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Recent Decisions

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RECENT DECISIONS

ADMIRALTY—Requirement of Minimum Contacts for Jurisdiction to Attach Property of Nonresident Defendant is not Applicable to Maritime Attachment

I. Facts and Holding

Plaintiff, a Bahamian corporation,[1] filed this action in admiralty to recover the value of fuel oil and other incidental services rendered to a Soviet flag vessel[2] while allegedly under charter to defendants, citizens of Canada.[3] Plaintiff's claim was based on an agreement whereby it provided fuel at a cost of $40,363.68 plus barge services valued at $600.00. Defendants were to deposit $45,000 with plaintiff to cover the cost of fuel and services, with plaintiff obligated to return any excess. Defendants allegedly failed to make the required deposit and have not paid any of the amount due. Plaintiff claimed in personam jurisdiction for the court based on the maritime attachment provisions in Supplemental Rule B(1) of the Federal Rules of Civil Procedure[4] under which plaintiff attached $8,851.38 on deposit by Pacific Seatrans in a bank within the geographic confines of the district. The defendants filed a motion to

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1. Grand Bahama Petroleum Co., Ltd. owns and operates a ship fueling facility at Freeport, Grand Bahama Island.

2. The vessel, *M/V Kuibshevges,* is owned by Murmansk Shipping Company. The owners are not involved in this suit.

3. The defendants include Canadian Transportation Agencies, Ltd., Seatrans Co., Ltd. and Odd Munsen. Canadian Transportation Agencies, Ltd. is recognized by the court as doing business as Seatrans, CTA/Seatrans, Pacific Seatrans Co. and PAC Seatrans Co.

4. With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees named in the complaint to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or his attorney that, to the affiant's knowledge, or to the best of his information and belief, the defendant cannot be found within the district. When a verified complaint is supported by such an affidavit the clerk shall forthwith issue a summons and process of attachment and garnishment. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(e) invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for Rule E(8) these supplemental Rules do not apply to state remedies so invoked.

Fed. R. Civ. P. Supp. R. B(1).

dismiss the action for lack of jurisdiction on the grounds that Supplemental Rule B(1) violated substantive and procedural due process guarantees of the Constitution. Defendants based their motion on the holding in *Shaffer v. Heitner*[5] and the argument that the attachment procedure provided by Rule B(1) is improper in that it provides inadequate procedural protection against mistaken deprivation of property. *Held:* The United States Supreme Court holding in *Shaffer v. Heitner* requiring minimum contacts before jurisdiction may be exercised in cases involving the attachment of property of a nonresident defendant does not reach maritime attachment; however, the attachment procedure provided under the Supplemental Rules for Certain Admiralty and Maritime Claims, Rule B(1), is violative of due process in that it does not provide sufficient protection for nonresident defendants from mistaken deprivation of property. *Grand Bahama Petroleum Co., Ltd. v. Canadian Transport Agencies, Ltd.,* 450 F. Supp. 447 (W.D. Wash. 1978).

II. Legal Background

The United States Constitution grants to the federal judiciary power over all cases of admiralty and maritime jurisdiction.[6] This provision was implemented in the 1789 Judiciary Act by a congressional grant of "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction" to the district courts.[7] In interpreting the scope of this general constitutional grant of power, the Supreme Court has asserted that determination of the limits of maritime law and admiralty jurisdiction is exclusively a judicial question.[8] With respect to factors to be considered in ascertaining the scope of maritime law, the Court has suggested four major considerations: (1) maritime law as derived from foreign codes and usages; (2) United States legal history and Constitution; (3) legislation passed by Congress; and (4) United States legal practices

5. Shaffer v. Heitner, 433 U.S. 186 (1977).
6. U.S. Const. art. 3, § 2.
7. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 77. The constitutional grant of jurisdiction over admiralty matters to the federal courts was qualified in the Judiciary Act of 1789 by the "saving to suitors" clause granting the aggrieved party the right to bring an action at common law where the common law courts were competent to grant the requested remedy. *Id.* § 9(a). For an interesting discussion of the historical and political origins of the saving clause see D. Robertson, Admiralty and Federalism (1970).
8. The Lottawanna, 88 U.S. (21 Wall.) 558 (1875).

and decisions.[9] Among the procedural elements of maritime law acquired from foreign codes and usages, the "ancient and unique remedy" of maritime attachment is the most powerful and distinctive.[10] The first Supreme Court recognition of the legitimacy of maritime attachment came in Justice Johnson's opinion in *Manro v. Almeida.*[11] In *Manro* defendant had contested the use of a writ of attachment issued by the court clerk to plaintiff as being contrary to common law practice. In overturning the trial court's decision in favor of defendant, Justice Johnson wrote:

> Upon the whole, we are of the opinion, that for a maritime trespass . . . the person injured may have his action *in personam,* and compel appearance by the process of attachment on the goods of the trespasser, according to the forms of the civil law, as engrafted upon the admiralty practice. And we think that it indispensible to the purposes of justice, and the due exercise of the admiralty jurisdiction, that the remedy should be applied, even in cases where the same goods may have been attachable under the process of foreign attachment issuing from the common law courts.[12]

The traditional maritime attachment procedure involved the filing of a complaint by the defendant with the court and the issuance of an order of arrest by the court to a marshall or his deputy directing him to take the defendant into custody. If the defendant could not be found by the marshall, any property belonging to him might be attached by the court. The primary purpose of the attachment was to compel the appearance of the defendant. If the defendant failed to appear within the time allotted by the procedural rules, however, the court would grant plaintiff relief based on satisfaction of his claim by judicial sale of defendant's attached property.[13] In 1825 the Court in *Manro* recognized a modification of this procedure to the extent that the writ of attachment could

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9. *Id.* at 576.

10. For a discussion of the divergent lines of development of United States and British admiralty practice in the area of in personam jurisdiction and maritime attachment see F. WISWALL, THE DEVELOPMENT OF ADMIRALTY JURISDICTION AND PRACTICE SINCE 1800 (1970).

11. 23 U.S. (10 Wheat.) 206 (1825).

12. *Id.* at 215-16. Justice Johnson's decision is also significant in that it affirmed the practice of United States admiralty courts to exercise a much wider scope of jurisdiction than was prevalent in England at the time, thereby freeing United States admiralty practice and procedure from the narrow scope of English admiralty practice. *See also* Justice Johnson's concurring opinion in Ramsay v. Allegre, 25 U.S. (12 Wheat.) 611, 640 (1827).

13. F. WISWALL, *supra* note 10, at 17.

be issued simultaneously with the writ of arrest.[14] This modified procedure was incorporated into the Admiralty Rules of 1844,[15] and remained largely unchanged through subsequent revisions including the complete revision of the rules in 1920.[16] In 1966 the unification of civil and admiralty procedure resulted in a major revision of admiralty procedure. The traditional maritime remedy of attachment and garnishment, however, was preserved from the prior rules with one important modification. Under the 1966 unification, Supplemental Rule B(1) shifted from the marshall to the plaintiff the burden of establishing that the defendant cannot be found in the district.[17] Under today's procedure in Supplemental Rule B(1), the marshall is no longer required to conduct a search for defendant within the jurisdiction and report to the court the results of its search.[18] The question of constitutional limitations on the nature and scope of admiralty jurisdiction has been the subject of few judicial comments with little or no carryover of constitutional standards of civil law into admiralty decisions. Several Supreme Court decisions have noted that although Congress has extensive power to alter, qualify or supplement admiralty law as experience or changing conditions might require, this power is subject to constitutional limitations.[19] It is significant, however, that no court has ever held an admiralty statute to be unconstitutional.[20] Similarly, there are no major cases overturning a procedural rule or

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14. 23 U.S. (10 Wheat.) at 215 (1825).

15. ADMIRALTY RULES OF PRACTICE 9, 44 U.S. (3 How.) ix, xi (1845).

16. ADMIRALTY RULES OF PRACTICE, 254 U.S. 679 (1920).

17. FED. R. CIV. P. Supp. R. B, Note of Advisory Committee on Rules, Subdivision 1 (1970).

18. This change has been viewed as an adjustment of the rules to reflect in fact what was taking place. J.W. Moore writes:

> In reality, however, the Supplemental Rules probably do not change the former practice since, in many of the more active maritime districts, the writ of foreign attachment did issue as of course and the courts looked *both* to the thoroughness of the information for service provided by the plaintiff and the diligence of the marshall . . . it appears that even under the former practice the diligence of the plaintiff in securing information regarding the whereabouts of the defendant was often accorded more weight than the diligence of the marshal.

7 A. J. MOORE & A. PELAEZ, MOORE'S FEDERAL PRACTICE, para. B.07 at B-301 (2d ed. 1978).

19. *See, e.g.,* United States v. Flores, 289 U.S. 137 (1932); Panama Ry. v. Johnson, 264 U.S. 375 (1924); The Steamer St. Lawrence, 66 U.S. (1 Black) 522 (1861).

20. *See* American Bridge Co. v. The Gloria O., 98 F. Supp. 71, 73 (E.D.N.Y. 1951).

judicial decision in admiralty on constitutional grounds. A series of recent decisions by the Supreme Court has upheld constitutional due process challenges to a number of state garnishment statutes with provisions very similar to the maritime attachment provisions of Supplemental Rule B(1). In *Sniadach v. Family Finance Corporation of Bay View*[21] and *Bell v. Burson*[22] state statutes allowing garnishment of property or termination of a state regulated interest without a prior hearing to determine the probable validity of the claim were declared violative of due process. In *Fuentes v. Shevin*[23] the Court summed up its holdings in *Sniadach* and *Bell* by saying:

> [I]t is now well settled that a temporary, nonfinal deprivation of property is nonetheless a "deprivation" in terms of the Fourteenth Amendment. . . . Both *Sniadach* and *Bell* involve takings of property pending a final judgment in an underlying dispute. In both cases, the challenged statutes included recovery provisions, allowing the defendants to post security to quickly regain the property taken from them. Yet the Court firmly held that these were deprivations of property that had to be preceded by a fair hearing.[24]

Three exceptional circumstances were listed by the Court as extraordinary situations which have warranted postponing notice and opportunity for a hearing, "First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, . . . the person initiating the seizure has been a government official responsible for determining . . . that it was necessary and justified in the particular instance."[25] In *Mitchell v. W.T. Grant Co.*[26] the Court withdrew somewhat from its position in *Shevin* which appeared to mandate a pre-attachment hearing in all except the aforementioned special circumstances.[27] In *Mitchell* the Court upheld a Louisiana sequestration statute which did not provide for a pre-sequestration hearing. The Court cited the requirement that plaintiff establish his interest in the property before a judge and that a writ could be issued only by a judge after the posting of a bond sufficient to protect the

21. 395 U.S. 337 (1969).
22. 402 U.S. 535 (1971).
23. 407 U.S. 67 (1972).
24. *Id.* at 84-85.
25. *Id.* at 91.
26. 416 U.S. 600 (1974).
27. Justice Powell's concurring opinion argues that *Mitchell* overrules *Fuentes*. *Id.* at 623 (Powell, J., concurring).

debtor from damages in the event of mistaken deprivation. The Louisiana statute provided further protection in that defendant had the right after attachment to seek immediate dissolution of the writ. It was necessary for the creditor then to prove, in a hearing, the grounds upon which the writ was issued to prevent its dissolution.[28] Some of the ambiguities regarding the status of *Fuentes* following *Mitchell* were resolved when the Supreme Court in *North Georgia Finishing v. Di-Chem*[29] overturned a Georgia garnishment statute on the ground that it failed to protect against a mistaken deprivation of property. The Court described the procedure under the Georgia statute as follows:

> The writ of garnishment is issuable on the affidavit of the creditor or his attorney, and the latter need not have personal knowledge of the facts. [footnote omitted] The affidavit . . . need contain only conclusory allegations. The writ is issuable . . . by the court clerk, without participation by a judge . . . . There is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment.[30]

In addition to the questions regarding the procedural legitimacy of Supplemental Rule B(1) raised by the *Sniadach* line of cases, the Supreme Court's decision in *Shaffer v. Heitner*[31] raises doubts as to the constitutional viability of maritime attachment in the face of a substantive due process attack. In *Shaffer* the Court invalidated a Delaware statute which allowed state courts to take jurisdiction of a lawsuit by sequestering in-state property of a nonresident defendant on the ground that, absent a finding of compelling state interest in the procedure, the state must establish minimum contacts among the parties, the contested transaction, and the forum state before jurisdiction can be exercised.[32] The standards applied by the Court in evaluating the Delaware sequestration statute were the standards of fairness and substantial justice set forth in *International Shoe.*[33]

