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Recent Decisions

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RECENT DECISIONS

CONFLICTS—IN THE ABSENCE OF FEDERAL CONFLICT OF LAWS RULE IN DIVERSITY CASES DISTRICT COURT MUST APPLY THE STATE'S CHOICE OF LAW RULE

Plaintiffs,[1] an American serviceman from Wisconsin and survivors of an American serviceman from Tennessee, sought damages in this diversity action[2] against defendant munitions manufacturing corporation[3] for personal injuries and death resulting from the premature explosion of a howitzer round in Cambodia. Plaintiffs alleged that the injuries were caused by the defective manufacture of the shell, for which the defendant should be liable under the strict liability rules of Texas, the forum and the place of the shell's manufacture.[4] The District Court of the Eastern District of Texas adopted the plaintiff's position on choice of law and the jury awarded damages. Before the Circuit Court of Appeals, defendants objected to the district court's application of Texas substantive law and argued that the conflict of laws rules of the Texas forum must be applied; under Texas conflict of laws rules, the law of the place of injury, Cambodia, would apply.[5] On appeal to the United States Court of Appeals for the First Circuit, *held*, affirmed. When application of the forum's conflict of laws rule would result in the use of a law of a jurisdiction that has no interest in the controversy, a federal choice of law rule exists which would apply the substantive law of the interested forum. On writ of certiorari to the United States Supreme Court, *held*, vacated and remanded. The

1. Plaintiff Hawley K. Challoner of Wisconsin was severely injured by the explosion; plaintiff Daniel E. Nelms of Tennessee was killed. At the time of the explosion, both were members of the United States Army engaged in combat with the North Vietnamese.

2. Diversity jurisdiction was based on 28 U.S.C. § 1331.

3. Defendant Day and Zimmerman is incorporated in Maryland and has its principal place of business in Pennsylvania.

4. Plaintiffs presented expert testimony that a cavitation in the explosive material probably caused its detonation before the shell had traveled the length of the gun tube, that all required safety precautions had been followed, and that government reports showed that tests performed on the remainder of the ammunition in the same lot as the round which exploded found defects. Defendants contended that the ammunition was manufactured in accordance with government design and monitored by government inspection systems, and that any defect would have been insufficient to cause a premature explosion. Therefore the defendent contended it should not be held strictly liable.

5. 512 F.2d 77 at 79-80.

district court must apply the state choice of law rule in the absence of a federal choice of law rule in diversity cases. *Challoner v. Day and Zimmerman, Inc.*, 512 F.2d 77 (1975), *cert. granted, vacated and remanded*, 423 U.S. 3 (1975).

The Supreme Court seemingly decided the question of whether there should be a federal conflict of laws rule for diversity cases in *Erie R.R. Co. v. Tompkins*, which held that a federal court, sitting in diversity, must apply the law of the state in which it sits.[6] The Court based its holding on an interpretation of section 34 of the Federal Judiciary Act of 1789[7] which indicated that state law should apply when the Constitution, statutes, or treaties did not require the application of federal law. This deferral to state law was applied to the conflict of laws rules in *Klaxon v. Stentor Electric Manufacturing Co., Inc.*,[8] in which the Supreme Court cited *Erie* and admonished the lower federal courts to apply the forum's choice of law rule and to avoid their own "independent determinations."[9] However, *Erie* and *Klaxon* left the federal judiciary free to create federal common law in cases which did not involve diversity of citizenship and where federal interests predominated.[10] The pol-

6. 304 U.S. 64 (1938).

7. § 34 of the Federal Judiciary Act of September 24, 1789, 28 U.S.C. § 1652 (1970):

> The laws of the several states, except where the Constitution, treaties, or statutes otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.

8. 313 U.S. 487 (1941).

9. 313 U.S. at 496.

10. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405, 407 (1964); Maier, *The Three Faces of Zapata: Maritime Law, Federal Common Law, Federal Courts Law*, 6 VAND. J. TRANSNAT'L L. 387-98 (1973); Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 667-74 (1959).

Examples of areas into which the federal judiciary extended federal common law were: (1) to protect federal regulatory agencies and thus provide national uniformity in cases which involved them [Federal Deposit Insurance Corp. in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1952)]; (2) to promote national use of arbitration [Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395 (1967)]; (3) to provide for recovery for marine wrongful death at shoreline [Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970)]; (4) to honor choice of forum clauses in foreign contracts [The Bremen v. Zapata Off-Shore Oil Co., 407 U.S. 1 (1972)]; and (5) to provide a federal means for solving state boundary disputes [Texas v. New Jersey, 379 U.S. 674 (1965); Hinderlinder v. La Plata River and Cherry Creek Ditch Co., 304 U.S. 92 (1937)]; Maier, *Coordination of Law in a National Federal State: An Analysis of the Writings of*

