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Subpoena Service on Citizens Residing Abroad: A Proposal for the Adoption of an International Approach in Criminal Proceedings

The frequency of world travel in the jet age, along with the acceleration of multinational business has facilitated an increase of international transactions of both a personal and commercial order. For this reason, the amount of time a person spends in a foreign nation has increased substantially.[1] As a result national legislative bodies have adopted methods for subpoenaing their citizens who are residing outside of the country.[2] Of course, the effectiveness of one nation's service laws in another nation depends upon their acceptance in the latter.[3]

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[1]The following figures give an indication of the vast growth of international travel and commerce. In 1955, about 2 million passengers arrived in, and about 1.5 million departed from, the United States. In 1974, these figures had become 15 million and 13.5 million. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES No. 369 (96th ed. 1975) [hereinafter cited as STATISTICAL ABSTRACT]. In 1955, United States assets abroad totalled about $65 billion while United States liabilities to foreigners amounted to about $28 billion. In 1974, these figures were, respectively, $226 and $163 billion. STATISTICAL ABSTRACT No. 1344.

[2]*See, e.g.,* The Walsh Act, 28 U.S.C. §§ 711-13 (1926) (current version at 28 U.S.C. § 1783 (1970)) [hereinafter cited as Walsh Act].

[3]*E.g.,* Comment, *Contemporary Practice of the United States Relating to International Law,* 56 AM. J. INT'L L. 794 (1962). An aide-memoire from the United States to Switzerland apologizing for violating Swiss sovereignty by direct service of process abroad. It is unlikely, however, that the situation would arise again between the two countries as to criminal matters. The United States and Switzerland signed a Treaty on Mutual Assistance in Criminal Matters on May 25, 1973. ____ U.S.T. ____, T.I.A.S. No. 8302. The treaty includes assistance encompassing grand jury proceedings. However, there is a limitation in the treaty that permits either party the right to refuse assistance where the receiving party feels that such assistance would prejudice its sovereignty. DEPT. OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW (1973 ed.) at 209-210; *see also,* DEPT. OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW (1976 ed.) at 311-312.

On the problems of service of process abroad, see also, Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform,* 62 YALE L.J. 515, 534-37 (1953); Longly, *Serving Process, Subpoenas and Other Documents in Foreign Territory,* ABA INT'L AND COMP. L. SECTION PROCEEDINGS 34 (1959).

Initial attempts to establish reciprocal procedures for service on a citizen residing in a foreign nation were accomplished through bilateral agreements.[4] However, because of the number of countries involved, and the procedural differences in each agreement, they proved not only to be overburdening, but also to be difficult to implement. Furthermore, the method of letters rogatory,[5] traditionally a formal request by the domestic court to a foreign

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The main point to be remembered is that before service of process is attempted within a foreign country, the laws and procedures of that country should be studied thoroughly in order to insure that the service does not offend that country as well as whether that country will provide judicial assistance. The following list is meant to provide a general background of the appropriate laws and procedures in the respective countries. GRÜTZNER, INTERNATIONAL JUDICIAL ASSISTANCE AND COOPERATION, IN II A TREATISE ON INTERNATIONAL CRIMINAL LAW 208 (Bassiouni and Nanda ed. 1973) (Federal Republic of Germany); S. BAYITCH & I. SIGNEIROS, CONFLICTS OF LAWS: MEXICO AND THE UNITED STATES, A BILATERAL STUDY, 260-64 (1968); DEPT. OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 209 (1973 3d.) (Switzerland); Bareck, *Service of Process Abroad,* 4 INT'L LAW. 145 (1969) (Austria); Carl, *Service of Judicial Documents in Latin America,* 53 DEN. L.J. 455 (1976); Ettinger, *Service of Process in Austria,* 9 INT'L LAW. 693 (1975); Ginsberg, *Service of Process Abroad,* 4 INT'L LAW. 145, 150 (1969) (Denmark, Finland, Norway and Sweden); Ginsburgs, *The Soviet Union and International Cooperation in Legal Matters: Criminal Law—The Current Phase,* 19 INT'L & COMP. L.Q. 626 (1970); Gori-Montanelli and Botwinik, *International Judicial Assistance—Italy,* 9 INT'L LAW. 717 (1975); Heidenberger, *Service of Process and the Gathering of Information Relative to a Law Suit Brought in West Germany,* 9 INT'L LAW. 725 (1975); Miller, *International Cooperation in Litigation Between the United States and Switzerland: Unilateral Procedural Accommodation in a Test Tube,* 49 MINN. L. REV. 1069 (1965) (The United States and Switzerland are now parties to a bilateral treaty concerning service of process, however, the treaty is applicable only to criminal matters); Mitsui, *Ratification of Convention Relating to Civil Procedure and Convention on the Service Abroad of Judicial and Extrajudicial Documents, in Civil and Commercial Matters, and Enactment of Domestic Laws of Japan Concerning Enforcement Thereof,* 16 JAPANESE ANN. OF INTL'L L. 7 (1972); Moore-Bick, *Service of Process: Documents Required in English Proceedings,* 9 INT'L LAW. 699 (1975).

In addition, for a discussion and analysis of the judicial systems of Austria, Belgium, Cyprus, Denmark, France, West Germany, Iceland, Ireland, Italy, Luxembourg, Malta, Netherlands, Norway, Sweden, Switzerland, Turkey and Great Britain, see COUNCIL OF EUROPE, JUDICIAL ORGANIZATION IN EUROPE (1975).

[4]*E.g.* A treaty between the United States and Japan provides a section for the consular officer to serve judicial documents on behalf of the issuing state in accordance with the laws of that state, provided that it does not violate the laws of the state in which the documents are to be served. Consular Convention, March 22, 1963, United States-Japan, Art. 17(e), paras. 1-3, 15 U.S.T. 768, T.I.A.S. No. 5602. It should be noted that both the United States and Japan are parties to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, *see* fn. 139, *infra.* For a discussion of how the Convention effects Japanese law, see Mitsui, *Ratification of Convention Relating to Civil Procedure and Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters, and Enactment of Domestic Laws of Japan Concerning Enforcement Thereof,* 16 JAPANESE ANN. OF INT'L L. 7 (1972). For a discussion of British service of process via bilateral agreements, see Harwood and Dunboyne, *Service and Evidence Abroad (Under English Civil Procedure),* 10 INT'L & COMP. L.Q. 284 (1961).