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28. *Id.* at 618.
29. 419 U.S. 601 (1975).
30. *Id.* at 607.
31. 433 U.S. 186 (1977).
32. For a discussion of *Shaffer v. Heitner,* see Recent Decisions, 11 VAND. J. TRANSNAT'L L. 159 (1978).
33. 433 U.S. 186, 207 (1977). *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

III. The Instant Opinion

In the instant case the court faced substantive and procedural due process challenges to its jurisdiction as a result of defendant's claim that both the remedy and procedure prescribed in Rule B(1) violated the due process clause of the fifth amendment.[34] The court first dealt with the substantive challenge and rejected defendant's assertion that the Supreme Court holding in *Shaffer v. Heitner*[35] required the district court to adopt the minimum contacts standard as a basis for the exercise of in personam jurisdiction in maritime attachment cases involving nonresident defendants. The court noted that the constitutional grant of judicial power conferred jurisdiction over admiralty and maritime matters independent of jurisdiction over law and equity matters.[36] It further noted that this independence was maintained by Congress in the Judiciary Act of 1789 and has been reaffirmed by the Supeme Court.[37] Building upon the constitutional distinctiveness of admiralty jurisprudence, the court traced maritime attachment from its recognition in *Manro v. Almeida*[38] to the present and concluded: "[M]aritime attachment is constitutionally permissible. The recognized autonomy of admiralty jurisprudence, although not absolute, and the long constitutional viability of maritime attachment compel me to conclude that *Shaffer* does not reach Rule B(1) at-

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34. 450 F. Supp. 447, 449 (W.D. Wash. 1977). Defendant made no claim that plaintiff failed to follow the procedures laid down in Supplemental Rule B(1). Thus, the court was presented with the threshold problem of ascertaining whether it had the power to declare a rule properly promulgated by the Supreme Court unconstitutional. The district court argued that the Supreme Court acts only in an administrative and not a judicial capacity when promulgating procedural rules and from this distinction established the ground for conducting an inquiry into the constitutionality of Rule B(1).

35. 433 U.S. 186 (1977).

36. 450 F. Supp. 447, 453 (W.D. Wash. 1977).

37. *Id.* at 453. The Court cited the following passage from *Romero v. International Terminal Operation Co.:*

> Of course all cases to which "judicial power" extends "arise," in a comprehensive, non-jurisdictional sense of the term "under this Constitution." It is the Constitution that is the ultimate source of all "judicial power"—defines grants and implies limits—and so "all Cases of admiralty and maritime Jurisdiction "arise under the Constitution in the sense that they have constitutional sanction. But they are not "Cases, in Law and Equity, arising under this Constitution, the Laws of the United States. . . ."

358 U.S. 354, 368 (1959).

38. 23 U.S. (10 Wheat.) 206 (1825).

tachment."[39] Analytically, the court distinguished the instant case from *Shaffer* on grounds that maritime attachment does not rest on the common law precedents which *Shaffer* overruled,[40] and on the modern trend in admiralty, contrary to common law, which has been to strengthen traditional remedies.[41] After deciding in favor of the constitutional validity of maritime in personam attachment, the court addressed defendant's second claim that Supplemental Rule B(1) violates procedural due process by failing to provide defendant sufficient protection against mistaken deprivation of property. The court examined the procedural elements of Rule B(1) and noted that the writ of attachment was issued by the *clerk* of the court as a matter of course solely on the basis of a complaint and affidavit asserting that defendants could not be found within the district. The court expressed concern that these documents were verified only by plaintiff's counsel (as provided for under the Rule) who apparently had no actual knowledge of the events set forth in the complaint. Finally, the court noted that there was no provision for an immediate post-seizure hearing. The court considered this procedure in light of the *Di-Chem* decision and concluded that the only meaningful distinction between *Di-Chem* and this action which might justify the Rule B(1) procedure was that this action was in admiralty.[42] The court, in finding that the instant case involved only private interests, rejected plaintiff's argument that the nature of admiralty practice is such that it satisfies the "extraordinary situations" exception to the pre-attachment hearing and notice requirements of *Fuentes v. Shevin.*[43] The court further found plaintiff's contention that the procedure under B(1) satisfies *Mitchell v. W.T. Grant* "without merit," citing the fact that the Louisiana statute required "a clear showing to a judge that the creditor had a right to possession; conclusory allegations of ownership would not suffice."[44] The court also noted that the Louisiana debtor was protected by the requirement that plaintiff file a bond to cover all damages to debtor if the deprivation of property proved to be mistaken, and that the debtor

39. 450 F. Supp. 447, 455 (W.D. Wash. 1977) (footnotes omitted.)

40. *Shaffer* overruled *Pennoyer v. Neff*, 95 U.S. 714 (1877), the traditional pre-minimum contacts precedent for exercise of in rem jurisdiction.

41. 450 F. Supp. 447, 456 (W.D. Wash. 1977).

42. *Id.* at 456.

43. *Id.* at 457. In view of the failure of the plaintiff's case to satisfy the governmental purpose requirement the court considered it unnecessary for it to consider the other two prongs of the *Fuentes* test.

44. *Id.* at 458.

was entitled to an immediate post-seizure hearing to determine the merits of creditor's claim against the attached property. None of these protections were found to be available in rule B(1). The court next considered whether a balancing of interests could justify the summary procedure implicit in Rule B(1). The court concluded that it did not, stating, "The vitality of maritime commerce depends as much on the availability of protections against the mistaken summary deprivation of property of maritime defendants as it does on the availability of speedy remedies for maritime plaintiffs."[45] Plaintiff finally contended that Rule B(1) satisfies due process because it was the same procedure employed when the Constitution was adopted. The court rejected this argument finding little resemblance between the present attachment procedure and that in existence when the Constitution was adopted. In support of its position the court pointed out that prior to *Manro* "a writ of maritime attachment was issued only after the marshal or his deputy had returned a warrant of arrest *in personam* that the defendant could not be found within the district."[46] Even after *Manro,* according to the court, and until 1844 when Admiralty Rule 2 was promulgated, maritime defendants had greater procedural protection[47] than that offered by Rule B(1), since judicial participation was required in the attachment procedure. Because the court found no indication that maritime defendants may be due less procedural protection against the mistaken deprivation of property than non-maritime defendants, it concluded that based on *Fuentes* and *Di-Chem* Rule B(1) was unconstitutional.[48]

IV. COMMENT

The instant opinion represents a practical middle ground in an important legal area which has received little academic or judicial consideration.[49] Against the danger of abuse of rules designed to

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45. *Id.*

46. *Id.* at 459 (quoting from the decision in Maryland Tuna Corp. v. M/S Benares, 429 F.2d 307, 320 (2d Cir. 1970)).

47. 450 F. Supp. 447, 458 (W.D. Wash. 1977).

48. *Id.* at 459, 460.

49. Even the question whether it is Congress or the courts which is supreme in defining the scope of admiralty jurisdiction remains unclear. An indication of the logical inconsistencies which appear in opinions in this area is exemplified by Chief Justice Hughes' opinion in *Detroit Trust Co. v. The Thomas Barlum,* in which he wrote, "[Congress] has paramount power to determine the maritime law which shall prevail throughout the country . . . . But in amending and revising the maritime law, the Congress necessarily acts within a sphere restricted

enhance "the safety and convenience of commerce and the speedy decision of controversies, where delay would often be ruin,"[50] the court must balance the consideration that:

> To compel suitors in admiralty (when the ship is abroad and cannot be reached by a libel *in rem*) to resort to the home of the defendant, and to prevent them from suing him in any district in which he might be served with a summons or his goods or credits attached, would not only often put them to great delay, inconvenience and expense, but would in many cases amount to a denial of justice.[51]

The necessity of maintaining "certain distinctive maritime remedies" was recognized by the Advisory Committee which drafted the Unified Rules of Civil and Admiralty Procedure adopted in 1966.[52] An extension of *Shaffer v. Heitner* into maritime attachment would have had serious repercussions on the conduct of United States and international maritime commerce. As the instant case demonstrates, foreign as well as domestic parties rely on the availability of judicial maritime attachment remedies which can be found worldwide in coastal states engaged in maritime trade. The court's arguments in favor of the historical and constitutional separateness of admiralty law are also persuasive. Although the constitutional uniqueness of admiralty law has never been clearly defined by the Supreme Court, it must extend to traditional remedies which are essential to the continued vitality of admiralty jurisprudence. Therefore, the court's decision to affirm the validity of maritime attachment can be supported on the grounds of equity and fairness to the parties involved, commercial

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by the concept of the admiralty and maritime jurisdiction." 293 U.S. 21, 43-44 (1934). One commentator has noted that this "subservient paramountcy may offer inviting fields for theological speculation [but] it will not draw much applause for jurisprudential certainty." Zobel, *Admiralty Jurisdiction, Unification, and The American Law Institute,* 6 SAN DIEGO L. REV. 385 (1969).

50. The Genesee Chief, 53 U.S. (12 How.) 233, 454 (1851).

51. *In re* Louisville Underwriters, 134 U.S. 488, 493 (1890).

52. The Committee wrote in their introductory note to Rule B:

> Certain distinctively maritime remedies must be preserved in unified rules. The commencement of an action by attachment or garnishment has heretofore been practically unknown in federal jurisprudence except in admiralty . . . .
>
> No attempt is here made to compile a complete and self-contained code governing these distinctly maritime remedies. The more limited objective is to carry forward the relevant provisions of the former Rules of Practice for Admiralty and Maritime Cases, modernized and revised to some extent but still in the context of history and precedent.

7A MOORE'S FEDERAL PRACTICE, *supra* note 16, para. A.01(2) at 513.

realism, and the constitutional uniqueness of admiralty jurisprudence. The court also goes beyond a simple affirmation of maritime attachment to examine the procedure of attachment.[53] The court convincingly demonstrates that there is neither historical nor judicial precedent to support the procedure in Supplemental Rule B(1). Likewise, there is no vested constitutional interest in the procedure employed in Rule B(1). Thus, commercial necessity and fundamental fairness to the parties remain the only factors to be considered in assessing the validity of Rule B(1). The court, however, chooses to treat this question as a conventional procedural due process question without expressly taking into consideration the unique commercial context which largely dictates the constitutional separateness of admiralty law. In the instant case, it is clear that the unique demands of maritime commerce for expeditious means of either insuring defendant's presence in court or satisfying valid claims cannot outweigh the defendant's interest in sufficient procedures providing a reasonable protection against mistaken deprivation of property.[54] The short-term impact of the district court's decision will be beneficial. Procedural protections under Rule B(1) are clearly inadequate, and this decision should stimulate courts to take appropriate steps under Rule 83 to make local rules which are not inconsistent with Rule B(1), but which provide greater protection to the defendant.[55] The long-term benefits of

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53. A discussion of the propriety of a district court declaring Rules promulgated by the Supreme Court unconstitutional is beyond the scope of this comment. However, the risks and problems associated with various district courts applying different constitutional standards to the Federal Rules of Civil Procedure are obvious.

54. In keeping with the constitutional uniqueness of admiralty law, arguably it was inappropriate for the court to cite *Fuentes v. Shevin* and *North Georgia Finishing v. Di-Chem* as controlling precedent in deciding the procedural due process question. Certainly their arguments could be cited as persuasive but their holdings should not be binding on admiralty merely because the factual patterns are similar or even identical.

55. Rule 83 provides that:

> Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

FED. R. CIV. P. 83. One procedural improvement which could be adopted quite readily under Rule 83 would be to allow defendant the right to seek immediate dissolution of the writ of attachment. *See, e.g.,* Mitchell v. W.T. Grant, 416 U.S. 337 (1969).

this decision are not as clear. The issues raised by the decision, however, may serve to stimulate a long overdue discussion of the constitutional parameters of admiralty jurisprudence.