icy of an overriding national interest in the uniform resolution of problems involving international affairs has resulted in the application of federal common law in areas of international concern.[11] Commentators have often cited similar policy reasons for a federal conflicts rule in diversity cases.[12] Conflicts writers can be grouped according to their theories on the relative state and federal interests involved in an interstate conflict. There are those who advocate a "vested rights" theory,[13] whereby the laws of a given political subdivision control rights and duties that arise from legally significant events within the territory of the subdivision (*e.g.*, tortious conduct). Others advocate a "local law" theory[14] under which a forum uses the results of previous conflicts cases to determine what result would be consistent. The forum is free to decide conflicts cases as it wishes, and is also free to adopt legal rules of a foreign state. Another group favors coordination of state and federal law by forcing the use of the law of the political subdivision whose policies most greatly affect the problem under consideration.[15] There is no concensus among commentators on the federal conflict of laws question, but the literature suggests the importance of the problem. The courts have dealt with the possible creation of a federal conflict of laws rule through a strict

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Elliott Evans Cheatham, 26 VAND. L. REV. 207, 224 (1973) [hereinafter cited as Maier].

11. Zschernig v. Miller, 389 U.S. 429 (1968) (invalidation of a state escheat statute for its treatment of resident aliens); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (criticism of a foreign nation's action under the Act of State Doctrine).

12. It should be noted that in the field of conflict of laws, often writers and law review articles are more abundant than cases. Few conflicts cases are heard by the higher level courts, creating a dearth of precedent and also of judges who can ably deal with conflicts issues. In the last fifty years, this field has undergone major changes, which were reflected in the writers long before they were evidenced in the courts.

13. Maier, *supra* note 10, at 213. The first group included primarily Professor Joseph Henry Beale, the Reporter of the First Restatement of Conflict of Laws. *See* 6 ALI PROCEEDINGS 463-64 (1927-28).

14. The second group's primary proponent was Professor W. Cook. *See* COOK, THE LOGICAL AND LEGAL BASIS OF THE CONFLICT OF LAWS (1942); Maier, *supra* note 10, at 214; VON MEHREN & TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 52-55 (1965).

15. The third group's chief advocate was Professor Elliott Cheatham. *See* Cheatham, *Conflict of Laws: Some Developments and Some Questions*, 25 ARK. L. REV. 9, 9-11 (1971); Cheatham, *Some Developments in Conflict of Laws*, 17 VAND. L. REV. 193 (1963); *see also* Hart, *The Relations Between State and Federal Law*, 54 CAL. L. REV. 489, 509 (1954).

application of the full faith and credit clause of the Constitution, which requires the application of a sister state's law notwithstanding any conflict with the forum state's law or policies. The courts that adhere to the *Klaxon* approach and apply forum state choice of law rules find that the controlling constitutional requirement is due process and judge the foreign state's choice of law rules by that standard.[16] In the 1930's the Court discouraged development of a federal conflict of laws rule when it found in two workmen's compensation cases that the forum state's choice of law rule did not violate due process and denied that full faith and credit required the use of a foreign state's statute within the forum when the forum had the predominant interest.[17] This view was radically changed by the Court's decision in *Hughes v. Fetter*.[18] In that case the Court required the Wisconsin forum to entertain a wrongful death action for the death of a Wisconsin resident in Illinois under the appropriate Illinois statute, in spite of a Wisconsin statute that created a cause of action for wrongful death only when the death occurred in Wisconsin. The Court based its decision on the application of the full faith and credit clause to sister state statutes as well as judgments.[19] After *Hughes*, the power of the federal courts to determine which state interest to apply in order to protect the expectations of the parties seemed fixed. As an example, the Court used the full faith and credit clause in *First National Bank of Chicago v. United Air Lines*[20] to invalidate an Illinois state statute that excluded an action for wrongful death of an Illinois resident outside Illinois if the action could have been brought in the state in which the death occurred. Thus, the Court refused to apply a state choice of law rule that it felt violated the full faith and credit clause. However, the Court, in *Wells v. Simonds Abrasive Co.*, severely limited the

16. U.S. CONST., art. IV, cl. 1: "Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial proceedings of every other State."

U.S. CONST. amend. XIV, cl. 1: ". . . nor shall any State deprive any person of life, liberty, or property without due process of law . . . ."; *supra* note 8.

17. Alaska Packers Ass'n v. Industrial Accident Comm'n of California, 294 U.S. 532 (1935); Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939). *See* Note, 46 COLUM. L. REV. 719 (1946).

18. 341 U.S. 609 (1951). Maier, *supra* note 10, at 236.

19. Some commentators have suggested that the proper basis for the *Hughes* decision was on equal protection grounds, because the Wisconsin statute discriminated unreasonably between Wisconsin citizens killed in Wisconsin and those killed in other states. Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36, 268 (1959).