[5]The medium whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country. BLACK'S LAW DICTIONARY 1050 (4th ed. 1951).

court, was often too slow, and it failed to provide that effectiveness[6] which even the international agreement offers.

Services of process in noncriminal areas was dealt with in the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters[7] [hereinafter cited as the Hague Convention]. A product of this convention was a plan to establish standard procedures for service in civil and commercial matters which would insure that a country will assist in the service of process "within its territory and in aid of litigation taking place in another contracting nation."[8] However, there has never been a similar convention for the service of process of a subpoena in criminal matters.[9]

Using the Hague Convention as a guideline, this paper would propose a similar agreement to provide for the service of subpoenas in criminal proceedings. An examination of the current procedures used in the United States to subpoena a person in a foreign country[10] and the assistance given by the United States to foreign nations which desire service here[11] will be examined. It will become apparent that the United States' legal system is in conformity with the Hague Convention and that it would further be in accordance with the proposed agreement for service in criminal proceedings. Before reviewing current United States practices, an historical analysis of the legislative development for service of process abroad and the earlier judicial interpretation of those laws seems indicated.

I. Federal Court Attempts to Subpoena United States Residents in Grand Jury Proceedings

A. *Federal Approach Prior to 1964*

In 1923, upon discovery of the Teapot Dome scandal[12] a few of the important potential witnesses took refuge in France. As there was no effective means

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[6]*See, e.g., In re* Letters Rogatory, 261 F. 652 (S.D.N.Y. 1919); Matter of Romero, 56 Misc. 319, 107 N.Y.S. 621 (Sup. Ct. 1907).

[7]Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, done November 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 [hereinafter cited as Hague Convention].

[8]13 AM. J. COMP. L. 612-13 (1964).

[9]The proposed convention would include grand jury investigations within the meaning of criminal matters or criminal proceedings. Investigative bodies of judicial or legislative branches of foreign countries should be included within the meaning of these terms in the proposed agreement. *See* Section III, *infra;* Hague Convention, arts. 2, 17. *See also* Section I(b), *infra.*

[10]Walsh Act, 28 U.S.C. § 1783 (1970).

[11]28 U.S.C. §§ 1696, 1781-82 (1970).

[12]The oil reserve scandal of the early 1920s is referred to as the Teapot Dome scandal. President Harding, in 1921, transferred certain lands (one of which was located in Teapot Dome, Wyoming) containing oil reserves from the Department of the Navy to the Department of the Interior. Albert Fall, Secretary of the Interior thereafter without competitive bidding leased these lands to private

to compel their presence for testifying,[13] Congress was prompted to pass the Walsh Act[14] which provided for service of a subpoena on a United States citizen residing in another country whose testimony was desired in connection with criminal proceedings. And, of course, the first judicial application of the Walsh Act was directed at those Teapot Dome witnesses who were responsible for its passage.[15]

Harry Blackmer was one of the potential witnesses residing in France whose testimony was deemed essential to the Teapot Dome investigation. Based on the Walsh Act, a subpoena was issued by the Supreme Court of the District of Columbia and served upon Blackmer by the United States consul,[16] requiring him to appear as a witness on behalf of the United States in a criminal trial. Blackmer failed to respond to the subpoena and was found to be in contempt of court. The decree was affirmed by the Court of Appeals of the District of Columbia.[17] The Supreme Court affirmed the contempt convictions[18] sanctioned by the Walsh Act, noting that the authority to issue the subpoenas emanated essentially from the responsibilities attached to citizenship in the United States.[19] Furthermore, the Court pointed out that the United States possesses the inherent power to demand the return of a citizen who resides in a foreign country whenever his presence would serve the public interest.[20]

Blackmer contended that the Walsh Act violated the due process clause of the Fifth Amendment because Congress had "no power to authorize the United States consuls to serve process except as permitted by treaty."[21] Rejecting this argument, the Supreme Court declared:

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oil companies. A Senate investigation conducted by Senator Thomas Walsh, found evidence that Secretary Fall was bribed by the oil companies and that the lease contracts were executed under highly suspect circumstances. Fall was later convicted of accepting a bribe. The contracts were cancelled and the oil lands were restored to the government. 16 ENCYCLOPEDIA BRITANNICA 904 (1968).

[13]The first federal statute concerning the issuance of subpoenas was the Act of March 2, 1793, ch. 23, § 6, 1 Stat. 335. It provided that subpoenas were valid in any district of the United States. There were no provisions for subpoenas outside the territorial limits of the United States.

The only method which the District Court of Wyoming could use was letters rogatory. The witnesses were called into the French Court pursuant to the request in the letters rogatory. However, the witnesses refused to testify. The only possble remedy was under French law, which was a suit for damages against the witnesses. Smit, *International Aspects of Federal Civil Procedure,* 61 COLUM. L. REV. 1031, 1044-45 (1961).

[14]*See* note 2, *supra.*

[15]Smit, *International Aspects of Federal Civil Procedure,* 61 COLUM. L. REV. 1031, 1045 (1961).

[16]*Id.* 1046 n. 75, which states:

"Under foreign service regulations, a United States consul may make foreign service only (1) if a federal statute provides for his doing so . . ." (citations omitted).

[17]Blackmer v. United States, 49 F.2d 523 (D.C. Cir. 1931).

[18]Blackmer v. United States, 284 U.S. 415 (1931).

[19]*Id.* at 436.

[20]*Id.* at 437.

[21]*Id.* at 436.