Aubrey W. Bogle, III

BUY AMERICAN STATUTES—New Jersey—
Constitutionality of Buy American Statute Upheld by State Supreme Court

I. Facts and Holding

Defendant, the North Jersey District Water Supply Commission, issued bidding specifications to contractors for the construction of a water treatment plant. The specifications contained provisions[1] requiring compliance with the New Jersey Buy American statute.[2] Generally, the Buy American statute requires exclusive use of domestic materials and supplies in public work projects and in any work for which the state pays part of the cost.[3] Failure to comply with these requirements results in the contractor's being barred from consideration for public work contracts for a period of three years.[4] Plaintiffs, an individual taxpayer and private resident of New Jersey,[5] and a New York subsidiary of a West German manufacturer of pumping equipment,[6] sought a declaration that

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1. An addendum to the original specifications contained the first mention of specifications requiring compliance with the Buy American statute.
2. N.J. Stat. Ann §§ 52:33-2 & 3 (West 1955).
3. The requirement is, however, flexible. "[I]f the head of the department or other public officer authorized by law to make the contract shall find that in respect to some particular domestic materials it is impracticable to make such requirement or that it would unreasonably increase the cost, an exception shall be noted in the specifications as to that particular material, and a public record made of the findings which justified the exception." N.J. Stat. Ann. § 52:33-3 (West 1955).
4. *Id.* § 52:33-4.
5. Sieglinde Fazio is a property owner, taxpayer and resident of the City of Clifton, New Jersey, a municipality serviced by the Commission. The trial court held that she had sufficient standing to bring the present suit. K.S.B. Technical Sales Corp. v. North Jersey Water Supply Commission of the State of New Jersey, 150 N.J. Super. 533, 376 A.2d 203 (1977). The instant court expressly concurred with the trial court's holding on the issue, reasoning that Fazio "as a taxpayer residing in a municipality . . . of the North Jersey District, has a pecuniary interest in the project." K.S.B. Technical Sales Corp. v. North Jersey Water Supply Comm'n, 75 N.J. 272, 381 A.2d 774, 777 (1977).
6. K.S.B. Technical Sales Corp. (KSB), a New York corporation which imports and distributes water-pumping equipment of the type required under the specifications issued by the Commission, is a wholly-owned subsidiary of Klein Schonzlin Becker AG, a West German manufacturer of pumps and pumping equipment. KSB had obtained the original bidding invitation from the Commission which did not include the Buy American provision. *See* note 1 *supra*. Seven days after the addendum containing the Buy American provision was issued, KSB instituted an action against the Commission in the United States District Court for the District of New Jersey. The federal district court appointed a con-

the Buy American condition in the specifications was invalid and that the statute was unconstitutional. Plaintiffs attacked the statute in three ways, arguing: (1) that the Buy American statute impaired and was inconsistent with the General Agreement on Tariffs and Trade (GATT);[7] (2) that it represented an impermissible conflict with the foreign affairs power of Congress and the President; and (3) that it violated the commerce clause.[8] The trial court declared the Buy American provisions in the specifications invalid, but held that in fairness the bids submitted in accordance therewith should stand.[9] The Appellate Division affirmed with respect to the invalidity of the Buy American condition, but reversed in part, holding that the bids submitted under the specifications were void.[10] On appeal to the Supreme Court of New Jersey, *reversed. Held:* The New Jersey Buy American statute is neither

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servator to collect the bids for the Commission and hold them unopened until further order of the court.

The trial court found that KSB had standing to bring this suit since the Buy American provision deprived it of the opportunity to offer its pumps to prospective bidders. 150 N.J. Super. at 542, 376 A.2d at 208. But the instant court noted that there was no clear showing that any bidder would have considered the pumps sold by KSB in making its bid. 75 N.J. 272, 381 A.2d at 777. The court, however, did not find it necessary to pass on the issue since it had been held that Faxio possessed a clear right to standing. *Id.*

7. The General Agreement on Tariffs and Trade (GATT), a multilateral international agreement made by executive action, is designed to remove impediments to international trade between the signatories. It is considered the "principal" means of regulating international trade. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A23, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as GATT]; *see* Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law,* 66 MICH. L. REV. 249 (1967).

GATT has been equated with treaty law on several occasions. *See* United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937). Plaintiffs felt the Buy American statute constituted an impediment to international trade, and since GATT is in effect federal law, that the Buy American statute should be preempted under the supremacy clause. U.S. CONST. art. VI, cl. 2.

8. U.S. CONST. art. I, § 8, cl. 3.

9. The trial court held that the Buy American provision conflicted with GATT and thus violated the supremacy clause. The court found, however, no commerce clause violation. 150 N.J. Super. at 548, 376 A.2d at 211.

10. 151 N.J. Super. 218, 376 A.2d 960, 964, 966 (1977). Following the trial court's opinion, the Appellate Division also found no intrusion by the statute into the commerce clause powers reserved to Congress. *Id.,* 376 A.2d at 962. On the issue of the validity of the bids, however, the court held that when positive constitutional prohibitions exist, a court of equity is not free to disregard them, citing Hedges v. Dixon City, 150 U.S. 182 (1893). 376 A.2d at 966. The court thereupon directed the conservator to return the bids unopened.

preempted by the General Agreement on Tariffs and Trade, nor an encroachment upon the federal foreign affairs or commerce powers, and is therefore constitutional. *K.S.B. Technical Sales Corp. v. North Jersey District Water Supply Commission,* 75 N.J. 272, 381 A.2d 774 (1977), *appeal dismissed,* ___ U.S. ___, 98 S.Ct. 1635 (1978).

II. Legal Background

The supremacy clause[11] provides that the Constitution, treaties, and federal legislation are to be considered the "supreme law of the land."[12] In some situations state laws must be held unconstitutional, even though the federal government has not expressly preempted the particular field and regardless of whether the state action is harmonious with federal policies.[13] Thus, congressional intent to preempt state action in a particular field exists impliedly where the nature of regulated subject matter "permits no other conclusion."[14] Where the entire field has not been preempted, however, coexistence of federal and state regulations is possible. This coexistence depends upon "whether both . . . regulations can be enforced without impairing the federal superintendence of the field, not [on] whether they are aimed at similar or different objectives."[15] Following this rule, the Supreme Court in *DeCanas v. Bica*[16] upheld a state regulation[17] prohibiting employers from knowingly employing aliens not entitled to lawful residence in the United States, if such employment had an adverse effect on lawful resident workers. The Court reasoned that because the regulation had only "purely speculative and indirect impact on immigration,"[18] it was not preempted by the federal government's exclusive power to regulate immigration. A state law must yield, however, if it impairs an attempt by the federal government to regulate a field through either treaty law[19] or congressional action.[20] Thus, in

11. U.S. Const. art. VI, cl. 2.
12. *Id.*
13. Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963).
14. *Id.*
15. *Id.*
16. 424 U.S. 351 (1976).
17. Cal. Lab. Code § 2805(a) (West Supp. 1978).
18. 424 U.S. at 355.
19. Kolovarat v. Oregon, 366 U.S. 187, 190 (1961); United States v. Pink, 315 U.S. 203, 230 (1942).
20. Perez v. Campbell, 402 U.S. 637 (1971); Lee v. Florida, 392 U.S. 378 (1968); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

Kolovarat v. Oregon,[21] a state statute providing that intestate property be escheated to the state when decedent leaves no next of kin except aliens living outside the United States, was held preempted by a treaty with Serbia (now Yugoslavia). The treaty allowed citizens of that country to inherit personal property located in the United States on the same basis as United States citizens. Although entered into by executive agreement, GATT is considered legally equivalent to treaties enacted under congressional initiative.[22] Thus, several state laws have been declared invalid because of inconsistency with GATT.[23] In *Territory v. Ho*,[24] for instance, a Hawaiian territorial law requiring retailers selling imported eggs to advertise openly that the eggs were imported was struck down as unconstitutional and contrary to federal agreement. Although the Constitution contains no such specific grant, it has been held that the power to regulate foreign affairs is reserved to Congress and the President.[25] In *United States v. Pink*,[26] the Supreme Court held that the power over external affairs was not shared by the states, but was vested in the national government exclusively.[27] The Supreme Court in *Zschernig v. Miller*[28] struck down an Oregon statute which, in its opinion, required probate courts to make value judgments regarding the governments of other nations before allowing citizens of those countries to take

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21. 366 U.S. 187.

22. United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937); *see also* Jackson, note 7 *supra*.

23. Baldwin-Lima-Hamilton Corp. v. Superior Court, 208 Cal. App. 2d 803, 25 Cal. Rptr. 798 (Dist. Ct. App. 1962); Territory v. Ho, 41 Haw. 565 (1957).

24. Territory v. Ho, 41 Haw. at 568 (*citing* United States v. Belmont and United States v. Pink).

25. Perez v. Brownell, 356 U.S. 44, 57 (1958); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). In *Curtis-Wright*, the Court recognized that Congress as well as the President possessed the power to regulate foreign affairs, stating that "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution." 299 U.S. at 318. The Court stated further, however, that the demands of national sovereignty require that "the President alone [possesses] the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates." *Id.* at 319.

26. 315 U.S. 203 (1942).

27. *Id.* at 233. Similarly, in Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581 (1889), the Court stated that "[f]or local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." 130 U.S. at 606.

28. 389 U.S. 429 (1968).

possession of property willed them by Oregon residents. Although the Oregon law had no effect outside the state, the Court felt it "inescapable" that such laws would affect "international relations in a persistent and subtle way."[29] This undesirable result would not necessarily stem from the law's substantive requirements or prohibitions, but rather from the general harm to foreign relations which would result if each state were allowed to establish its own foreign policy.[30] Relying on *Zschernig,* the Supreme Court of New Jersey, in *In re Estate of Kish,*[31] ruled that in order to avoid interference with federal foreign policy, New Jersey state courts should not predicate decisions on comparisons of political, social, or economic systems.

The commerce clause of the Constitution empowers Congress "to regulate commerce with foreign nations and among the several states. . . . "[32] Even though the clause authorizes only Congress to act, a residue of power remains in the states to enact legislation affecting commerce, absent a finding that Congress has preempted the particular field.[33] Although Supreme Court cases in this area have traditionally involved state regulation of commercial activity in the private sector,[34] cases testing the validity of state laws that regulate the manner in which private contractors carry out public work contracts have arisen. For example, in *Heim v. McCall,*[35] the Court sustained a New York statute requiring that only United State citizens be employed on public work projects in that state. In a more recent decision, *American Yearbook Co. v. Askew,*[36] a state statute requiring all public printing for the State of Florida

29. *Id.* at 440. The Court continued: "Where those laws conflict with a treaty, they must bow to the superior federal policy. Yet, even in absence of a treaty, a State's policy may disturb foreign relations." *Id.* at 441.

30. *Id.* at 441.

31. 52 N.J. 454, 246 A.2d 1 (1968). The court held that in a proceeding brought by foreign beneficiaries under a will, the beneficiaries should be permitted to take control of their shares absent a federal prohibition against transmission of private funds to that particular nation.

32. U.S. CONST. art. I, § 8, cl. 3.

33. Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945); Cooley v. Board of Wardens, 52 U.S. (12 How.) 299 (1852).

34. Hale v. Bimco Trading, Inc., 306 U.S. 375 (1939); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1934). Review of this type of state legislation calls for a balancing between the public interest served by the law or regulation against the extent of the burden placed upon the affected party, and the availability of alternatives to the law in question. A. & P. Tea Co. v. Cottrell, 424 U.S. 366 (1976); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

35. 239 U.S. 175 (1915).

36. 339 F. Supp. 719 (M.D. Fla. 1972). *aff'd mem.,* 409 U.S. 904 (1972).

to be done within the state was held not to violate the commerce clause. Finally, in *Hughes v. Alexandria Scrap Corp.*,[37] the Court upheld a Maryland statute which, in distinguishing between in-state and foreign scrap metal processors, arguably discriminated in favor of the former. The Court stated that "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."[38] In *Garden State Dairies of Vineland, Inc. v. Sills*,[39] the Supreme Court of New Jersey upheld a similar statute which required governmental purchasers of milk to obtain from the seller a certification that he would purchase an equal amount of fresh milk from New Jersey producers. The court pointed out that any private purchaser of milk could confine his purchases to New Jersey milk, or milk from dealers who sell equivalent quantities of New Jersey milk.[40] The court asked whether the state, as a buyer in the marketplace, should not have the same right.[41] Although the New Jersey Buy American statute had not been directly challenged prior to the instant action, in California a similar act[42] had twice been successfully attacked. In the first of these cases, *Baldwin-Lima-Hamilton Corp. v. Superior Court*,[43] a California district court of appeal held that the California Buy American Act was unenforceable in the particular situation then before the court because it conflicted with the GATT. The court did not, however, conclude that the act itself was unconstitutional. In a more recent case, *Bethlehem Steel Corp. v. Board of Commissioners*,[44] however, the Act was declared unconstitutional. The California Buy American

37. 426 U.S. 794 (1976). The purpose of the statute was to protect the state's environment by encouraging the removal of abandoned automobiles from Maryland streets and junkyards.