20. 342 U.S. 396 (1952).

use of the full faith and credit clause as a federal choice of law rule.[21] Although the Pennsylvania forum was required to entertain a wrongful death action under the Alabama statute where an Alabama resident was killed by a defective wheel manufactured in Pennsylvania, the Supreme Court allowed the Pennsylvania court to bar the action under its one-year statute of limitation for wrongful death, in spite of Alabama's two-year limit. Thus, the Court indicated that the full faith and credit clause would prevent any arbitrary discrimination against out-of-state causes of action. Justice Jackson, in his dissenting opinion, noted that, ironically, the lack of uniformity in this case was exactly what *Erie* sought to correct.[22] The Court further extended this limiting view of the *Hughes* doctrine in *Carroll v. Lanza*[23] when a suit for common law damages under Arkansas law for an Arkansas injury was allowed although the worker had an exclusive Missouri workmen's compensation remedy under which he had been receiving benefits. The Court found that Arkansas, as the place of injury, had sufficient contact to apply its own law without being compelled under the full faith and credit clause to apply Missouri law and without violating due process. Practically, therefore, states today are free to choose their own choice of law rules in the absence of a federal conflict of laws rule within the bounds of due process. The requirement that full faith and credit must be given is applicable only in isolated cases in which a decision not to give full faith and credit would be arbitrary.[24]

In the instant case, the Fifth Circuit upheld the District Court's determination that Texas substantive law should apply, in spite of the traditional conflicts rule which would apply the state choice of law rule.[25] Under Texas choice of law principles, Cambodian law would then apply.[26] The court relied on a previous Fifth Circuit decision, *Lester v. Aetna Life Ins. Co.*,[27] which applied a federal

21. 345 U.S. 514 (1953). Maier, *supra* note 10, at 238.

22. 345 U.S. at 519 (1953). The lack of uniformity between actions in state and federal court within the state was the concern in *Erie*. *Supra* note 6.

23. 349 U.S. 408 (1955); Maier, *supra* note 10, at 259.

24. *Supra* note 16; *see* Home Insurance Co. v. Dick, 281 U.S. 397 (1930); N.Y. Life Ins. Co. v. Dodge, 246 U.S. 357 (1918).

25. Erie v. Tompkins, *supra* note 6; Klaxon v. Stentor, *supra* note 8; Friendly, *supra* note 10.

26. TEX. ANN. STAT. tit. 77, art. 4678 (1975); *supra* note 5.

27. Lester v. Aetna Life Ins. Co., 433 F.2d 884, 888 (1970), *cert. den.*, 402 U.S. 909 (1970). In *Lester*, the court applied Louisiana law to protect the insured Louisiana resident by requiring that the Louisiana law regarding notice and can-

choice of law rule that prohibited the application of the law of a jurisdiction that had "no interest" in the case. The court also noted that the application of Texas substantive law would satisfy the substantial interests of the four American states involved, *i.e.* Wisconsin, Pennsylvania, Texas, and Tennessee.[28] All four jurisdictions are strict liability states for commercial tort cases; thus, no interested American jurisdiction would have its policy "frustrated" by the application of Texas law.[29] The court mentioned the interest of the United States in the compensation of injured servicemen and noted that American citizens would not want their servicemen governed by any lower standard of care than that standard applied by the soldier's home state.[30] The court recognized no Cambodian interest in this case.[31] Turning to a consideration of traditional principles of international law, the court viewed Cambodia as having given up its traditional exclusive jurisdiction over its own territory because Cambodia allowed foreign troops on her soil.[32] The court also cited the traditional rule that no nation can assume jurisdiction over non-residents.[33] Finally, the court stated that, as an American tribunal, applying American law, it found no reason to "frustrate" United States policy by applying Cambodian law.[34] Having decided on the application of Texas substantive law, the court then determined that the major issues of Texas substantive law were applied correctly by the district court and found the

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cellation of insurance policies be applied to allow recovery against the insurer, instead of denying recovery under the less stringent Wisconsin rule, which was the place of issuance of the policy. The court determined that the *Klaxon* principle was inapplicable because of what the court called a "false conflict" situation, defined as the situation occurring "when one of the two states related to a case has a legitimate interest in the application of its law and policy and the other has none."

28. *Supra* notes 1, 3.

29. 512 F.2d at 80; Howes v. Hanson, 56 Wisc.2d 247, 201 N.W.2d 825 (1972); Ford Motor Co. v. Lonon, 217 Tenn. 400, 398 S.W.2d 240 (1966); Hoffman v. A.B. Chance Co., 346 F. Supp. 991 (M.D. Pa. 1972); Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969).

30. 512 F.2d at 80.

31. 512 F.2d at 80. The court stated: "The Cambodian requirement that fault be proven is a policy designed to afford a high degree of protection to Cambodian manufacturers; Cambodia is indifferent to the protection of American manufacturers."