> The question of validity of the provision for actual service of the subpoena in a foreign country is one that arises solely between the Government of the United States and the citizen. The mere giving of such notice to the citizen in the foreign country of the requirement of his government that he shall return is in no sense an invasion of any right of the foreign government. . . .[22]

The Court's reasoning has been challenged by some writers on the basis that the right of United States consul to serve subpoenas within the territory of another country depends on that nation's willingness to permit such service.[23] A few nations forbid United States consuls to serve subpoenas in their territory, finding such action to be a violation of their sovereignty.[24]

Although the Walsh Act was amended in 1948,[25] its validity was subsequently challenged in *United States v. Thompson.*[26] In *Thompson* the Second Circuit heard an appeal from a criminal contempt proceeding for failure to comply with a grand jury subpoena issued under 28 U.S.C. section 1783 which provides for the subpoena of a witness in a foreign country.[27] Thompson was a citizen of the United States who was living in the Philippines. After a grand jury in New York subpoenaed Thompson to testify before it, the subpoena was personally served on him by the United States consul in the Philippines. Nevertheless, he failed to appear and was subsequently found guilty of contempt by the district court.[28] On appeal Thompson challenged the power of the court to issue a subpoena requiring a United States citizen residing in a foreign country to appear before a grand jury. He argued that a grand jury was not a criminal proceeding[29] within the meaning of the Walsh Act.[30]

Although the Second Circuit found the Walsh Act vague on its face,[31] it examined the legislative history to determine the congressional intent in enacting the provision.[32] The findings led it to conclude that "the district court was

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[22]*Id.* at 439.

[23]8 WIGMORE, EVIDENCE § 2195(c) (third ed. 1940); Smit, *International Aspects of Federal Civil Procedure,* 61 COLUM. L. REV. 1031, 1046 (1961).

[24]*See* note 3, *supra.*

[25]*See* Revisors Note 28 U.S.C.A. § 1783 (1966); U.S. CODE CONG. & AD. NEWS 3790-91 (1964).

[26]319 F.2d 665 (2d Cir. 1963).

[27]28 U.S.C. § 1783 (1948) (current version at 28 U.S.C. § 1783 (1970)) provided in part:

> Subpoena of Witness in Foreign Country
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> (A) A court of the United States may subpoena, for appearance before it, a citizen or resident of the United States who:
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> (2) is beyond the jurisdiction of the United States and whose testimony in a criminal proceeding is desired by the Attorney General.

[28]*In re* Thompson, 213 F. Supp. 372 (S.D.N.Y. 1963).

[29]319 F.2d 665, 668 (2d Cir. 1963).

[30]*See* note 27, *supra,* for the test of the material provisions of the Walsh Act, 28 U.S.C. § 1783 (1948).

[31]319 F.2d 665, 668 (2d Cir. 1963).

[32]*See, e.g.,* Barron, *The Judicial Code, 1948 Revision,* 8 F.R.D., 439, 445-46 (1949).

without power or jurisdiction to issue a subpoena requiring a citizen abroad to appear before a grand jury. . . ."[33]

The *Thompson* court had struck down the use of the Walsh Act to subpoena a witness residing abroad to testify in a grand jury proceeding. This limitation by the court excluded the grand jury from the term "criminal proceedings." However, the act did not remain subject to the *Thompson* restriction[34] as it was again amended a year later.

B. *The 1964 Amendment of the Walsh Act and Related Legislation*

The amendment of the Walsh Act in 1964[35] eliminated the problem areas presented by the *Thompson* line of cases.[36] Subsection (a) of the amended act overrules the *Thompson* decision by specifically permitting a federal court[37] to issue subpoenas requiring the appearance of a witness before the court, or ". . . before a person or body designated by it."[38] The new provision was intended to extend the court's power to issue subpoenas on citizens who reside outside the United States to ". . . all criminal proceedings, including grand jury proceedings."[39] The amended act provides that the subpoena can be issued on behalf of the prosecution or the accused.[40] In addition to empowering the courts with the discretion to determine whether the subpoena should be issued, the new provision allows the court to place conditions on the subpoena's issuance which are within the statutory limits.[41]

Subsection (b) of the Walsh Act no longer limits delivery of the subpoena to personal service abroad by the United States consul.[42] It can now be carried

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[33]319 F.2d 665, 670 (2d Cir. 1963).

[34]The Thompson decision holding that the Walsh Act did not apply to grand jury proceedings was reaffirmed later in a case based on a similar fact situation. The parties (husband and wife) who resided in Mexico were served with subpoenas which ordered them to appear before a special grand jury in New York. Failing to appear, they were judged in contempt, an order later set aside, which was based on the Thompson decision. *In re* Stern, 235 F. Supp. 680 (S.D.N.Y. 1964).

[35]28 U.S.C. § 1783 (1970).

[36]United States v. Thompson, 319 F.2d 665 (2d Cir. 1963); *In re* Stern, 235 F. Supp. 680 (S.D.N.Y. 1964).

[37]A subpoena may be issued only in connection with federal proceedings. A federal court may not issue a subpoena under 28 U.S.C. § 1783 to procure a witness for a proceeding in a state court. Mancusi v. Stubbs, 408 U.S. 204 (1972).

[38]28 U.S.C. § 1783 (1970).

[39]U.S. CODE CONG. & AD. NEWS 3790 (1964).

[40]*Id.* Smit, *International Litigation Under the United States Code,* 65 COLUM. L. REV. 1015, 1036 n. 125 (1965).

[41]U.S. CODE CONG. & AD. NEWS 3791 (1964); Smit, *International Litigation Under the United States Code,* 65 COLUM. L. REV. 1015, 1037 (1965).