38. 426 U.S. at 810.

39. 46 N.J. 349, 217 A.2d 126 (1966).

40. *Id.* at 353, 217 A.2d at 128.

41. *Id.* *Garden State* was cited by Mr. Justice Brennan's dissent in Hughes v. Alexandria Scrap Corp., 426 U.S. 794. He felt the Court in *Hughes* had abandoned completely the commerce clause doctrine in dealing with the Maryland statute, whereas the New Jersey Supreme Court in *Garden State* had refused an invitation to "forego all Commerce Clause analysis merely because the State [was] acting in a proprietary purchasing capacity in implementing its discriminatory policies." 426 U.S. at 823.

42. CAL. GOV'T CODE §§ 4300-4305 (West 1966); *see* Usher, *Buy American Policy: Conflict with GATT and the Constitution*, 17 STAN. L. REV. 119 (1964).

43. 208 Cal. App. 2d 803, 25 Cal. Rptr. 798 (Ct. App. 1962).

44. 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (Ct. App. 1969).

Act required that contracts for public construction or for the purchase of materials for state use be awarded only to those agreeing to use or supply only materials manufactured in the United States while fulfilling the contracts. Although similar in most respects to the New Jersey Buy American statute, the California Act was more inflexible in its application. Whereas the New Jersey statute allows public officers some discretion in enforcing the statute's requirements, the only exemptions to the California Act were in regard to purchases of particular types of material.[45] Without addressing whether the California Buy American Act was in conflict with the GATT or whether the Act intruded upon the commerce clause powers reserved to Congress, the court concluded that the Act was "an unconstitutional encroachment upon the federal government's exclusive power over foreign affairs, and constituted an undue interference with the United States' conduct of foreign relations."[46] The court reasoned that the California Act amounted to a usurpation by the state of the federal government's power to regulate foreign trade policy.[47] In the instant case, the New Jersey Buy American statute was confronted with essentially the same challenge as was the California Act.

III. The Instant Opinion

Although recognizing that the New Jersey Buy American statute appears inconsistent with GATT,[48] the instant court nevertheless held that no impermissible conflicts existed between the two, and accordingly, that GATT did not preempt the New Jersey statute. The court determined that the materials needed by the Commission for the construction of the water treatment plant would fall within an express exemption to the treaty,[49] which excludes from coverage products which are purchased by governmental agencies for governmental purposes and which are not intended to be resold

45. *See* 276 Cal. App. 2d at 227 n.9, 80 Cal. Rptr. at 804 n.9.

46. *Id.* at 224, 80 Cal. Rptr. at 802.

47. *Id.* at 225, 80 Cal. Rptr. at 803.

48. The court singled out GATT, *supra* note 7, art. III (2) as directly conflicting with the Buy American statute. The paragraph provides that products of any signatory to GATT, imported into the territory of another signatory, should "be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale . . . . "

49. "The provisions of this Article shall not apply to the procurement by governmental agencies of products purchased for governmental purposes and not for resale or use in the production of goods for sale . . . . " *Id.* art. III(5).

or used in the production of goods for commercial sale. After a comprehensive examination of the structure and functions of the Commission, the court concluded that the Commission's purchases of materials and equipment for construction of the water treatment plant were for a legitimate public purpose. The court found it unnecessary, however, to pass on whether the water "produced" by the Commission should be considered "goods" for commercial sale since it was clear to the court that the Commission had acted for governmental purposes and not because of any commercial motive.[50] In ruling that the Buy American statute did not encroach upon the federal government's foreign affairs powers, the court reasoned that, since application of the statute does not require state officials to evaluate the economic and governmental policies of other countries, it does not usurp the federal government's function of formulating foreign policy. The court stated in dicta that if "refined inquiries into foreign ideologies"[51] entered into the decision to apply the Buy American statute, there would have been "little difficulty,"[52] in light of *Zschernig v. Miller,*[53] in concluding that the statute was unconstitutional. In a footnote,[54] the court impled that, since in their view the Buy American statute is consistent with federal policy, the *Zschernig* case would not present a problem regarding the validity of the statute. The court distinguished *Bethlehem Steel*[55] by contrasting the California and New Jersey statutes. The court felt that the New Jersey statute had a more limited impact and a more restricted sphere than the California Act because of its provision giving state officials the discretion not to apply the Buy American requirements.[56] The court noted, moreover, that the California court had failed to consider the express exemption to GATT into which it believed both statutes fell.[57] Citing *DeCanas v. Bica,*[58] the court concluded by asserting that not every state statute touching upon foreign affairs

50. 75 N.J. 272, 381 A.2d at 792. The court reasoned that since one Commission operates at cost and since potable water is a necessity upon which the very existence of the inhabitants of the northern water supply district depends, the Commission's activities in providing the water to the northern district constitute governmental functions.

51. 75 N.J. 272, 381 A.2d at 784.

52. *Id.*

53. 389 U.S. 429.

54. 75 N.J. 272, 381 A.2d at 784 n.6.

55. 276 Cal. App. 2d 21, 80 Cal. Rptr. 800.

56. *See* note 3 *supra.*

57. *See* note 49 *supra.*

58. 424 U.S. 351.

is invalid, but only those statutes which "result demonstrably in a significant and direct impact upon foreign affairs."[59] In approaching the commerce clause question, the court first distinguished state regulation of the commercial affairs of others from a state's regulation of its own entry into the marketplace. The court noted that commerce which is "burdened" by such self-regulation would not even exist but for the state's willing entry into the marketplace. Relying on *Hughes v. Alexandria Scrap Corp.*[60] and *American Yearbook Co. v. Askew,*[61] the court held that in the absence of conflicting federal action, state legislation relating to the state's purchase of goods and materials is not subject to the usual commerce clause restrictions.[62] The court therefore concluded that the New Jersey Buy American statute in no way violated the commerce clause.

IV. COMMENT

The instant decision, aside from its obvious effect on public works contracts in New Jersey,[63] is of national significance. The political forces which prompted the passage of the New Jersey Buy American statute were not unique to that state. The federal government[64] and several of the states[65] have passed legislation with similar restrictions on governmental purchasing of foreign goods and materials. Criticism of these statutes has been extensive.[66] The criticism of the Federal Buy American Act has centered on the apparent conflict between the protectionist policies of the Act and the professed international trade policies of the United States. For decades the United States has espoused the reduction and elimination of restrictions on international trade.[67] The most visible evidence of this attitude is GATT. As the instant court recognized,

59. 75 N.J. 272, 381 A.2d at 784.
60. 426 U.S. 794.
61. 339 F. Supp. 719.
62. 75 N.J. 272, 381 A.2d at 787.
63. The effects which the statute will have upon commerce in New Jersey are two-sided. First, every contractor with the state will, of course, be forced to confine itself to American-made materials. Second, the Buy American statute will make it very difficult for foreign corporations to do business at all with the State of New Jersey.
64. Buy American Act, 41 U.S.C. § 10a-d (1976).
65. *See generally* Berliner, *State "Buy American" Policies—One Vice, Many Voices,* 32 GEO. WASH. L. REV. 584, 585 (1964).
66. *See, e.g., id.;* Knapp, *The Buy American Act: A Review and Assessment,* 61 COLUM. L. REV. 430 (1961).
67. *See* Knapp, note 66 *supra.*

however, GATT seems inconsistent with all Buy American legislation. But the conflict is deeper than the inconsistency between GATT and Buy American legislation. The dispute has an economic, and thus political, basis. Since this political battle is of an economic nature, it is not likely to dissipate with time. The political momentum seems to have swung, moreover, toward protectionism, especially at the state level.[68] The overturning of the California Buy American Act[69] on constitutional grounds in *Bethlehem Steel*, however, provided the opponents of such legislation with an alternative to political battle in that the case represents strong legal authority against such statutes. The instant decision, however, blunts the effectiveness of *Bethlehem Steel* by establishing contrary judicial precedent. The New Jersey court, moreover, went beyond simply creating a balance of authority. By carefully distinguishing the New Jersey statute from its California counterpart, and by pointing out the California court's failure to consider the "governmental purposes" exemption to GATT,[70] the court seems impliedly to have set up the New Jersey Buy American statute as a model after which other states may pattern their legislation.

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68. Evidence of this is seen in the number of states which have adopted legislation similar to the New Jersey Buy American statute. *See* Berliner, note 65 *supra*.

69. *See* Bethlehem Steel Corp. v. Board of Comm'rs, note 44 *supra*.

70. *See* note 49 *supra*.

CITIZENSHIP—THE FOURTEENTH AMENDMENT REQUIRES PROOF BY CLEAR, CONVINCING, AD UNEQUIVOCAL EVIDENCE THAT RELINQUISHMENT OF UNITED STATES CITIZENSHIP IS VOLUNTARY

I. FACTS AND HOLDING

Plaintiff, a dual national, brought suit against the Secretary of State,[1] seeking issuance of a passport and a declaration of United States citizenship. Plaintiff was born in the United States[2] where his mother was a citizen. His father was, however, a Mexican citizen and plaintiff was, at birth, a citizen of both countries.[3] The State Department issued a Certificate of Loss of Nationality in 1971,[4] after learning that the plaintiff had signed an oath of allegiance to Mexico and had obtained a Certificate of Mexican Nationality in order to graduate from a Mexican college. Plaintiff first sought reinstatement of citizenship by an appearance before the Board of Appellate Review of the Department of State, where he contended that he had not voluntarily renounced citizenship[5] when he signed the application form for a Certificate of Mexican Nationality.[6] The Board affirmed the administrative finding of expatria-

1. Plaintiff's action was initiated pursuant to 8 U.S.C. § 1503(a) (1976), which allows a person who has been denied the right of citizenship by final administrative action to bring suit in district court against the head of the department for a judgment declaring him to be a United States citizen.

2. Laurence J. Terrazas was born in Takoma Park, Maryland, on December 13, 1947.

3. U.S. CONST. amend. XIV, § 1. "[A]ll persons born . . . in the United States are citizens of the United States."

4. The Certificate was issued in accordance with 8 U.S.C. § 1501 (1976), which directs any consular officer who has reason to believe that a person has lost his citizenship to certify the facts upon which the belief is based. If the report is approved by the Secretary of State, the Certificate of Loss of Nationality is sent to the Attorney General and to the person to whom the certificate relates.

5. Plaintiff told a United States consular official in Monterey, Mexico, that he had acquired a Certificate of Mexican Nationality, whereupon he was advised that the acquisition of the Certificate was an act of expatriation. The official then stated that he lacked authority to make a final determination and asked plaintiff to fill out several forms explaining the circumstances. Except for one statement, plaintiff's answers to the questions indicated that he did not intend to give up his United States citizenship. It was not clear whether plaintiff understood at that time he was making an application for Certificate of Loss of Nationality.

6. 8 U.S.C. § 1481(a)(2) (1976) provides: "From and after the effective date of this chapter a person who is a national of the United States . . . shall lose his nationality by taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or political subdivision thereof; or . . . ."

The application completed by the plaintiff was printed in Spanish and was translated:

tion and denied plaintiff's application for a United States passport. Plaintiff then instituted an action in district court. The court ruled that a denial of plaintiff's passport application by reason of expatriation was proper, applying the burden of proof standard set out in 8 U.S.C. § 1481(c), which requires that the government prove by a preponderance of the evidence that an individual has voluntarily renounced citizenship. The court concluded that the government had satisfied this burden. On appeal to the Seventh Circuit Court of Appeals, *reversed and remanded. Held:* The fourteenth amendment requires the government to prove by clear, convincing, and unequivocal evidence that relinquishment of United States citizenship is voluntary. *Terrazas v. Vance,* 577 F.2d 7 (7th Cir. 1978).