32. 512 F.2d at 81; The Schooner Exchange v. M'Fadden, 7 Cranch 116, 137, 3 L. Ed. 287 (1812); J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19-20 (2d ed. 1841) [hereinafter cited as STORY].

33. 512 F.2d at 81; STORY, *supra* note 32, W. BISHOP, INTERNATIONAL LAW 439-40 (2d ed. 1962).

34. 512 F.2d at 82.

defendant corporation liable for the death and injuries caused by the defective shell.[35]

The Supreme Court overturned the Court of Appeals use of a federal conflict of laws rule. The Court upheld the use of the established state conflict of laws rule as required by *Klaxon*, and remanded the case to the district court for application of the Texas choice of law rule.[36] The *per curiam* opinion rejected both the lower court's reliance on *Lester v. Aetna Life Ins. Co.*,[37] and the lower court's contention that the traditional conflict rule should not apply to a federal court dealing with American soldiers injured in a foreign country.[38] The Court stated that the circuit court misinterpreted *Klaxon* or "determined for itself that it was no longer of controlling force . . . ."[39] The Court emphasized the need for the application of the same law whether the suit was brought in state or federal court.[40] The Court thus saw no reason to reverse the traditional application of state conflict of laws rules in federal diversity cases.[41]

This case presented the district and circuit courts with the problem of how to maneuver the forum's conflict of laws rules in order to apply Texas law to an injury caused by a defective product manufactured in Texas when the injury occurred on foreign soil. On a policy basis, the lower courts did make the more equitable decision in applying Texas law.[42] Viewed under one commentator's test, both lower courts were applying the law that would give the most predictable and uniform results, maintain international and

35. The six major issues under Texas substantive law were: (1) whether transaction was commercial; (2) whether jury could find defendants liable if the product was defectively designed; (3) whether round was defective when it left defendant's hands; (4) whether to admit governmental test reports on the shell; (5) whether public policy demands strict liability with costs of injuries from defective manufacture accruing to manufacturing corporation; and (6) whether Texas wrongful death statute applied extraterritorially.

36. 96 S.Ct. 167 at 168; Klaxon, *supra* note 8.

37. *Supra* note 27.

38. 96 S.Ct. at 168; Lester, *supra* note 27.

39. 96 S.Ct. at 168.

40. Justice Blackman in a concurring opinion added that he does not interpret the majority opinion to "compel" the determination that it was only the law of Cambodia that is applicable. On remand he felt that the Court of Appeals could hold that Texas state courts would apply the Texas rule of strict liability.

41. 96 S.Ct. at 168.

42. Some policies traditionally examined include: most beneficial compensation to victims; possible deterrance to future manufacturers; and state interest in the safety of products manufactured within its borders.

interstate order, simplify the judicial task, advance the forum's interest, and apply the better rule of law.[43] These policies, however, were not articulated by the courts in the instant case. Also, the application of Texas law would fulfill the "most significant relationship" test of the *Restatement (Second) of Conflict of Laws*.[44] The adoption of a federal choice of law rule would further the above-mentioned policies and free the federal courts from the need to apply automatically the law of an uninterested forum, and to follow blindly the *Erie-Klaxon* line of cases. Indeed, some writers feel that the creation of a national conflict of laws rule would not contradict *Erie*; to the contrary, those authors believe that *Erie*, far from doing away with federal common law, may have freed this interstitial body of law to "develop naturally in those areas in which national interests predominate."[45] Such national interests are found in *Challoner*: the injured men were American servicemen engaged in combat for the United States; the product that caused the injury had been manufactured according to government specifications and safety regulations; the injury occurred in a foreign country.[46] As Professor Jessup ably pointed out, the *Erie* Doctrine should not apply in the field of foreign relations because conducting international affairs is a federal prerogative and the states of the union generally do not participate in international affairs.[47] Neither court discussed the predominance of the federal government over the state in international affairs in their opinions; a federal choice of law rule would establish needed guidelines in this area.[48] It should be noted that a federal conflict of laws rule is not called for by all writers. Some writers feel that the difficulties in

43. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 282 (1966), quoted in Horowitz, *Toward a Federal Common Law Choice of Law*, 14 U.C.L.A. L. REV. 1191, 1192 (1967); *see also* Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963).

44. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1969). The section states that the local law of the state which has the most significant relationship to the issue would apply as established by contacts specified (place of injury, domicile, and nationality of parties, place of conduct which caused the injury, and place where relationship between the parties is centered).

45. Maier, *supra* note 10, at 223.

46. 512 F.2d 80 at n.2.

47. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740, 743 (1939).