[42]U.S. CODE CONG. & AD. NEWS 3791 (1964); In order to clarify the role of the United States consul, the Department of State revised 22 C.F.R. §§ 92.85-86 to read as follows:

§ 92.84 Legal process defined.

out in accordance with the Federal Rules of Civil Procedure which provide for service on a person in a foreign country.[43]

Rule 4(i) of the Federal Rules allows service to be effected by using the procedures adopted by the foreign country. However, the laws of other countries are not uniform.[44] Therefore, in order to insure that service under foreign law would be effective, that law must be thoroughly scrutinized before a court decides that subdivision (i) of Rule 4 is appropriate.[45] If this is done, it will create a method which "provides an alternative that is likely to create least objection in the place of service and also is likely to enhance the possibilities of securing ultimate enforcement of the judgment abroad."[46]

As noted, amendment of the Walsh Act[47] and the alternative methods for service in a foreign country provided for under the Federal Rules[48] resolved the problem brought out in the *Thompson*[49] case. However, these provisions were subsequently challenged in *United States v. Danenza.*[50]

C. *Post Amendment Application*

On May 1, 1975, pursuant to Rule 17 of the Federal Rules of Criminal Procedure[51] and the Walsh Act,[52] a Federal Judge in the Southern District of New York ordered the issuance and service of a *subpoena duces tecum*[53] incident to

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Legal process means a writ, warrant, mandate, or other process issuing from a court of justice. The term includes subpoenas, citations, and complaints.

§ 92.85 Service of legal process usually prohibited. The service of process and legal papers is not normally a Foreign Service function. Except when directed by the Department of State, officers of the Foreign Service are prohibited from serving process or legal papers or appointing other persons to do so. [Dept. Reg. 108.564, 32 FR. 11776, Aug. 16, 1967].

§ 92.86 Consular responsibility for serving subpoenas. When directed by the Department of State, officers of the Foreign Service will serve a subpoena issued by a court of the United States on a national or resident of the United States who is in a foreign country unless such action is prohibited by the law of the foreign country. [Dept. Reg. 108.564, 32 F.R. 11776, Aug. 16, 1967]

[43]FED. R. CIV. P. 4(e)-(i) (1963).

[44]*See, e.g.,* In Austria the basic method for service of process is by mail. Ettinger, *Service of Process in Austria,* 9 INT'L LAW. 693 (1975).

[45]Foster, *Judicial Economy; Fairness and Convenience of Place of Trial: Long-Arm Jurisdiction in District Courts,* 47 F.R.D. 73, 118 (1970).

[46]28 U.S.C.A. FED. R. CIV. P. 4 (Supp. 1976) (Notes of Advisory Committee on Rules 96, 98).

[47]28 U.S.C. § 1783 (1970).

[48]FED. R. CIV. P. 4(i)(1963).

[49]United States v. Thompson, 319 F.2d 665 (2d Cir. 1963).

[50]528 F.2d 390 (2d Cir. 1975). See 32 A.L.R. Fed. 894 (1977) for a discussion of subpoenaing persons in foreign countries UNDPR 28 U.S.C. § 1783.

[51]The material part of the rule reads:

A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28 U.S.C. § 1783.

FED. R. CRIM. P. 17(e)(2).

[52]28 U.S.C. § 1783 (1970).

[53]A process by which the court, at the instances of a suitor, commands a witness who has in his possession or control some document or paper that is pertinent to the issues of a pending controversy, to produce it at the trial. BLACK'S LAW DICTIONARY 1595 (4th ed. 1951).

a grand jury investigation on Victor Danenza, a United States citizen then residing in Milan, Italy. The judge's order[54] and subpoena were forwarded to the United States Consulate in Milan by the Department of State. The subpoena was then delivered by the United States consul to the District Attorney's Office of the Republic of Milan for service on Danenza.[55]

Because the appropriate Italian authorities were unable to find Danenza, they left the document with the concierge[56] of the hotel where he was residing.[57] Although this procedure was proper under Italian law[58] Danenza called the United States Consul in Milan and objected to the service. He protested that it had not been served on him "directly," but rather it was merely placed in his mailbox by the concierge.[59]

When Danenza failed to appear before the grand jury in New York as directed by the subpoena, the District Court issued an order to show cause why he should not be held in contempt.[60] At the hearing on the order, Danenza argued that the subpoena had been improperly served. He asserted, first, that the judge's order for the subpoena[61] requiring that he be served "directly" meant to him in person, and further that he did not have knowledge of the subpoena's contents.[62] The court nevertheless found Danenza in contempt since he was unable to support these claims in light of the government's evidence[63] to the contrary.[64]

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[54]The pertinent part of the order reads as follows:

> [T]hat the attached subpoena be served directly on said Victor Danenza, by the appropriate official of the American Consulate in Rome, Italy or through the appropriate Italian official in accordance with the requirements of Italian Law.

Brief for Appellee at 3, United States v. Danenza, 528 F.2d 390 (2d Cir. 1975) [hereinafter cited as Brief].

[55]*Id.* at 3-4.

[56]A resident attendant in a French building who oversees ingress and egress, handles mail, and performs various functions of a janitor or porter. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 470 (1971).

[57]Stated in an affidavit by Serra Livio, the Adjutant Judicial Official of the Court of Appeals of Milan. Also in the affidavit, Livio stated that on May 24, 1975, he notified Danenza by registered mail that he had left the subpoena with the concierge. Brief at 4.

[58]The service of the subpoena was in compliance with Article 139 of the Italian Civil Procedure Code. This section provides for service at the residence, domicile or office of the person to be served. If the person cannot be found on the premises, a copy of the subpoena may be served on the concierge followed by the mailing of the subpoena to the person to be served by registered mail. 528 F.2d 390, 391 & n. 2 (2d Cir. 1975); Brief at 4; Gori-Montanelli and Botwinik, *International Judicial Assistance—Italy,* 9 INT'L LAW. 717, 718 (1975).

[59]Brief at 5.

[60]528 F.2d 390, 391 (2d Cir. 1975). The order to show cause was served on Danenza's attorneys in New York and a copy was mailed to him at his Milan, Italy residence. Brief at 6.

[61]*See* note 54, *supra.*

[62]528 F.2d 390, 391 (2d Cir. 1975).