II. Legal Background

In *Afroyim v. Rusk,*[7] the Supreme Court held that the fourteenth amendment protects every citizen from a congressional withdrawal of his right of citizenship.[8] An individual could not be deprived of

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> I therefore hereby expressly renounce ________________ citizenship as well as any submission, obedience and loyalty to my foreign government, especially that of ________________ of which I might have been subject, all protection foreign to the laws of Mexico, all rights which treaties or international law grant to foreigners: and furthermore I swear adherence, obedience and submission to the laws and authorities of the Mexican Republic.

The blanks were filled in with the Spanish words for the English terms, "United States" and "North America" respectively. Plaintiff claimed that when he signed the application form the blanks were empty and he had no idea that he was renouncing United States citizenship.

7. 387 U.S. 253 (1967). Afroyim, a naturalized American citizen, voted in an Israeli election. The State Department refused to renew his passport, maintaining that he had lost his citizenship by virtue of § 401(e) of the Nationality Act of 1940, 8 U.S.C. § 1481(a)(5) (1976), which provides that citizenship can be lost by voting in a foreign election. Afroyim brought a declaratory judgment action alleging the unconstitutionality of § 401(e).

8. 387 U.S. at 268. The court reached this conclusion by reviewing the legislative and judicial history of congressional power over citizenship matters. It relied especially on Justice Marshall's pre-fourteenth amendment dictum in Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 827 (1824), that legislative powers over citizenship matters are limited to prescribing a uniform rule of naturalization. The court also relied on an 1898 Supreme Court opinion, United States v. Wong Kim Ark, 169 U.S. 649 (1898), which declared that Congress could not deny citizenship guaranteed by the fourteenth amendment to those born or naturalized in the United States. The court concluded from this history that the language and purpose of the fourteenth amendment made it an absolute bar to congressional interference.

citizenship unless he voluntarily chose to relinquish it.[9] *Afroyim* expressly overruled an earlier decision in *Perez v. Brownell,*[10] where the majority had ruled that Congress' implied power to regulate foreign affairs[11] enabled it to strip United States nationals of citizenship for voting in foreign elections.[12] *Afroyim* thus declared an end to a long history of judicial deference to legislative determination of the problems of expatriation.[13] At the same time, the decision created new difficulties for courts and administrators because it did not define precisely "voluntary relinquishment" of citizenship or the quantum of proof necessary to show voluntary relin-

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9. Although it has long been recognized that expatriation must be voluntary to be effective, earlier decisions have held that proof of specific intent is not required. *See* Cafiero v. Kennedy, 262 F. Supp. 140 (D.N.J. 1966). Baker v. Rusk, 296 F. Supp. 1244 (C.D. Cal. 1969), *appeal dismissed by stipulation,* applied a preponderance of the evidence test, but is otherwise in accord with the broad interpretation of *Afroyim* given by the instant court. *Baker* held that an individual could not lose his citizenship by merely taking an oath; the government must prove that he voluntarily intended to renounce citizenship.

10. 356 U.S. 44 (1958). *Perez* was decided as a companion case to two other loss of citizenship cases, Trop v. Dulles, 356 U.S. 86 (1958), and Nishikawa v. Dulles, 356 U.S. 129 (1958).

11. 356 U.S. at 57. Justice Frankfurter's majority opinion viewed the Nationality Act of 1940 as an exercise of the congressional power to regulate foreign affairs. *See generally* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Mackenzie v. Hare, 239 U.S. 299 (1915).

12. 356 U.S. at 58-59. Since Congress may not act arbitrarily the majority found that "a rational nexus must exist between the content of a specific power in Congress and the action of Congress in carrying that power into execution." Specifically, withdrawal of citizenship must be related to regulation of foreign affairs. The Court found that it was related because voting by United States citizens might have caused embarrassment to the United States Government.

13. The attitude of the courts in the first half of this century was objective and noninterventionist. If a citizen had performed one of the acts described by Congress as an act of expatriation the courts held that the citizen had lost his citizenship regardless of his intent or knowledge of the law. Ample authority for Congress' power was found in the "necessary and proper clause" and the power to regulate foreign affairs. *See* Savorgnan v. United States, 338 U.S. 491 (1950); MacKenzie v. Hare, 239 U.S. 299 (1915). *Perez* may be viewed as the final major reaffirmation of this trend in judicial thinking. Its two companion cases, *Nishikawa* and *Trop,* marked the beginning of a new trend toward limitation of congressional expatriation powers. In two cases prior to *Afroyim,* Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), and Schneider v. Rusk, 377 U.S. 163 (1964), the Court moved to limit Congress' authority to expatriate citizens. This trend culminated in *Afroyim's* absolute prohibition on congressional power to involuntarily expatriate citizens. *See* Dionisopoulos, *Afroyim v. Rusk: The Evolution, Uncertainty and Implications of a Constitutional Principle,* 55 MINN. L. REV. 235 (1970).

quishment.[14] The most recent Supreme Court opinion on the standard of proof in expatriation cases came in *Nishikawa v. Dulles,*[15] in which the majority declared that the burden is on the government to prove by clear, convincing, and unequivocal evidence that an individual's renunciation of citizenship is voluntary.[16] The court based its decision not on the fourteenth amendment, but on the belief that the consequences of loss of citizenship are so drastic that a strict standard of proof should be applied.[17] Congress did not feel bound by this interpretation and amended 8 U.S.C. § 1481(c) to place a presumption of voluntariness on any act of expatriation.[18] This presumption could be rebutted only by a preponderance of the evidence.[19] The legislative history of this 1961 amendment reveals that Congress was dissatisfied with the clear, convincing, and unequivocal evidence standard and wanted to make it more difficult for individuals to claim that expatriation was involuntary.[20] The amendment has forced courts to choose between the congressional standard and the Supreme Court's *Nishikawa* standard in deciding expatriation cases. *Afroyim* failed to resolved

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14. Justice Harlan had noted these problems in advance in a footnote to his dissent. 387 U.S. at 269 n. 1. Difficulties and confusion over these issues during the year that followed *Afroyim* led to a 1969 Statement of Interpretation by the outgoing Attorney General, Ramsey Clark. 34 Fed. Reg. 1079 (1969). *See* Murphy, *Loss of Nationality Under United States Law and Practice: A Foreign Policy Perspective,* 19 KAN. L. REV. 89, 95 (1970).

15. 356 U.S. 129 (1958). *See* note 14 *supra.*

16. 356 U.S. at 133.

17. *Id.* at 134. The Court relied on its earlier holdings in Schneiderman v. United States, 320 U.S. 118 (1943), which held that denaturalization proceedings require that the facts and law be construed as far as possible in favor of the defendant, and Gonzales v. Landon, 350 U.S. 920 (1955), which held that the same rule should be applied to expatriation cases under § 401(e) of the Nationality Act of 1940. The Court expanded the rule to apply to all cases under the subsections of § 401. The Court found the stricter standard of proof to be justified by the legislative history of § 401.

18. Pub. L. No. 87-301, § 19, 75 Stat. 656 (1961).

19. H.R. REP. No. 1086, 87th Cong., 1st Sess. 6, *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 2950, 2984.

20. The Committee report states:

> It is more difficult . . . to subscribe to *Gonzales v. Landon* . . . and *Nishikawa v. Dulles* . . . . The committee has noted that administrative application of *Nishikawa* has led to rulings vitiating outright not only the intent of the statute . . . but doing violence to its very letter by ascribing involuntariness to absence from the United States for business purposes in order to avoid military service.

[1961] U.S. CODE CONG. & AD. NEWS at 2984.

the conflict,[21] although it overruled *Perez* and seemed to supply for the clear and convincing standard the fourteenth amendment rationale which the Court had declined to use in *Nishikawa*. In a 1969 Statement of Interpretation,[22] the Attorney General instructed federal agencies that, "until the courts have clarified the scope of Afroyim," the government's burden of proof for showing voluntariness was not easily satisfied.[23] Since *Afroyim*, some courts have chosen to apply the clear and convincing evidence standard.[24] Others have continued to use the statutory, preponderance of the evidence standard.[25] In 1972, the Ninth Circuit applied the statutory standard in *King v. Rogers*,[26] to conclude that a man who had never formally renounced United States citizenship had expatriated himself by swearing allegiance to a foreign sovereign. One year earlier, the Burger Court had indicated doubts about the scope of the *Afroyim* decision in *Rogers v. Bellei*,[27] by finding that the language of the fourteenth amendment did not prevent Congress from expatriating citizens born outside the United States.[28] Two standards of proof remain. Despite the fact that the majority of courts have used the *Nishikawa* standard,[29] no court has recognized it as being constitutionally based.

III. THE INSTANT OPINION

In the instant case, the court began its analysis by stating that Congress' retention of the power to define the standard of proof in

21. In two cases decided in the same year, King v. Rogers, 463 F.2d 1188 (9th Cir. 1972), and Peter v. Secretary of State, 347 F. Supp. 1035 (D.D.C. 1972), the courts required different standards of proof.

22. Statement of Attorney General Ramsey Clark, 34 Fed. Reg. 1079 (1969).

23. *Id.* at 1079-80.

24. *See* United States v. Matheson, 532 F.2d 809 (2d Cir. 1976); Peter v. Secretary of State, 347 F. Supp. 1035.

25. *See* King v. Rogers, 463 F.2d 1188; Baker v. Rusk, 296 F. Supp. 1244.

26. 463 F.2d 1188.

27. 401 U.S. 815 (1971).

28. Some commentators, including Judge Specher in the instant opinion, have seen the *Bellei* decision as merely a recognition that the language of the fourteenth amendment does not permit the Court to extend *Afroyim's* absolute right of citizenship to persons who are not citizens by birth in the United States or by naturalization. Other commentators have viewed *Bellei* as a "retreat from the principles of Afroyim" that "acknowledges congressional power over some forms of citizenship." Schwartz, *American Ctizenship After Afroyim and Bellei: Continuing Controversy*, 2 HASTINGS CONST. L.Q. 1003, 1025 (1975). [The suggestion is made that *Bellei* represents a shift in opinion from the Warren Court to the Burger Court and that a reevaluation of *Afroyim* may soon take place.]

29. 577 F.2d at 11.

voluntary expatriation cases is inconsistent with the Supreme Court's interpretation of the fourteenth amendment right of citizenship in *Afroyim*. By reviewing the legislative history of 8 U.S.C. § 1481(c) the court found that Congress had recognized that a citizen's ability to retain citizenship could be a function of the standard of proof. The court noted that Congress had legislated a stricter standard solely to prevent individuals it felt should be expatriated from retaining citizenship. The court reasoned that congressional power to define the standard of proof in voluntary expatriation cases was, in effect, a continuing power over an individual's constitutional right to citizenship. Because *Afroyim* held that the right to citizenship is guaranteed by the fourteenth amendment and cannot be given up without the citizen's assent, the court determined that the standard of proof in this case and similar cases must be defined by the courts. In determining this standard the court relied first on the Supreme Court opinion in *Nishikawa v. Dulles*. Although this court was uncertain whether the clear, convincing, and unequivocal standard applied in that case was constitutionally derived, it nevertheless deduced that the *Nishikawa* Court viewed the clear and convincing standard as best suited to protect the individual's citizenship interest. The court then noted that most of the lower court decisions since *Afroyim* have used the *Nishikawa* standard. Finally, the court relied on statements from two recent cases, as well as Chief Justice Warren's dissent in *Perez* to point out that citizenship is a basic right upon which other rights and democratic activities depend.[30] The court found that because society attaches great value to the right of citizenship, ambiguities in the evidence must be resolved in favor of citizenship, and that the minimum evidentiary standard must adequately protect the citizenship interest. The court concluded that the minimum standard required by the fourteenth amendment is proof by clear, convincing, and unequivocal evidence.

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30. The court in United States v. Matheson stated:

> An individual denied his or her United States citizenship, even if permitted entry into the country, is denied effective participation in our country's electoral processes, which is ordinarily regarded as a fundamental constitutional interest, as well as access to a range of livelihoods and positions opened only to citizens of this country.

532 F.2d at 815 (citations omitted). In Peter v. Secretary of State, the court recognized that "American citizenship is perhaps the most precious right known to man today." 347 F. Supp. at 1038.