48. One example of on going work in the federal conflict of law area is the upcoming Private International Law Convention on Products Liability being prepared by John W. Wade, reporter (not yet published).

the area stem from the very existence of conflicts rules.[49] However, most authors agree that the need for resolution of the federal conflict of laws issue is great in the modern shrinking world. Because of the desire for predictability, uniformity, preservation of expectations of parties, simplicity of the judicial task, and protection of federal interests, a national conflict of laws rule is necessary in a commercial tort case where the injury occurs on foreign soil.[50] *Challoner* does not solve this problem; however, the decision dramatically illustrates the need for the Supreme Court to adopt a federal conflict of laws rule.

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49. Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 8 DUKE L.J. 171 (1959), reprinted in SELECTED ESSAYS ON THE CONFLICT OF LAWS 117, 183-84 (1963).

50. *See* D. CAVERS, THE CHOICE OF LAW PROCESS (1965).

EUROPEAN COMMUNITIES—MIGRANT WORKERS—EXCLUSION OF ALIENS—A MEMBER STATE MAY LIMIT FREE MOVEMENT OF WORKERS ON GROUNDS OF PUBLIC POLICY, PUBLIC SECURITY, OR HEALTH IN THE EXERCISE OF DISCRETION UNDER ARTICLE 48 AND ARTICLE 3(1) OF COUNCIL DIRECTIVE No. 64/221

The Church of Scientology, established in the United States, functions in the United Kingdom through a college at East Grinstead, Sussex. Although no legal restrictions are placed upon the practice of Scientology in the United Kingdom or upon British nationals wishing to become members of or take employment with the Church of Scientology, the British Government regards the activities of the Church as contrary to public policy.[1] Petitioner, a Dutch national, was offered employment as a secretary with the Church of Scientology at its college in the United Kingdom. Intending to accept that offer, she arrived at Gatwick Airport in May 1973 but was refused leave to enter by an immigration officer who acted in accordance with government policy and with rule 65 of the Immigration Rules for Control of Entry.[2] Petitioner sought a declaration in the English High Court, Chancery Division, that she be entitled to enter and remain in the United Kingdom to accept employment with the Church of Scientology. In asserting that the refusal of leave to enter was unlawful, petitioner relied on the rules of freedom of movement for workers established by the European Community, specifically article 48 of the European Economic Community Treaty,[3] Council Regulation 1612/68,[4] and article 3 of

1. In a speech before the House of Commons on July 25, 1968, the Minister of Health declared Scientology to be a socially harmful "pseudo-philosophical cult." 769 PARL. DEB., H.C. (5th Ser.) 189 (1968).

2. The power to refuse entry into the United Kingdom is vested in immigration officers by virtue of section 4(1) of the Immigration Act of 1971, c.77. Rule 65 of the Statement of Immigration Rules for Control on Entry, 1973, House of Commons Paper 81, provides:

> Any passenger except the wife or child under 18 of a person settled in the U.K. may be refused leave to enter on the ground that the exclusion is conducive to the public good where—(a) the Secretary of State has personally so directed, or (b) from information available to the Immigration Officer it seems right to refuse leave to enter on that ground—if for example, in the light of the passenger's character, conduct or associations it is undesirable to give him leave to enter.

3. Treaty Establishing the European Community (EEC), March 25, 1957, article 48 provides:

> 1. Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest.
> 2. Such freedom of movement for workers shall entail the abolition of any

Council Directive No. 64/221.[5] The Home Office asserted in the Chancery Division that neither article 48 nor Directive 64/221 were directly applicable so as to confer rights on foreign workers enforceable by them in English courts[6] and emphasized that refusal of leave to enter was based exclusively on the personal conduct of petitioner within the meaning of article 3(1) of Council Directive No. 64/221.[7] The Vice-Chancellor of the High Court stayed the proceedings and referred three questions[8] to the Court of Justice

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discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that state laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

4. The provisions of this article shall not apply to employment in the public service.

The authoritative English text of the EEC Treaty may be found in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (Office for Official Publications of the European Communities, 1973). An unofficial English text may be found in 298 U.N.T.S. 3 (1958).

4. Council Regulation No. 1612/68 of October 19, 1968, established the provisions governing the free movement of workers within the Community. [1968] Official Journal of the European Communities 1 [hereinafter cited as O.J.].

5. Article 3(1) of Council Directive No. 64/221 of February 25, 1964, provides: "Measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned." [1964] O.J. 850.

6. The Chancery Division case is reported at, Van Duyn v. Home Office, 13 Comm. Mkt. L.R. 347 (1974).

7. 13 Comm. Mkt. L.R. at 354.