[63]The government submitted the affidavits of the Adjutant Judicial Official of the Court of Appeals of Milan, Notification Office and the Vice-Consul of the American Embassy in Milan. A copy of the May 21, 1975 letter sent to Danenza from the American Consul in Milan was also submitted along with a copy and a translation of Article 139 of the Italian Code of Civil Procedure. Brief at 6.

[64]528 F.2d 390, 391 (2d Cir. 1975).

On appeal to the Second Circuit, Danenza again challenged the validity of the service. He contended that the word "directly" required personal service in compliance with the alternative modes enumerated in the order to provide him with actual notice. Hence, the use of Italian procedure could only result in improper service.[65]

The Court of Appeals rejected this interpretation of the order.[66] Because service of process was statutory, it considered that the statute must be consulted to interpret what the district court judge's order meant.[67]

Under Rule 4(i) of the Federal Rules of Civil Procedure there are five alternative methods for effecting service on a person in a foreign country.[68] One of these methods permits service in the manner prescribed by the foreign law.[69] This provision was designed to permit a maximum of flexibility in achieving service abroad.[70]

The government pointed out that the order included two of the alternative methods of Rule 4(i).[71] It stated that service could be made "through the appropriate Italian official in accordance with the requirements of Italian law"[72] or "directly on said Victor Danenza, by the appropriate official of the American Consulate. . . ."[73] Both methods were in compliance with the Federal Rules.

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[65]*Id.*

[66]*Id.* at 391-92.

[67]*Id.*

[68]Subdivision (i) of Rule 4 provides:

(i) Alternative Provisions for Service in a Foreign Country.

(1) Manner. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.

(2) Return. Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1) (D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

[69]*Id. See* clause (1)(A).

[70]Kaplin, *Amendments of the Federal Rules of Civil Procedure,* 1961-1963(I), 77 HARV. L. REV. 601 (1964); 62 MICH. L. REV. 1375 (1964).

[71]Brief at 9.

[72]*See* note 54, *supra.*

[73]*Id.*

The Court of Appeals found that the order only required that service of the subpoena comply with the applicable Italian law, provided however that the service be "reasonably calculated to give actual notice"[74] within the limits of due process.[75] The evidence presented by the government established that these minimum requirements were met.[76]

The *Danenza* case[77] provides a good example of the interaction of the Walsh Act[78] and Rule 4 of the Federal Rules. The basic rule espoused by *Danenza* is that a federal court[79] can successfully subpoena a United States citizen or resident[80] who is in a foreign country to compel his testimony[81] in a criminal proceeding.[82] There have been no challenges to this holding.[83]

In a final analysis, *Danenza* illustrates that the federal statutory requirements for subpoenaing a witness in a foreign country do not completely "regulate the procedures for seeking cooperation abroad in aid of domestic litigation."[84] Rather the federal procedures only "regulate the service of federal subpoenas in foreign countries in a manner that meets the reasonable requirements of present day litigation and avoids unnecessary complications."[85] The changes brought about by the amendments to the Walsh Act and Rule 4 are only part of efforts by United States to provide for international judicial cooperation. Other statutes regulate federal assistance to foreign judicial bodies seeking to achieve service here.[86] An examination of this legislation will demonstrate that the statutory scheme for aiding service by a foreign country in the United States is in accord with the Hague Convention and that it would be in conformity with a proposed agreement for service in criminal proceedings.

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[74]28 U.S.C.A. FED. R. CIV. P. 4 (Supp. 1976) (Notes of Advisory Committee on Rules 96, 99).

[75]*See,* Milliken v. Meyer, 311 U.S. 457 (1940); Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950).

[76]528 F.2d 390, 392 (2d Cir. 1975).

[77]528 F.2d 390 (2d Cir. 1975).

[78]28 U.S.C. § 1783 (1970). *See* 32 A.L.R. Fed. 894 (1977).

[79]*See* note 37, *supra.*

[80]A federal court does not have the power to compel the attendance of aliens when at the time of the request the person is an inhabitant of a foreign country. United States v. Haim, 218 F. Supp. 922 (S.D.N.Y. 1963).

[81]Weston, *Compulsory Process II,* 74 MICH. L. REV. 194, 281-83 (1975).

[82]This includes grand jury proceedings. *See* note 39, *supra.*

[83]However, the question of whether 28 U.S.C. § 1784, dealing with contempt proceedings, provides exclusive procedure and penalty for failure to comply with a subpoena issued under the Walsh Act was presented to a federal court in 1974. The court did not decide the issue because it reversed the lower court's finding of contempt because of lack of evidence presented by the government. United States v. Lansky, 496 F.2d 1063 (5th Cir. 1974), rehearing denied, 502 F.2d 1168 (5th Cir. 1974).

[84]Smit, *International Litigation Under the United States Code,* 65 COLUM. L. REV. 1015, 1035 (1965).

[85]*Id.*

[86]28 U.S.C. §§ 1696, 1781-82 (1970).

II. Services of Foreign Documents in the United States

A. *Approach Prior to 1964*

Previous to 1964, there were two basic methods for serving foreign judicial documents in the United States which this country acknowledged. One method was service on the person, which is still permitted today.[87] This can be achieved either through use of the mails, or by members of diplomatic or consular missions. However, no compulsion may be used.[88] The United States does not regard this type of service as a sovereign act, consequently there is no infringement upon the United States' sovereignty.[89] The rationale for this policy is that service is considered to be a matter between the foreign country and the person to be served.

The second method in existence prior to 1964 was the use of letters rogatory.[90] Since many countries consider service of process to be a sovereign act requiring official recognition or assistance by the government of the country in which service is to be made.[91] A request for such recognition or aid was transmitted through the use of letters rogatory.[92] United States courts, however, did not lend their support to these requests.[93] This attitude was based on the assumption that personal service of the documents sought by letters rogatory would give the foreign courts personal jurisdiction over the party served which otherwise could not be obtained.[94] This position has been criticized on the basis that the United States courts did not understand the civil law concept of "service of process."[95] However, acknowledgement of letters rogatory by United States courts is now governed by federal legislation which mandates judicial assistance.[96]

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[87]28 U.S.C. § 1696(b) (1970).