IV. COMMENT

The holding in the instant case brings together the two most important citizenship cases decided by the Warren Court, *Nishikawa* and *Afroyim*, to produce a badly needed definition of the standard of evidence in voluntary expatriation cases. *Nishikawa* and *Afroyim* must now be viewed as incomplete decisions. The *Nishikawa* holding failed to produce an adequate rationale for a standard of evidence which protects an individual's constitutional right to citizenship from congressional interference.[31] The *Afroyim* decision's failure to define the acts that constitute voluntary relinquishment or the required standard of evidence for determining these acts permitted Congress to retain some power over expatriation matters by determining the standard of proof.[32] The Seventh Circuit has recognized that these two decisions are complementary. *Afroyim's* declaration that the fourteenth amendment protects United States citizens from involuntary deprivation of citizenship supplies a stronger rationale for the *Nishikawa* requirement of a clear, convincing, and unequivocal evidence standard, while the *Nishikawa* evidence standard protects the fourteenth amendment citizenship right described in *Afroyim* from congressional interference. The instant court's decision, if followed, will strengthen *Afroyim*.[33] A constitutionally required stricter evidence standard will make the government's task of proving voluntary expatriation and enforcing current expatriation statutes more difficult, as cases applying the *Nishikawa* standard have already shown.[34] United States citizens will be able to enter into many activities now forbidden by statute with less fear of loss of citizenship. Examples include serving in the armed forces of a foreign state,[35] holding important foreign political offices,[36] and participating in foreign political activities.[37] Most important, the stricter standard will facilitate the acquisition of a second nation-

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31. It was the lack of clarity in the *Nishikawa* rationale that left it vulnerable to congressional dissatisfaction and attack. *See* H.R. REP. No. 1086, *supra* note 23.

32. 577 F.2d at 10.

33. Congressional recognition of the difficulties of proving expatriation under this standard brought about creation of the less strict standard. *See* notes 23 & 24 *supra*.

34. *See* United States v. Matheson, 532 F.2d 809; Peter v. Secretary of State, 347 F. Supp. 1035.

35. 8 U.S.C. § 1481(a)(3) (1976).

36. *Id.* § 1481(a)(4).

37. *Id.* § 1481(a)(5).

ality by some United States citizens, insofar as the acquisition of a particular nationality does not require the express renunciation of United States citizenship.[38] These activities may make it more difficult, however, for the United States government to conduct foreign policy and protect citizens living and traveling in foreign countries, a concern of the *Perez* majority.[39] This concern has been repeated by more recent commentators[40] who have feared that a broad interpretation of *Afroyim* would lead to the impairment of foreign policy objectives by United States citizens and increased involvement in the internal political affairs of foreign nations. Although the dangers are serious, these problems have not significantly emerged in the decade that has followed *Afroyim*[41] and may not appear even after the instant court's broad interpretation of *Afroyim*. However, because the dangers are serious, they must be balanced against an equally important consideration, the preeminence of citizenship as a right. The language of the fourteenth amendment may not exclude Congress from defining acts of expatriation,[42] but as the Supreme Court,[43] the instant court,[44] and many other courts and commentators have found, citizenship is universally recognized as a basic right.[45] Without this right many

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38. Under the authority of Perkins v. Elg, 307 U.S. 325 (1939), it has long been thought possible for United States citizens to acquire a second nationality as long as renunciation of United States citizenship or an oath of allegiance to a foreign power was not required. Since the instant court's broad interpretation of *Afroyim*may allow a person to take an oath without voluntarily relinquishing his citizenship, such a person may take an oath with the expectation that the *Nishikawa* standard of evidence will protect him in court. *See* 54 CORNELL L. REV. 624 (1969).

39. 356 U.S. 44 (1958); *see* notes 15 & 16 *supra*.

40. *See* Dionisopoulos, *Afroyim v. Rusk: The Evolution, Uncertainty and Implications of a Constitutional Principle*, 55 MINN. L. REV. 235 (1970); Murphy, *Loss of Nationality Under United States Law and Practice: A Foreign Policy Perspective*, 19 KAN. L. REV. 89 (1970).

41. Dionisopoulos, *supra* note 40; Murphy, *supra* note 40. These critics were concerned that *Afroyim* would encourage United States nationals to enlist in the Israeli, Rhodesian, Cuban, or other armies and thereby increase the likelihood of United States involvement. They were also concerned about a proliferation of persons with dual citizenship and the confusion it would create about duties owed to different states. To date, few difficulties of this nature have reached the courts and the United States has not been drawn into serious international problems by the actions of its nationals serving in foreign armies or performing one of the other acts of expatriation noted in 8 U.S.C. § 1481(1976).

42. *See* Afroyim v. Rusk, 387 U.S. at 268-93 (Harlan J., dissenting).

43. *Id.* at 267-68.

44. 577 F.2d at 11-12.

45. Article 15 of the Universal Declaration of Human Rights proclaims that

of the participatory rights of a free society are not possible.[46] If these rights are not subject to deprivation by a legislative body,[47] neither should be the right upon which they are based. The instant court has shown that Congress intended to introduce a standard which could deprive individuals of a basic right, simply because it had felt that they should be expatriated. The instant court was correct in deciding that citizenship was a matter too important and too valued to be left to the changing judgment of Congress.[48]

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everyone has a right to a nationality and should not be arbitrarily deprived of it. G.A. Res. 217, U.N. Doc. A/810, at 71(1948), *reprinted in* OFFICE OF PUBLIC INFORMATION, UNITED NATIONS, EVERYMAN'S UNITED NATIONS 588 (8th ed. 1968).

46. *See* 577 F.2d at 11-13; United States v. Matheson, 532 F.2d at 815.

47. Although the Bill of Rights also protects the rights of aliens, only citizens have the right to vote, hold office, and be immune from deportation. *See generally* U.S. CONST. art. 1, § 2; *id.* art. 2, § 1; *id.* amend. XIV, § 1. Deportation is not mentioned in the Constitution, but only aliens are deported. *See, e.g.,* Fong Yue Ting v. United States, 149 U.S. 698 (1893).

48. 577 F.2d at 10.

EXTRADITION—Double Jeopardy Provision of Extradition Treaty Applies Even Where Crime Committed Before Ratification

I. Facts and Holding

Appellant, a United States citizen, was tried and sentenced by a United States court[1] for securities fraud carried on in both the United States and Canada. He had been the subject of several federal indictments in the United States, and had agreed to cooperate with the federal government in exchange for being allowed to plead guilty to only two of the indictments.[2] The prosecution was intended to cover all fraudulent involvement by appellant which came within the jurisdiction of the United States Department of Justice.[3] On February 6, 1973, a Canadian information was filed in Montreal charging Galanis with having defrauded Champion Savings Corp., Ltd., a Canadian corporation, and its creditors of securities valued at 1.6 million Canadian dollars in 1971 and 1972. Government counsel then applied to the District Court of Connecticut for a warrant requiring appellant to appear before the court for a hearing to determine if probable cause existed to sustain the Canadian charges.[4] The court found probable cause and ordered appellant to remain in custody until an extradition warrant could be issued by the Secretary of State. Appellant sued for habeas corpus,[5] arguing that extradition violated the double jeopardy provision contained in the current extradition treaty[6] between the

1. United States v. Galanis, 429 F. Supp. 1215 (D. Conn. 1977).

2. The two indictments carried maximum penalties of ten years imprisonment and fines of $20,000 each. Appellant was sentenced for both crimes on February 2, 1973. He served six months of a five-year prison sentence, and was then granted probation. *Id.* at 1219.

3. The Assistant United States Attorney in charge of the prosecution against appellant testified, however, that appellant's guilty pleas were also intended to cover the fraud perpetrated upon Champion Savings Corp. Ltd., a Canadian corporation. Galanis v. Pallanck, 568 F.2d 234, 236 (2d Cir. 1977).

4. Government counsel made application on September 1, 1976, pursuant to 18 U.S.C. § 3184 (1976), which governs extradition of persons in the United States to foreign countries. Section 3184 requires that a hearing be held in either federal or state court, at the request of the government. If the court finds probable cause to sustain the charge, it certifies that finding to the Secretary of State who takes appropriate steps to secure extradition upon request of the foreign government.

5. In extradition proceedings, the judge's decision itself is not appealable. The accused can petition the courts, however, for a writ of habeas corpus to examine questions of jurisdiction. Terlinden v. Ames, 184 U.S. 270, 278 (1902).

6. Treaty on Extradition, Dec. 3, 1971, United States-Canada [1976]

United States and Canada.[7] The government maintained that appellant's status was not governed by the current treaty,[8] but by an earlier treaty which contained no double jeopardy provision.[9] The District Court of Connecticut denied appellant's petition. On appeal to the United States Court of Appeals, Second Circuit, *reversed. Held:* Where a crime has been committed before ratification of a treaty, but extradition proceedings are begun after the exchange of ratifications, the double jeopardy clause of the treaty applies.[10] *Galanis v. Pallanck,* 568 F.2d 234 (2d Cir. 1977).

II. LEGAL BACKGROUND

Extradition is a matter of comity rather than a legal duty.[11] The

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1 U.S.T. 983, T.I.A.S. No. 8237 [hereinafter cited as 1971 Treaty]. This treaty specified as extraditable any offense against federal laws relating to the sale or purchase of securities. The double jeopardy provisions are in *id.* art. 4(1)(i).

7. In addition to the double jeopardy claim, appellant also argued that he had been given a grant of immunity in exchange for his cooperation, that the government violated the immunity by using information supplied by appellant to support his extradition, and that depositions taken in Switzerland and presented in evidence by the government had not been properly authenticated. The instant court found the double jeopardy argument dispositive. 568 F.2d at 236.

8. The government based this assertion on the "except" clause:

> This treaty shall terminate and replace any extradition agreements and provisions on extradition in any other agreement in force between the United States and Canada; except that the crimes listed in such agreements and committed prior to entry into force of this Treaty shall be subject to extradition pursuant to the provisions of such agreements.

1971 Treaty, *supra* note 6, art. 18(2).

9. Webster-Ashburton Treaty, Aug. 8, 1842, United States-Great Britain, art. X, 8 Stat. 572. The provisions of this treaty were modified by the following agreements: T.S. No. 119; Convention, July 12, 1889, 26 Stat. 1508, T.S. No. 139; Supplementary Extradition Convention, Dec. 13, 1900, 32 Stat. 1864, T.S. No. 391 [item 11 added "obtaining money, valuable securities or other property by false pretenses" as an extraditable offense]; Supplementary Extradition Convention, Apr. 12, 1905, 34 Stat. 2903, T.S. No. 458; Supplementary Extradition Convention, May 15, 1922, 42 Stat. 2224, T.S. No. 666; Convention to Provide for Extradition on Account of Crimes or Offenses Against Narcotic Laws, Jan. 8, 1925, 44 Stat. 2100, T.S. No. 719; Supplementary Convention for the Mutual Extradition of Fugitive Criminals, Oct. 26, 1951, [1952] 2 U.S.T. 2826, T.I.A.S. No. 2454.

10. The Court of Appeals did not reach or consider the question of whether the double jeopardy clause of the 1971 Treaty would apply in proceedings brought, but not concluded, prior to the exchange of ratifying instruments. 568 F.2d at 239.

11. Bassiouni, *International Extradition: A Summary of the Contemporary American Practice and a Proposed Formula,* 15 WAYNE L. REV. 733, 734 (1969); 6 VAND. J. TRANSNAT'L L. 299, 301 (1972).

fifth amendment has been construed to require that a treaty[12] or federal enactment exist before the government can return a fugitive to a requesting state.[13] Where treaty provisions concerning extradition are arguably ambiguous, the judiciary has exercised wide powers of interpretation in order to safeguard the rights of the accused.[14] United States courts have based their interpretations both on standards accepted by the international community, especially when justifying a liberal interpretation effecting private rights,[15] and on the *travaux prèparatories* in an attempt to determine the purposes and principles of a treaty.[16] In addition, courts have interpreted treaties in the light of other similar treaties, or on the basis of traditional policies and practices of a signatory.[17] Domestic court decisions reflect United States policy on a number of questions of treaty interpretation. In *In re De Giacomo,* the court held that, barring an express provision to the contrary, treaties are presumptively retroactive in application.[18] *De Giacomo* has been upheld by federal courts in *United States ex rel. Oppenheim v. Hecht,*[19] and more recently in *Gallina v. Fraser.*[20] The United States Supreme Court has implicitly approved the reasoning in the *De Giacomo* line of cases by refusing to review the decisions in *Oppenheim* and *Gallina.* Courts have been sensitive, however, to attempts by the drafters of treaties to overcome the *De Giacomo* presumption. In *United States v. Flores,*[21] the court held that language in the 1970 Extradition Treaty[22] between the United States and Spain was intended to overcome the presumption of retroactive application. According to the court, the treaty did so by pro-

12. Article X of the Webster-Ashburton Treaty of 1842, *supra* note 9, set the pattern of extradition based on listed offenses. Timbers & Pollack, *Extradition from Canada to the United States for Securities Fraud: Frustration of the National Policies of Both Countries,* 24 FORDHAM L. REV. 301, 305 (1955).