8. The Court of Justice was requested to give a preliminary ruling on the following questions:

1. Whether article 48 of the Treaty Establishing the European Economic Community is directly applicable so as to confer on individuals rights enforceable by them in the court[s] of a Member State;

2. Whether Directive No. 64/221 . . . is directly applicable so as to confer on individuals rights enforceable by them in the courts of a Member State;

3. Whether upon the proper interpretation of article 48 . . . and article 3 of Directive No. 64/221 a Member State in the performance of its duty to

of the European Community pursuant to article 177.[9] The Court of Justice ruled that article 48(3) of the EEC Treaty and article 3(1) of Council Directive No. 64/221 were directly applicable, conferring rights on individuals which would be enforceable by them in the courts of Member States. The Court, *held*, that present membership of and participation in the activities of a socially undesirable organization may constitute "personal conduct" within the meaning of the Council's Directive and that such conduct need not be tainted with illegality before a Member State may exercise its discretionary power under article 48(3) by refusing a Community national entry into its country. *Van Duyn v. Home Office*, [1974] E.C.R. 178, 2 CCH COMM. MKT. REP. ¶ 8283, 15 Comm. Mkt. L.R. 1 (1975).

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base a measure taken on grounds of public policy exclusively on the personal conduct of the individual concerned is entitled to take into account as matters of personal conduct (a) the fact that the individual is or has been associated with some body or an organization the activities of which the Member State considers contrary to the public good but which are not unlawful in that State; (b) the fact that the individual intends to take up employment in the Member State with such a body or organization, it being the case that no restrictions are placed upon nationals of the Member State who wish to take similar employment with such a body or organization.

Van Duyn v. Home Office, 2 CCH COMM. MKT. REP. ¶ 8283, at 7221-22, 15 Comm. Mkt. L.R. 15 (1975).

9. The European Community was enlarged through the accession of the United Kingdom, Ireland, and Denmark on January 1, 1973. The High Court of London, Chancery Division, referred to the Court of Justice pursuant to EEC article 177 which provides:

> The Court of Justice shall be competent to give preliminary rulings concerning:
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> (a) the interpretation of this Treaty;
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> (b) the validity and interpretation of acts of the institutions of the Community;
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> (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
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> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice to give a ruling thereon.

For a case analysis of the Court's interpretationof its powers under article 177 see Woodworth, *The Court of Justice of the European Communities: The Request for a Preliminary Ruling and the Protection of Individual Rights Under Article 177 of the Treaty of Rome*, 18 SYR. L. REV. 602 (1967).

Over the years the Court of Justice has developed criteria for determining whether a provision set out in the EEC Treaty is directly applicable so as to confer upon individuals rights enforceable by them in national courts. These criteria include: (1) the provision must impose a clear and precise obligation on Member States; (2) it must be unconditional or, if a provision is subject to limitation, the nature and extent of the limitation or qualification must be clearly defined; and (3) Member States must not be left any real discretion with regard to the application of the rule in question.[10] The proposition that the provisions of article 48 establishing freedom of movement within the Community for employed persons satisfy the criteria noted above is no longer subject to question in light of the recent decision in *Commission v. France*,[11] in which the Court said that since article 48 is directly applicable in the legal system of every Member State and because Community law has priority over national law, national authorities must respect and safeguard the rights of migrant workers.[12] Article 189[13] draws a distinction between: (1) regulations, which

10. *See* International Fruit Co. NV v. Produktschap voor Groenten en Fruit, 18 Recueil de la Jurisprudence de la Cour (Cour de Justice de la Communaute Europeenne) 1219 [hereinafter cited as Recueil], 2 CCH COMM. MKT. REP. ¶ 8194 (1972) (interpreting article 177); Firma Carl Schluter v. Hauptzollamt, [1973] E.C.R. 1135, 2 CCH COMM. MKT. REP. ¶ 8233 (interpreting articles 5 and 107 on the establishment in stages of an economic and monetary union within the Community); Reyners v. Belgium, [1974] E.C.R. 631, 2 CCH COMM. MKT. REP. ¶ 8256, 14 Comm. Mkt. L.R. 305 (regarding article 52 on the right of establishment).

11. Commission v. France, [1974] E.C.R. 359, 2 CCH COMM. MKT. REP. ¶ 8270, 14 Comm. Mkt. L.R. 216. In that case, article 3(2) of the French Code du Travail Maritime provided that the crew of a ship must, in a ratio laid down by an order of the Minister of Merchant Marine, be of French nationality. The Court of Justice held the provision invalid under EEC article 48 and article 4 of Council Regulation No. 1612/68 of October 15, 1968. [1968] O.J. 2.