[88]62 MICH. L. REV. 1375, 1382 (1964).

[89]*Id.* at 1384.

[90]*See* note 6, *supra.*

[91]Some countries require that letters rogatory be submitted through diplomatic channels. Others permit a direct court-to-court channel to be used. *See, e.g.,* 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW, 204 (1968) [hereinafter cited as WHITEMAN].

[92]Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform,* 62 YALE L.J. 515, 543 (1953); 62 MICH. L. REV. 1375, 1382 (1964).

[93]*See, e.g., In re* Letters Rogatory, 261 F. 652 (S.D.N.Y. 1919); Matter of Romero, 56 Misc. 319, 107 N.Y.S. 621 (Sup. Ct. 1907).

[94]*See* WHITEMAN, *supra* note 91, at 194.

[95]In civil law countries service is regarded as a mere means of notification to the party. Jurisdiction over the party is gained by some contact between the country and the party, such as the place of the performance of a contract. WHITEMAN, *supra* note 91, at 188; GRÜTZNER, INTERNATIONAL JUDICIAL ASSISTANCE AND COOPERATION, IN II A TREATISE ON INTERNATIONAL CRIMINAL LAW 208 (Bassiouni and Nanda ed. 1973); Smit, *International Litigation Under the United States Code,* 65 COLUM. L. REV. 1015, 1022-23 (1965); 44 COLUM. L. REV. 72 (1944); 62 MICH. L. REV. 1375, 1382-83 (1964).

[96]*See* 28 U.S.C. §§ 1696, 1781-82 (1970).

B. *The Current Federal Approach*

In 1948, Congress codified the methods that the federal courts were bound to follow in giving assistance to foreign judiciaries when it enacted Title 28 of the United States Code.[97] The original statute included sections on the "Transmittal of letters rogatory" and "Assistance for foreign and international tribunals."[98] These were amended in 1964 to reflect their present form.[99]

Title of 28 U.S.C. section 1782 requires United States assistance in obtaining testimony and documentary evidence for foreign judiciaries.[100] The Department of State is authorized by section 1781 to receive and transmit letters rogatory.[101] This enables foreign judiciaries to send their requests to a central authority, who will ensure that it is executed, unless determined to be in conflict with United States law.[102]

The concept of a central authority is also espoused in the Hague Convention.[103] In both the Hague Convention and section 1781 the central authority acts "as a conduit on request to receive and return letters rogatory or other requests for judicial assistance."[104] It should be noted that neither of the provisions precludes other methods of service outside of the central authority.[105]

Title 28 U.S.C. section 1696 expressly permits service of process within the United States pursuant to letters rogatory.[106] Federal courts must assist in efforts to achieve service when requested to do so by a foreign judicial body.[107] However, providing the foreign country with such aid does not mean that the courts recognize the foreign litigation as valid. The discretion of the district judge is limited to insuring only that the manner of service is in conformity with the law of the country making the request.[108]

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[97]Title 28 U.S.C., JUDICIARY AND JUDICIAL PROCEDURE (1970).

[98]28 U.S.C. §§ 1781-82 (1948) (current versions at 28 U.S.C. §§ 1781-82 (1970).

[99]28 U.S.C. §§ 1781-82 (1970). For a discussion of types of judicial assistance the United States provides, see Dept. of State, *Digest of United States Practice in International Law* (1976) at 306-311.

[100]The purpose of § 1782 are not within the scope of this paper. For a detailed discussion of this area see, U.S. CODE CONG. & AD. NEWS 3788 (1964).

[101]However, the freedom to transmit directly from one tribunal to another, or the use of any voluntary channel is not precluded by these sections, 28 U.S.C. §§ 1696(b), 1781(b), 1782(b) (1970).

[102]For a further discussion of the discretion of the Department of State and the district courts in compliance with §§ 1696, 1781-82, see U.S. CODE CONG. & AD. NEWS 3786-90 (1964).

[103]*Compare* the Hague Convention art. 2 *with* §§ 1781-82 which provide for a comparison of the respective "central authority" concepts.

[104]Amram, *The Proposed International Convention on the Service of Documents Abroad,* 51 A.B.A.J. 650-51 (1965).

[105]*See* Hague Convention arts. 8-11; 28 U.S.C. §§ 1696(b), 1781(b), 1782(b) (1970).

[106]28 U.S.C. § 1696 (1970), Service in foreign and international litigation.

[107]*See* Smit, *International Litigation Under the United States Code,* 65 COLUM. L. REV. 1015, 1019-1035 (1965).

[108]U.S. CODE CONG. & AD. NEWS 3785-90 (1964); Amram, *The Proposed International Convention on the Service of Documents Abroad,* 51 A.B.A.J. 650-51 (1965).

The scope of the statute extends to giving judicial assistance to a "foreign or international tribunal,"[109] including investigative and quasi-judicial proceedings.[110] The district court judge must evaluate the nature of the foreign matter in order to determine whether it will merit the requested assistance.[111] Unfortunately not all nations have such a liberal procedure for international judicial assistance.[112] The sponsors of the United States legislation noted that the law "grants wide assistance to others, but demands nothing in return."[113] They hoped the action taken by the United States would cause foreign countries to liberalize their procedures.[114]

The United States approach to service is inadequate, being confined to one country, or providing only limited assistance.[115] Clearly an international approach is needed here. Such efforts to date have been only in civil and com-

[109]28 U.S.C. § 1696 (1970).

[110]*See* U.S. CODE CONG. & AD. NEWS 3785 (1964).

[111]Amram, *The Proposed International Convention on the Service of Documents Abroad,* 51 A.B.A.J. 650, 651 (1965).