13. Factor v. Laubenheimer, 290 U.S. 276, 287 (1933).

14. Bassiouni, *International Extradition in American Practice and World Public Order,* 36 TENN. L. REV. 1, 27 (1969).

15. Factor v. Laubenheimer, 290 U.S. at 293-94.

16. Timbers & Pollack, *supra* note 12, at 324.

17. Vienna Convention on the Law of Treaties, art. 31(3)(b), *opened for signature* May 23, 1969, U.N. Doc. A/CONF. 39-127 (1969), *cited in* BASIC DOCUMENTS IN INTERNATIONAL LAW 233 (I. Brownlie ed. 1972).

18. 7 F. Cas. 366, 368 (C.C.S.D. N.Y. 1874) (No. 3,747).

19. 16 F.2d 955 (2d Cir. 1927), *cert. denied,* 273 U.S. 769 (1927).

20. 177 F. Supp. 856 (D. Conn.), *cert. denied,* 364 U.S. 851 (1960).

21. 538 F.2d 939, 945 (2d Cir. 1976).

22. Treaty on Extradition, May 29, 1970, United States-Spain, [1971] 1 U.S.T. 737, T.I.A.S. No. 7136.

viding that extraditable offenses under the former treaty committed before the entry into force of the new treaty would not be subject to extradition pursuant to the provisions of the new treaty. National policy is less clear in regard to the double jeopardy doctrine in extradition proceedings.[23] On the international level, the doctrine of separate sovereignties prevails. This doctrine provides theoretically for the extradition of an accused, already convicted in one forum, to be prosecuted for the same crime in a second or third forum.[24] Each prosecution is for an offense committed against a separate sovereign power. Similarly, the test for double jeopardy, as clarified by the United States Supreme Court in *Fox v. Ohio*,[25] is not one punishment for each act but rather, one punishment for each offense. In keeping with English common law traditions, however, United States courts have been unwilling, absent "compelling circumstances," to sanction retrial of a defendant where overlapping jurisdiction with a foreign court is recognized.[26] Courts have based their reasoning on the internationally observed requirement of double criminality in extradition proceedings, which requires that the act be an offense under the laws of both the asylum and requesting state.[27] In balancing the doctrine of fairness with the doctrine of separate sovereignties, authorities have argued that great weight should be given to the defense of double jeopardy, because extradition can constitute a final disposition of the accused's rights where he has already been convicted in the asylum state.[28] This attitude toward double jeopardy has been incorporated into bipartite and multipartite treaties on extradition to insure that extradition for the same crime would not be

23. The United States has traditionally opposed the practice of exempting nationals from extradition. Charlton v. Kelly, 229 U.S. 447, 467 (1913).

24. Bassiouni, *supra* note 14, at 10.

25. 46 U.S. 447, 5 How. 410 (1847).

26. *See* Franck, *An International Lawyer Looks at the Bartkus Rule,* 34 N.Y.U. L. REV. 1096 (1959). In England, acquittal by one nation prevents retrial by another. Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution,* 28 U. CHI. L. REV. 591, 603 (1961). In addition, there is civil law precedent for applying double jeopardy protection in extradition proceedings. CODE DE PROCEDURE PENAL [French Code of Criminal Procedure], arts. 5, 7, *cited in* Franck, *supra,* at 1100.

27. Collins v. Loisel, 259 U.S. 309 (1922); Wright v. Henkel, 190 U.S. 40 (1903).

28. Morrison, *Extradition from Canada: Rights of the Fugitive Following Committal for Surrender,* 19 CRIM. L.Q. 366, 369-70 (1977). From the standpoint of the accused, it makes no difference whether successive prosecutions are by the same or different sovereign powers. Fisher, *supra* note 26, at 598.

granted where proceedings had been completed in the asylum state.[29] A clear indication of the evolution in United States policy regarding the doctrines of double jeopardy and separate sovereignties is provided by the state and federal case law, which addresses the doctrine of separate sovereignties as between state and federal courts.[30] The rule in *Fox* was reaffirmed by the Court in *United States v. Lanza,*[31] and more recently in *Abbate v. United States*[32] and *Bartkus v. Illinois.*[33] The corroboration of the doctrine of separate sovereignties in the state/federal context in *Abbate* and *Bartkus* was, however, a minimum standard set by the Court.[34] Since these decisions every state has ruled against double jeopardy based on separate sovereignties either by statute or case law.[35] Furthermore, after *Abbate* and *Bartkus,* the attorney general indicated that the federal government would not, except in "compelling circumstances," prosecute for the same act after a state prosecution.[36] Ten years later, in *Benton v. Maryland,*[37] by

29. HARVARD RESEARCH IN INTERNATIONAL LAW, DRAFT TREATY ON EXTRADITION, art. 9, *reprinted in* 29 AM. J. INT'L L. 144-48 (Supp. 1935).

30. Bassiouni, *supra* note 11, at 745.

31. 260 U.S. 377 (1922) (defendants charged with manufacturing, transporting and possessing intoxicating liquor in violation of the National Prohibition Act).

32. 359 U.S. 187 (1959).

33. 359 U.S. 121 (1959).

34. In *Bartkus* the majority observed: "The Anglo-American system of law is based not upon transcendental revelation but upon the conscience of society ascertained as best it may be by a tribunal disciplined for the task and environed by the best safeguards for disinterestedness and detachment." *Id.* at 128. *See also* Stewart, *Justice Stewart Discussses Right of Counsel,* 19 LEGAL AID BRIEF CASE 91 (1960). Justice Stewart stated: "The Supreme Court of the United States is ultimately concerned only with deciding the absolute minimum standards that the Constitution will tolerate." *Id.* at 92.

35. In addition, both federal and state courts have heeded the Supreme Court's encouragement in *Bartkus* to apply common sense limitations when double jeopardy due to separate sovereignties is at issue. Commonwealth v. Cepulonis, 373 N.E.2d 1136, 1140 (Mass. 1978).

36. The Attorney General issued a directive to United States Attorneys advising them of the limits he placed on the power granted in *Abbate* and *Bartkus:* "No federal case should be tried when there has already been a state prosecution for substantially the same act or acts without the United States Attorney first submitting a recommendation to the appropriate Assistant Attorney General in the department." Department of Justice Press Release (April 7, 1959), *reprinted in* 27 U.S.L.W. 2509 (1959).

37. 395 U.S. 784 (1969) (overruling Palko v. Connecticut, 302 U.S. 319 (1937)). In defining the doctrine in *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969), the Court had stated that the guaranty against double jeopardy protects against a second prosecution for the same offense after acquittal or after conviction, and against multiple punishments for the same offense.

holding the double jeopardy clause applicable to the states via the fourteenth amendment, the Court called into question the continuing validity of the line of cases ending with *Bartkus*.[38] Thus it appears that while *Bartkus* has not been expressly overruled, both the courts and the federal executive branch are mindful of the need to protect an accused against double jeopardy, that this concern has been incorporated into many extradition treaties, indicating a national policy in keeping with accepted international standards of justice, and that courts would be correct in interpreting ambiguous treaty provisions in light of this policy.

III. THE INSTANT OPINION

In the instant decision, the court acknowledged that appellant had been tried and punished in the United States for the offense upon which the Canadian extradition request was based. The court noted that the stated purpose of the 1971 Treaty was to modernize extradition relations between the United States and Canada.[39] The court found that the purpose of the draftsmen in including the "except" clause was (1) to insure that persons extraditable under previous treaties would not gain immunity when these treaties were terminated and replaced by the new treaty, and (2) that there would be no *ex post facto* application of offenses which had become extraditable through the 1971 Treaty. Citing *Gallina v. Fraser*, the court took note of the long-established rule that, absent a clause to the contrary, offenses committed prior to the conclusion of an extradition treaty are covered by the new treaty.[40] It was noted that several recent treaties, in contrast to the treaty with Canada, expressly apply to offenses committed before the effective date of the new treaty which were not previously grounds for extradition.[41]

38. The question was raised again in *Smith v. United States*, 423 U.S. 1303, 1307 (1975) (Douglas, J.). In that case Justice Douglas granted a stay of a district court order that files of a federal grand jury be turned over to a state prosecutor.

39. Message from the President Transmitting the Treaty on Extradition Between the United States and Canada, S. EXEC. Doc. No. G, 93d Cong., 2d Sess. 3 (1974), *noted in* Galanis v. Pollanck, 568 F.2d at 237.

40. *Id.* at 237-38. The 1971 Treaty, *supra* note 6, provided in article 18(3) that upon exchange of ratifications, the treaty would enter into force. The 1971 Treaty was ratified on March 22, 1976. Canada had requested extradition of appellant on February 6, 1973. The government sought an extradition hearing on September 1, 1976, and the hearing commenced on November 23, 1976. United States v. Galanis, 429 F. Supp. at 1216-17.

41. The court cited the following treaties as examples: Treaty on Extradition, May 14, 1974, United States-Australia, [1976] 1 U.S.T. 957, T.I.A.S. No. 8234; Treaty on Extradition, May 24, 1973, United States-Paraguay, [1974] 1 U.S.T.

Observing that the 1971 Treaty with Canada significantly expanded the list of extraditable crimes, the court interpreted the "except" clause as rebutting the *ex post facto* presumption, while simultaneously insuring that persons extraditable under previous treaties would not gain immunity under the 1971 Treaty.[42] In addition, the court pointed out that the protection against double jeopardy is a common element of recent extradition treaties,[43] that the United States Supreme Court has evidenced concern about double jeopardy between the state and federal systems, and that the Department of Justice has adopted a policy against initiating duplicative federal/state prosecutions. Accordingly, the court concluded that the double jeopardy clause of the 1971 Treaty applied to extradition proceedings begun after the new treaty went into effect.

IV. Comment

The instant court's interpretation of the 1971 Treaty is an example of protection of international individual rights through judicial activism. By calling into question a treaty provision which arguably prohibited a defense of double jeopardy for crimes committed before the treaty became effective, the instant opinion suggests that the double jeopardy doctrine is such a strong national policy that it will be found in a treaty absent an unambiguous provision to the contrary. By implying that the double jeopardy doctrine is

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967, T.I.A.S. No. 7838; Treaty on Extradition, Jan. 18, 1973, United States-Italy, [1974] 1 U.S.T. 493, T.I.A.S. No. 8052; Treaty on Extradition, Jan. 12, 1970, United States-New Zealand, [1971] 1 U.S.T. 1, T.I.A.S. No. 7035. Galanis v. Pollanck, 568 F.2d at 238.

42. The court explicitly rejected the interpretation of the Assistant Legal Adviser for Management in the Office of the Legal Adviser, Department of State, noting that although the views of the State Department are entitled to respect, they are not binding upon the court. *Id.* at 239.