12. For a discussion of article 48 (workers and the EEC) see A. PARRY & S. HARDY, EEC LAW ch. 23 (1973).

13. EEC article 189 provides:

> The Council and the Commission shall, in the discharge of their duties and in accordance with the provisions of this Treaty, issue regulations and directives, take decisions and formulate recommendations or opinions.
> Regulations shall have general application. They shall be binding in every respect and directly applicable in each Member State.
> *Directives shall be binding in respect of the result to be achieved, upon every Member State, but the form and manner of enforcing them shall be a matter for the national authorities.* Decisions shall be binding in every respect upon those to whom they are directed.

are rules promulgated when a uniform solution is needed for all Member States and which have the effect of national law; (2) directives, which do not have the force of directly binding law, but rather set goals for all, some, or a single Member State and obligates the State to prescribe the manner and means of execution; (3) decisions, which, unlike regulations, do not have general application, but are binding only upon those to whom they are addressed; and (4) recommendations and opinions, which are not legally binding. Because of these fine distinctions, there exists uncertainty regarding the direct applicability of Council Directives—in the instant case, the Council Directive of February 25, 1964, No. 64/221, article 3(1).[14] The framework for establishing the direct applicability of directives, however, has been built by several prior Court decisions. In *Grad v. Finanzamt Traunstein*,[15] the Court held that article 189 measures other than regulations could have direct applicability, particularly when Community organs have imposed upon Member States the duty to adopt a certain mode of conduct. The Court reasoned that the value of Community measures would be lessened were nationals of Member States unable to invoke them in national courts and if the courts themselves could not take them into consideration as part of Community law.[16] In *S.A.C.E. v. Italian Ministry of Finance*[17] the Court clearly interpreted the nature and scope of directives, holding that they can be directly applicable. The question left for the Court in the instant case was to determine whether Member States under article 48 and article 3 of Council Directive No. 64/221 could take into

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Recommendations and opinions shall have no binding force. (Emphasis added).

14. *See* note 5 *supra*.

15. Franz Grad v. Finanzamt Traunstein, 18 Recueil 825, 10 Comm. Mkt. L.R. 1 (1971).

16. The Court stated, "It is true that by article 189 regulations are directly applicable and may therefore certainly produce direct effects by virtue of their nature as law. However, it does not follow from this that other categories of legal measures mentioned in that article could never produce similar effects." 10 Comm. Mkt. L.R. at 23.

17. "Directive 68/131, the purpose of which was to impose on a Member State a final date for the performance of a Community obligation, not only affects the relations between the Commission and that State but also entails legal consequences which may be invoked both by other Member States which are interested in its execution and by individuals whenever by its nature the provision establishing this obligation is directly applicable. . . ." 16 Recueil 1213, 2 CCH COMM. MKT. REP. ¶ 8117, at 7316, 10 Comm. Mkt. L.R. 123, 133 (1971).

account, as matters of "personal conduct," present or past associations with an organization considered by the Member State to be contrary to the public good, despite the fact that no similar restrictions applied to nationals of the State. The issue of limitations imposed by considerations of public policy and public security upon the principle of freedom of movement for workers within the Community as set forth in article 48[18] had not been previously addressed by the Court.

Three questions were referred to the Court of Justice by the English High Court.[19] To the question of the direct applicability of article 48, the Court replied in the affirmative, holding that article 48(1) and (2) leave Member States no discretionary power with regard to implementation. Although article 48(3) authorizes limitations on the free movement of workers when justified by public policy, public security, or public health considerations, the Court reasoned that these limitations were subject to judicial scrutiny to insure that a Member State's right to invoke the limitations would not thwart the purpose of article 48—the preservation of free movement for workers within the Community. The Court next rejected the argument of the Home Office that the distinction between regulations, directives, and decisions raises a presumption that by issuing a directive, the Council necessarily intended that it not be directly applicable. Such an interpretation, the Court reasoned, would be incompatible with articles 189 and 177 because the net effect would be to prevent individuals from relying on Community Acts before their national courts. Specifically limiting its interpretation to article 3(1), the Court did not rule on the direct applicability of all articles of Directive No. 64/221.[20] Nevertheless, the Court held that article 3(1), requiring that measures restricting free movement of workers be made on public policy grounds and be based on the individual's personal conduct, is

18. *See* note 3 *supra*.

19. *See* note 8 *supra*.

20. The Court explained why it chose to limit its interpretation as follows: "According to the order making the referral, the only provision of the Directive that is relevant is the one contained in article 3(1), which provides that 'measures taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned.'" 2 CCH COMM. MKT. REP. ¶ 8283, at 7226, 15 Comm. Mkt. L.R. 1, 15 (1975). Moreover, the Court said, "It is necessary to examine, in every case, whether the nature, general scheme and wording of the provision in question are capable of having direct effect on the relation between Member States and individuals." 2 CCH COMM. MKT. REP. ¶ 8283, at 7227, 15 Comm. Mkt. L.R. 1, 16 (1975).

