling on the question of jurisdiction in an international sense,[36] and concluded that plaintiff's complaint satisfied the basic requirements of bringing suit in the United States. The court noted, however, that the plaintiff must further show that the particular court has statutory jurisdiction over his action. The court addressed the two bases for plaintiff's claim of federal jurisdiction both as a federal question "arising under" a treaty and under the Alien Tort Claims Act.[37] The Alien Tort Claims Act was inapplicable because the alleged acts violated neither a treaty of the United States nor the law of nations.[38] Accordingly, the court found the crucial issue to be whether planntiff's cause of action for wrongful death "arises under" the Warsaw Convention. The court reversed prior case law by determining that article 17 does create an independent cause of action for death or injury to a passenger. First, the court held that even though a cause of action is not specifically indicated in the text of the Convention, the drafters clearly intended to create a "uniform law to govern air crashes."[39] To insist that an injured passenger first find an appropriate cause of action in the domestic law of a country runs counter to the spirit of uniformity inherent in the Convention. The court concluded that to further the purpose of the Convention, this inconsistency must be removed and the Convention construed as providing a uniform cause of action. Second, the court held that because other articles create causes of action based on the Convention, the apparent purpose of the Convention is to create a general cause of action throughout, including article 17 for wrongful death. The court specifically relied on articles 18 and 30(3) which it interpreted as creating an independent cause of action for baggage loss or damage.[40] Third, the court held that the most compelling evi-

36. Article 28(I) provides:

> An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.

Warsaw Convention, *supra* note 3, art. 28(I).

37. 572 F.2d at 915-16.

38. The court stated that, "Airlines do not 'violate' the Convention when they crash . . . but only when they fail to compensate victims who are adjudged to be appropriate recipients of damages." *Id.* at 916. On the issue of a violation of the law of nations, the court cited ITT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975). 572 F.2d at 916.

39. 572 F.2d at 917.

40. *See generally* Calkins, note 11 *supra*.

dence of the existence of a cause of action in the Convention is the acceptance of that principle by other common law signatories. The court referred to England's passage of the Carriage by Air Act, 1932, that clearly specified the sole source of international air carrier liability as the Warsaw Convention. A dissent was submitted, in which the majority was condemned for disregarding the intent of Congress and expanding federal jurisdiction by rewriting the terms of the Convention through judicial fiat. The dissent further argued that a basic trade-off existed in the Convention with the carrier's limited liability being countered by shifting the burden of proof to the carrier. The dissent reasoned that this shifting of the burden was accomplished by article 17 which placed a presumption of liability upon a carrier and did not create a cause of action for wrongful death or injury. This presumption could then be rebutted by the carrier under article 20(1). The majority, however, held that the need for uniformity in international air law requires that the Warsaw Convention be a "universal source" of a cause of action for death or injury to a passenger.

## IV. COMMENT

The instant court's interpretation of article 17 of the Warsaw Convention as creating an independent cause of action for wrongful death and personal injury has reversed all prior rulings in the federal courts.[41] The effect of the decision is to overturn the federal courts' reliance on the tort law doctrine that lex loci delicti governs a cause of action for damages. Thus, the court places the United States in harmony with other signatories to the Warsaw Convention,[42] and gives an injured passenger a cause of action based solely on article 17 of the Convention. The court ascertained the problem of maintaining a uniform internatonal air law when an air disaster victim is forced to base an action on domestic law. For instance, if a flight between two signatories to the Convention crashed in a

41. Maugnie v. Compagnie Nationale Air France, 549 F.2d 1256 (9th Cir. 1977), *cert. denied,* 431 U.S. 974 (1977); Noel v. Linea Aeropostal Venezolana, 247 F.2d 677, 679 (2d Cir. 1957), *cert. denied,* 355 U.S. 907 (1957); Komlos v. Compagnie Nationale Air France, 111 F. Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds,* 209 F.2d 436 (2d Cir. 1953), *cert. denied,* 38 U.S. 820 (1954).

42. The court has created the same harmony has had previously been created by the New York courts. *See* Salamon v. Koninklijke Luchtvaart Maatschappij, N.V., 107 N.Y.S.2d 768 (1951), *aff'd,* 120 N.Y.S.2d 917 (1953); Garcia v. Pan American Airways, Inc., 269 App. Div. 287, 55 N.Y.S.2d 317 (1945), *aff'd,* 295 N.Y. 852, 67 N.E.2d 257 (1946), *aff'd,* 329 U.S. 741 (1946).

nonsignatory country without a wrongful death law, a passenger's survivors could be precluded from bringing suit against the carrier because of the principle of lex loci delicti.[43] The court viewed such a result as undermining the protection that a universally applicable cause of action afforded a passenger on a flight covered by the Warsaw Convention. The instant opinion will allow a party whose flight is covered by the Convention to bring an action for wrongful death or physical injury in United States federal courts, regardless of the place where the disaster occurs. The only unanswered question in this case is the dissent's assertion that the court has improperly ignored Congress' intent to limit federal jurisdiction in Convention cases.[44] However, in view of the need to retain a uniformly applicable international air law, the court displaces the lex loci delicti doctrine used by prior courts and acknowledges the existence of a universal cause of action arising under the Warsaw Convention.

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43. *See* Lowenfeld & Mendelsohn, *supra* note 11, at 518-19.

44. The holding also raises a question of whether the court has overreached its jurisdiction in international legal questions and encroached upon the role of the Executive and Congress to create and define the international laws that are to bind the United States. *See generally* W. BISHOP, INTERNATIONAL LAW 166-91 (3d ed. 1971).