[112]*See, e.g.* Miller, *International Cooperation in Litigation Between the United States and Switzerland: Unilateral Procedural Accommodation in a Test Tube,* 49 MINN. L. REV. 1069, 1075-109 (1965). However, since the United States and Switzerland in 1973 signed a bilateral agreement dealing with judicial assistance in criminal matters, *see* note 3, *supra,* the applicability of this article may be diminished. The treaty, however, deals only with criminal matters. Switzerland is not a party to the Hague Convention, *see* note 139, *infra.* Therefore, service of process in civil matters could still cause a problem in that it could violate Swiss sovereignty. *See* note 3, *supra.* In addition, the analysis provided in the article is still valid as a general overview of the problems of the bilateral approach. *See also,* fn. 115, *infra.*

[113]Amram, *The Proposed International Convention on the Service of Documents Abroad,* 51 A.B.A.J. 650, 651 (1965).

[114]*Id.*

[115]It is suggested by the author that the bilateral approach is ineffective and unrealistic. Bilateral agreements are sometimes used for a special purpose in unique situations. Such agreements are usually after the fact and have no useful purpose other than for the specific factual circumstances which their inception was based on. For example, the discovery of alleged payoffs by the Lockheed Corporation led to a number of bilateral agreements concerning the investigation of the matter. *See, e.g.,* Agreement Concerning Mutual Assistance in the Administration of Justice in Connection with the Lockheed Aircraft Corporation Matter with Agreed Minutes, Sept. 24, 1976, United States-Federal Republic of Germany, ____ U.S.T. ____, T.I.A.S. No. 8373; Procedure for Mutual Assistance in the Administration of Justice in Connection with the Lockheed Aircraft Corporation Matter, March 29, 1976, United States-Italy, ____ U.S.T. ____, T.I.A.S. No. 8374.

Absent special circumstances of an express bilateral agreement, service of process can be effected by diplomatic counsel if such service does not violate any of the sovereign's rights. For example:

(1) A consular officer may, within his district

(g) serve or cause to be served judicial documents or take evidence on behalf of courts of the sending state in a manner permitted under special arrangements on this subject between the High Contracting Parties or otherwise not inconsistent with the laws of the territory.

Consular Convention, May 1, 1950, United States-Ireland, Art. 17(g), 5 U.S.T. 949, T.I.A.S. No. 2984.

If no applicable treaty exists, service may be effected as a matter of comity. For example, there is no bilateral agreement between Italy and the United States dealing with judicial assistance. Therefore, to effect service of process in Italy, an examination of the Italian Code of Civil Pro-

mercial matters,[116] but much can be learned from this in trying to formulate an international agreement for service of process in criminal proceedings.

III. The Hague Convention as a Framework for Service in Criminal Proceedings—A Proposal

The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters exemplifies multinational cooperation in the area of judicial assistance.[117] It embodies an approach to service which guarantees uniformity among those nations who are signatories.[118]

The Convention was opened for signature only four days after the amendments to Title 28 U.S.C. were signed into law.[119] As a result, the text of these provisions were presented to the delegates for their careful analysis.[120] Al-

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cedure provisions relating to service of process would be required before a United States court attempted service within Italy. This was done in the Danenza case, *see* footnotes 51-85 and accompanying text, *supra.* This would also be required in civil matters as Italy is not a party to the Hague Convention, fn. 139, *infra.* For a discussion of how service of process can be effected in Italy, *see,* Gori-Montanelli and Botwinik, *International Judicial Assistance-Italy,* 9 INT'L LAW. 717, 718-21 (1975).

The Federal Republic of Germany is another country which is not a party to the Hague Convention (although the Federal Republic of Germany is a signatory to the Convention, it has not ratified the agreement). Other than agreement concerning the Lockheed matter, *supra,* there is a limited agreement between the U.S. and Germany; Agreement Relating to Reciprocal Legal Assistance in Penal Matters and Information from the Penal Registrar, Nov. 7, 1960-Jan. 3, 1961, United States-Germany, 12 U.S.T. 1156, T.I.A.S. No. 4826. This agreement, however, as the name implies, is limited to assistance in penal matters. Other than the limited scope of these two treaties, it can be said that the United States and Germany have no treaty for judicial assistance. Such assistance, however, is generally given as a matter of comity. For a discussion of service of process in Germany, see, Heidenberg, *Service of Process and the Gathering of Information Relative to a Law Suit Brought in West Germany,* 9 INT'L LAW. 725, 728-29 (1975). For a discussion of international judicial assistance by a German author, see, GRÜTZNER, INTERNATIONAL JUDICIAL ASSISTANCE AND COOPERATION, IN II A TREATISE ON INTERNATIONAL CRIMINAL LAW 208 (Bassiouni and Nanda ed. 1973).

For a discussion of the treaty status between the United States and Switzerland *see* n. 112, *supra.*

The weaknesses inherent in the bilateral approach call for the use of multilateral agreement. It is submitted that the Hague Convention was a positive step in this direction. However, the Danenza case, *supra,* demonstrates the need for an agreement which would include not only civil and commercial matters as the Hague Convention, but also criminal matters including grand jury proceedings.

[116]*See* Hague Convention, note 7, *supra.*

[117]Hague Convention, done November 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163.

[118]*Id.* The text and purposes of the Hague Convention have been well documented. For background discussions on the Hague Convention and its effects, see Amram, *Report on Tenth Session of the Hague Convention on Private International Law,* 59 AM. J. INT'L L. 87 (1965); Nadelman, *The United States Joins the Hague Conference on Private International Law—A History with Comments,* 30 LAW & CONTEMP. PROB. 291 (1965); 13 AM. J. COMP. L. 612 (1964); 2 CORNELL INT'L L.J. 125 (1969).

[119]The amendments to Title 28 U.S.C. (Pub. L. No. 88-619) were signed by President Johnson on October 3, 1964. 78 Stat. 995. The Hague Convention opened on October 7, 1964.

[120]The United States delegation pointed out the freedom under 28 U.S.C. §§ 1696, 1781-82 that

though the extent of its impact on the framers of the Hague Convention resolution is impossible to determine, the approved convention does not vary the basic procedures in United States laws.[121] There was, therefore, no obstacle to its quick adoption by the United States.[122] It is entirely reasonable to suggest that the United States approach in criminal proceedings[123] be used as a guideline for an international approach.