43. The court cited the following treaties: Treaty on Extradition, May 14, 1974, United States-Australia, [1976] 1 U.S.T. 957, T.I.A.S. No. 8234; Treaty on Extradition, Jan. 18, 1973, United States-Italy, [1975] 1 U.S.T. 493, T.I.A.S. No. 8052; Treaty on Extradition, June 22, 1972, United States-Denmark, [1974] 2 U.S.T. 1293, T.I.A.S. No. 7864; Treaty on Extradition, Jan. 21, 1972, United States-Argentina, [1972] 4 U.S.T. 3501, T.I.A.S. No. 7510; Supplementary Convention to the Extradition Convention of Jan. 6, 1909, Feb. 12, 1970, United States-France, [1971] 1 U.S.T. 407, T.I.A.S. No. 7075; Treaty on Extradition, Jan. 12, 1970, United States-New Zealand, [1971] 1 U.S.T. 1, T.I.A.S. No. 7035; Convention on Extradition, Dec. 10, 1962, United States-Israel, [1963] 1 U.S.T. 1707, T.I.A.S. No. 5476; Convention on Extradition, Oct. 24, 1961, United States-Sweden, [1963] 2 U.S.T. 1845, T.I.A.S. No. 5496; Treaty on Extradition, Dec. 18, 1947, United States-Union of South Africa, [1951] 1 U.S.T. 884, T.I.A.S. No. 2243. *Id.* at 238.

national policy as reflected in recent treaties, the court has established a precedent which supports a fundamental right guaranteed by the fifth amendment, but avoids any implication of preferential treatment of United States nationals in extradition proceedings. The importance of the court's decision lies not only in its effect on the immediate status of extradition relations with Canada, but also in the precedent established by ruling in favor of the appellant's double jeopardy argument. The court, in finding a double jeopardy defense in the face of a separate sovereignties argument, has significantly eroded any implications *Abbate* and *Bartkus* might have for international law. The ultimate significance of the instant decision depends on whether subsequent cases rely on this case to find double jeopardy to be an overriding policy consideration. If the instant opinion does become the accepted rule, then the instant court has served to clarify the heretofore nebulous guidelines for extradition proceedings.[44] If the instant decision is later found, however, to apply only to the specific fact pattern of this case, then this opinion is merely one more element in a nonuniform series of rules and decisions concerning extradition. The language in the instant opinion suggested that a government showing of "compelling circumstances" could lead to an exception to the double jeopardy doctrine.[45] A more intricate decision, and one not reached in this opinion, is a determination of the gravity of "compelling circumstances" which could overcome the double jeopardy doctrine. The clear implication of this opinion is that the judiciary, rather than the political branch, will decide this question when it arises.[46] Thus, the instant decision promotes individual rights over the doctrine of separate sovereignties by interpreting a treaty so as to find a double jeopardy defense applicable, but the long-term effect will depend on whether this precedent is broadly applied and on how courts interpret "compelling circumstances."

Michael P. Peck

44. Bassiouni, *supra* note 14, at 28.
45. Galanis v. Pollanck, 568 F.2d at 238.
46. *See id.* at 239.

SOVEREIGN IMMUNITY—Service of Process in the United States on a Permanent Mission to the United Nations Must Conform to the Specific Requirements of the Foreign Sovereign Immunities Act

I. Facts and Holding

Plaintiff, first mortgagee of a New York City building, brought a foreclosure action against defendant, the Permanent Mission of the People's Republic of the Congo to the United Nations (Congo Mission). The Congo Mission, made no further payments to discharge plaintiff's first mortgage. The New York State Supreme Court entered a default judgement against the defendant,[1] who then had the action removed to the United States District Court for the Southern District of New York. Defendant moved to dismiss on the ground that the New York Supreme Court lacked personal jurisdiction over the Congo Mission because service of process did not conform to the requirements of the Foreign Sovereign Immunities Act.[2] On defendants motion to dismiss and plain-

1. The court entered a judgment of foreclosure and sale against the defendant Congo Mission.

2. 28 U.S.C. §§ 1602 - 1611 (1976).

Section 1608 reads:

> (a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:
>
> (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or
>
> (2) if no special arrangement exists by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or
>
> (3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or
>
> (4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

tiffs motion to remand to the state courts, default judgment vacated and the action *dismissed. Held:* A permanent mission to the United Nations is the embodiment of a foreign state and service of process on a permanent mission must conform to the formal requirements of the Foreign Sovereign Immunities Act. *Gray v. Permanent Mission of the Peoples Republic of the Congo to the United Nations,* 443 F. Supp. 816 (S.D.N.Y. 1978).

II. LEGAL BACKGROUND

Before the Sovereign Immunities Act became effective on January 19, 1977, process was generally served upon a foreign state by attachment of the foreign state's property.[3] Attachment could interrupt the orderly functioning of foreign government offices, immobilize assets needed for debt payment, and exacerbate political tensions between the United States and foreign sovereigns.[4] De-

As used in this subsection, a notice of suit shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(c) as directed by order of the court consistent with the law of the place where service is to be made.

3. *See generally* Miller, *Service of Process on State, Local, and Foreign Governments Under Rule 4, Federal Rules of Civil Procedure—Some Unfinished Business for the Rulemakers,* 46 F.R.D. 101 (1969); Note, *Amenability of Foreign Sovereigns to Federal In Personam Jurisdiction,* 14 VA. J. INT'L I. 487 (1974).

4. For these reasons, the question of sovereign immunity had been left to the executive branch prior to the Foreign Sovereign Immunities Act. *See* Rich v.

spite the negative consequences of attachment, no other effective means for service of process on a foreign state existed. Personal service on an embassy is a felony[5] and service by mail is regarded by the State Department as a violation of article 31 of the Vienna Convention on Diplomatic Relations which extends immunity to ambassadors from the civil and administrative jurisdiction of the states to which they are attached.[6] Further, Rule 4 of the Federal Rules of Civil Procedure provides no means for service of process on foreign states or their agencies or instrumentalities,[7] except where an agency or instrumentality is considered a foreign corporation . . . or other association under Federal Rule 4 (d)(3).[8] Rule 4 (d)(3) however has never successfully been employed as a means of service upon a foreign state.[9] Only if the sovereign has consented to jurisdiction have the courts permitted service of process under the Federal Rules of Civil Procedure.[10]

Section 1608 of the Foreign Sovereign Immunities Act precludes attachment of foreign property and sets forth two means for effecting service of process on foreign states and their agencies. Under

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Naviera Vacuba S.A., 295 F.2d 24 (4th Cir. 1961) (attachment of hijacked Cuban merchant vessel denied).

5. 22 U.S.C. §§ 252 - 253 (1976); cf. Hellenic Lines, Ltd. v. Moore, 345 F.2d 978 (D.C. Cir. 1965) (personal jurisdiction could not be made by personal service of summons upon ambassador as agent for foreign government).

6. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95. Service of process upon the foreign state by mail sent to other than a diplomatic official or embassy would be consistent with articles 22 and 31 of the Convention because diplomatic immunity refers to the person of the foreign official and not to the foreign state itself. *See* Lowefeld, *Claims Against Foreign States — A Proposal for Reform of United States Law,* 44 N.Y.U. L. REV. 901, 934 (1969).

7. *See* Note, *Sovereign Immunity — Proposed Statutory Elimination* of State Department Role — Attachment, Service of Process, and Execution, 15 HARV. INT'L L.J. 157, 163-4 (1974).

8. Fed. R. Civ. P. 4(d)(3). *See e.g.,* Kane v. Union of Soviet Socialist Republics, 267 F. Supp. 709 (E.D. Pa. 1967), *aff'd* 394 F.2d 131 (3d Cir. 1968); cf. Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), *cert. denied,* 381 U.S. 934 (1965) (foreign state could be served under federal rule of civil procedure 4(d)(7) when state official implicitly consented to jurisdiction of court by signing agreement to arbitrate in New York).

9. *See* Petrol Shipping Corp. v. Greece, 360 F.2d 103 (2d Cir. 1966). The court, per Smith, J., stated, [W]e do not equate presence, or amenability to suit, with service of process, as our treatment of these two questions here indicates, and we regard Rule 4 as speaking to service alone, and not both service and amenability. *Id.* at 109.

10. *Id.* Under FED.R.C.P. 83, process was served on a foreign state which implicitly consented to jurisdiction through an arbitration agreement.

both procedures, the preferrable manner of service is by delivery of the summons and complaint in a manner agreed upon by the parties.[11] In the absence of an agreement, service is to be made in accordance with an applicable international convention on service of judicial documents.[12] Pursuant to section 1608(a) alternate service may be made upon the head of the ministry of foreign affairs by any form of mail requiring a signed receipt.[13] If this method of service is not effectuated, the Secretary of State must transmit notice through diplomatic channels to the foreign state.[14] Under section 1608(b), service upon an agency or instrumentality[15] may be made either:[16] (1) as directed by an authority of the foreign state in response to a letter rogatory or request (2) by certified or registered mail dispatched by the clerk of the court or (3) as directed by court order.[17]

III. THE INSTANT OPINION

In the instant opinion the district court found that the Congo Mission was the embodiment of a foreign state rather than an agency or instrumentality thereof[18] and found that service on the

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11. 28 U.S.C. §§ 1608(a)(1), 1608(b)(1) (1976).

12. *Id.* §§ 1608(a)(2), 1608(b)(2). The only such convention to which the United States is presently a party is the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163.

13. *Id.* § 1608(a)(3). The term notice of suit used in this subsection would advise a foreign state of the legal proceeding, explain the legal significance of the summons, complaint, and service, and indicate what steps are available under or required by United States law in order to defend the action. In short, it would provide an introductory explanation to a foreign state that may be unfamiliar with the United States law or procedure. H.R. Rep. No. 94 - 1487 94th Cong. 2d Sess. 15, reprinted in (1976) U.S. Code Cong. & Ad. News 6604, 6623.

14. 28 U.S.C. § 1608(a)(4) (1976).

15. The Act defines an agency or instrumentality of a foreign state as any entity:

> (1) which is a separate legal person, corporate or otherwise and
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

16. The alternative selected must be the one most likely to give actual notice to the agency or instrumentality. *Id.* § 1608(b)(3).

17. *Id.*, §§ 1608(b)(1) - (3).

18. The district court based this conclusion on the legislative history of section 1610, which governs exceptions to a foreign states immunity from attachment or

Congo Mission must conform to section 1608(a) rather than 1608(b).[19] Because there was no arrangement between plaintiff and defendant for service and no applicable international convention for service, the court concluded that service did not conform to subsections one and two of section 1608(a). Additionally since service was not mailed to the head of the ministry of foreign affairs of the United States Secretary of State, the court further concluded that service did not conform to subsections three and four of section 1608(a) and therefore was insufficient under the Act. The district court noted that because the Act stipulated specific notice requirements, informal notice[20] even if adequate to inform a foreign state of an action, would be insufficient. The district court found that strict adherence to the notice provisions would be required because the Foreign Sovereign Immunities Act evidences congressional concern for difficulties inherent in cross-cultural and multilingual litigation.[21] The district court, therefore, decided that any party seeking to serve process on a foreign state or its agency or instrumentality must strictly comply with the notice provisions specified in section 1608.

IV. Comment

In its strict application of the notice requirements of section 1608 of the Foreign Sovereign Immunities Act, the instant court set precedent by relying on statutory standards rather than ad hoc determinations of sufficiency of service. The opinion provides a reasonable rationale for strict compliance with the Act by recognizing Congress' explicit concern that a foreign state understand the

execution, in which the House Report stated that such buildings (including diplomatic and consular missions) are those of the foreign state itself. H.R. Rep. No. 94 - 1487, 94th Cong. 2d Sess. 15, *reprinted in (1976) U.S. Code Cong. & Ad. News* 6604, 6628.

19. The court noted in its footnote 4 that if section 1608(b) was applicable, subsection 2 would permit in - hand service of a summons and complaint on an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States. Since the plaintiff stated that it served only defendants secretary, the district court indicated that service would be insufficient even under section 1608(b). Gray v. Permanent Mission, 443 F. Supp. 816, 820 (S.D.N.Y. 1978).

20. The plaintiffs attorney stated that in addition to service on the Congo Missions secretary, she wrote or telephoned the Missions Ambassador or representatives advising them of their rights, duties and obligations.

21. The district court noted that 28 U.S.C. 1608(a)(1) and (2) called for a prior agreement between the litigants, and 1608(a)(3) and (4) require translation of the summons and complaint into the language of the party to be served.

complaint and legal action required. The district court suggests that such understanding is achieved through compliance with the provisions of section 1608(a) and (b). By linking this need for understanding with the notice provisions of the Act the court avoids a subjective knowledge requirement in favor of the objective provisions of section 1608. Strict judicial application of the section 1608 standard should render consistent decisions on sufficiency of service on foreign states and hasten compliance with notice provisions.[22] Consistency is particularly desirable since litigants are required under the Act to venture from the traditional method of service by attachment to the statutory requirement of "notice of suit" served on the foreign state.

Joe Bernard Foltz

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22. *See* 40 D 6262 Realty Corp. v. United Arab Emirates Government, 447 F. Supp. 710 (S.D.N.Y. 1978). In this decision, one month after *Gray,* the court held that service consisting of attaching a copy of notice of petition to premises in question and mailing a copy to foreign states permanent mission was inadequate under the Foreign Sovereign Immunities Act.