Ratification by the United States[124] indicates that the legislature desired a uniform approach to international service of process, not only in civil and commercial matters, but also in criminal proceedings.[125] The multinational agreement proffered a solution to the problems of service of process which transcends territorial boundaries. Perhaps other countries may now be encouraged to pursue further international efforts.[126]

The Hague Convention provided a modern and efficient method for international judicial assistance in the service of documents abroad. Using the Convention as a model, it is possible to propose a similar multinational agreement encompassing the service of subpoenas in grand jury and other criminal proceedings.

The proposed agreement, which could be based on the Hague Convention,[127] would retain the concept of a "central authority" in each nation, which would be designated to receive requests for service and proceed accordingly.[128] It would allow the country seeking foreign service to have it effected by either the internal law of the country where the service is to take place, or as requested, which would allow for any particular methods of their domestic system to be used.[129] However, the "central authority" concept would not preclude diplomatic,[130] direct,[131] or other methods of service[132] if the countries in-

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no authorization or permission from the United States government is needed for the transmission of letters rogatory or the service of documents within her territorial limits, but that if assistance is requested it will be provided by the Department of State. Amram, *The Proposed International Convention on the Service of Documents Abroad,* 51 A.B.A.J. 650, 652 (1965).

[121] *Compare* the Hague Convention *with* 28 U.S.C. §§ 1696, 1781-82 (1970).

[122] The United States ratified the Hague Convention on April 14, 1967. *See* 20 U.S.T. 361.

[123] *See* 28 U.S.C. §§ 1696, 1781-83 (1970).

[124] *See* note 122, *supra.*

[125] In discussing the amendments to 28 U.S.C., the Senate Committee stated: "It is hoped the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures." Amram, *The Proposed International Convention on the Service of Documents Abroad,* 51 A.B.A.J. 650, at 651 (1965).

[126] *Id.*

[127] And the relevant sections in the U.S.C. which are compatible with the Hague Convention. *See* 28 U.S.C. §§ 1696, 1781-84 (1970).

[128] *See* Hague Convention, art. 2, for the provision for a central authority.

[129] *See* Hague Convention, art. 5.

[130] However, no compulsion may be used. *See* Hague Convention, art. 8.

[131] *See* Hague Convention, arts. 9 and 10.

[132] *See* Hague Convention, art. 11.

volved permit it. The proposed agreement should also contain a provision limiting the powers of a contracting state to decline to perform.[133] A country might only refuse on the grounds that the requested service would violate its national security or sovereignty.[134] Furthermore, the proposed agreement for service of subpoenas in criminal proceedings should contain provisions safeguarding the various due process concepts of the contracting states in order to insure the validity of foreign service under the respective domestic law.[135]

The foregoing outline of the basic provisions for the proposed agreement do not give any answers to the critical question of how such an agreement can be drawn up. Through the United Nations General Assembly a commission could be formed to investigate the possibilities for a multinational agreement on the service of subpoenas in criminal proceedings. Such a commission could be expected to draw heavily upon the approach used in the Hague Convention[136] and the United States.[137]

IV. Summary and Conclusion

The need for a multinational agreement for the service of subpoenas in criminal proceedings has become apparent. Litigation involving international ramifications is becoming more common.[138] It is no longer possible for a country to ignore the realities of the world's business, a fact acknowledged by the Hague Convention. Furthermore, the number of countries continues to increase as colonies have gained their independence. Thus, the bilateral approach under these circumstances is outdated. The sheer number of bilateral agreements for an effective system would be astronomical, giving rise to countless different procedures making effective service close to unworkable. The burden on governments and their judicial bodies is prohibitive.

The multinational approach offers a viable alternative. Although the Hague Convention has not been as widely accepted as anticipated,[139] those states which are members and whose legal theories are divergent, have demonstrated that they can reach mutually agreeable terms in a multinational agreement.

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[133]*See* Hague Convention, art. 13.

[134]*Id.* A claim of exclusive jurisdiction by the country requested to serve process will not allow that country to refuse to serve the documents.

[135]*See* Hague Convention, arts. 15 and 16.

[136]*Supra* note 7.

[137]*See* 28 U.S.C. §§ 1696, 1781-83 (1970).

[138]*See* Smit, *International Litigation Under the United States Code,* 65 COLUM. L. REV. 1015 (1965).

[139]As of January 1, 1977, the following nations were parties to the Hague Convention; Barbados, Belgium, Botswana, Denmark, Egypt, Finland, France, Israel, Japan, Luxembourg, Malawi, Netherlands, Norway, Portugal, Sweden, Turkey, United Kingdom and United States. TREATIES IN FORCE (1976 ed.).

Varying concepts of service can be tied together by stressing that the rendering of assistance to a foreign judicial body does not add any credence to the foreign claim.[140]

International judicial assistance was not an acknowledged concept in the United States a century ago. Even though it became recognized there was little cooperation because of judicial uncertainties of its impact. Gradually, through legislative initiative, the United States adopted one of the most liberal and comprehensive concepts of international judicial assistance.[141]

The first attempts at international cooperation were limited to bilateral agreements. These proved to be impractical as international transactions increased.[142] The Hague Convention broadened the concept of multinational agreements to include a uniform procedure for the service of documents in civil and commercial matters. However, service of subpoenas in grand jury and other criminal proceedings are still in the embryonic stage of the bilateral agreement. The Hague Convention provided the international community with a forum to solve the problem of service in civil and commercial matters. Based on this earlier effort, a new agreement with a similar structure could provide nations with an additional forum in order to serve extraterritorial criminal subpoenas.

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[140]*See, e.g.*, 28 U.S.C. § 1696 (1970).
[141]*See* 28 U.S.C. §§ 1696, 1781-83 (1970).
[142]*See also* note 1, *supra.*