directly applicable so as to confer on individuals rights enforceable by them in the courts of Member States. In addressing the question of whether a Member State may consider an individual's present or past associations, the Court first considered whether association with a body or an organization in itself constitutes "personal conduct" within the meaning of article 3(1) of Directive No. 64/221. The Court held that although an individual's past associations cannot justify a restriction upon his freedom of movement within the Community, present association can. The Court defined "present association" as either participation in an organization's activities or identification with its aims,[21] and held that Petitioner's association with the Church of Scientology constituted "personal conduct" within the meaning of the Council's Directive. The Court next probed the issue of whether a Member State is entitled on public policy grounds to prevent a national of another Member State from taking employment with an organization in its territory, when no similar restrictions exist for its own nationals. Once more, the Court strictly interpreted article 48 and article 3(1) of Directive No. 64/221 as being subject to limitations justified solely on grounds of public policy, security, or health. Member States cannot reasonably be required to make objectionable activities illegal to justify a measure restricting free movement.[22] The Court easily discarded notions of *ipso facto* discrimination by a Member State which refuses entry to nationals of another Member State and not its own, relying on the general principle of international law that a state is precluded from refusing right of entry and residence to its own nationals.[23] While the Court admitted concepts of "public policy" would differ from Member State to Member State,[24] it did not believe the imposition of a Community

21. 2 CCH COMM. MKT. REP. ¶ 8283, at 7227, 15 Comm. Mkt. L.R. 1, 17 (1975).

22. 2 CCH COMM. MKT. REP. ¶ 8283, at 7227, 15 Comm. Mkt. L.R. 1, 17 (1975).

23. In this instance, the Court accepted the rationale of the United Kingdom: "A state has a duty under international law to receive back its own nationals. The United Kingdom refers *inter alia* to Article [13(2)] of the Universal Declaration of Human Rights, which states: 'Everyone has the right to leave any country, including his own, and to return to his country.'" 2 CCH COMM. MKT. REP. ¶ 8283, at 7225 (1975).

24. In the words of the Court:

> Nevertheless, the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty.

public policy concept would be either feasible or advisable, preferring instead to allow national authorities a measure of discretion within the confines of the Treaty.

This decision marks an important milestone in the history of the Court of Justice and of the European Community because it is the first case referred by a British Court to the Court of Justice. This is also the first time the Court has been called upon to interpret the limitations set forth in article 48 on the principle of free movement of workers within the Community imposed by national standards of public policy, public health, and public security. The Court of Justice was faced with the precarious task of reconciling the power of Member States to determine national public policy concepts with the need for a uniform application of Community law and, specifically, with the Treaty principle of nondiscrimination between migrant and national workers. The Court of Justice has now ruled consistently with its judgments in *Reyners v. Belgium* and *Commission v. France*[25] that provisions of article 48 are directly enforceable in national courts. Additionally, the Court has specifically held that article 3(1) of Council Directive No. 64/221 is directly enforceable in national courts of Member States. The essential element of article 3(1) is that any restriction on workers' movement on grounds of public policy or security shall be based exclusively on the "personal conduct" of the individual concerned. In its opinion, the Court has interpreted "personal conduct" within the meaning of Community law.[26] The Court has pragmatically preserved the power of Member States to determine national concepts of public policy and security rather than imposing any single Community standard. Recognizing that circumstances justifying concepts of public policy differ not only from Member State to Member State, but over time within each state,

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2 CCH COMM. MKT. REP. ¶ 8283, at 7227, 15 Comm. Mkt. L.R. 1, 17 (1975).

25. Reyners v. Belgium, [1974] E.C.R. 631, 2 CCH COMM. MKT. REP. ¶ 8256, 14 Comm. Mkt. L.R. 305 (1974); Commission v. France, [1974] E.C.R. 359, 2 CCH COMM. MKT. REP. ¶ 8270, 14 Comm. Mkt. L.R. 216 (1974).

26. *See* note 21 *supra*. In a recent subsequent decision the Court, citing *Van Duyn v. Home Office*, held that the concept of "personal conduct" in article 3 of Council Directive No. 64/221 expressed the requirement that a deportation order relating to persons covered by article 48, may only be made for breaches of the peace, public security, etc., which might be committed by the individual affected. The deportation order issued by the national authorities for the purpose of deterring other aliens, *i.e.* of a general preventative nature, was struck down by the Court of Justice. Bonsignore v. Oberstadtdirektor, [1975] E.C.R. ____, 2 CCH COMM. MKT. REP. ¶ 8298, 15 Comm. Mkt. L.R. 472 (1975).

the Court has attempted to maintain the flexibility and adaptability of Community law. The Court has not only preserved the spirit of the EEC Treaty but has strengthened Community law by ruling that justifications of restrictions on free worker movement by national authorities will be subject to review by Community organs.[27] As a result of the instant case, it is likely that there will be future referrals to the Court of Justice by the national courts of the United Kingdom and the other newly admitted states, Ireland and Denmark. It is clear that the scope of the Court's authority and its interpretation of directly applicable provisions of the EEC Treaty[28] have given the Court a central role as a unifying force in the Community system, assuring both a uniform and an authoritative resolution of questions of Community law.

Susan L. Blankenheimer

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27. In the words of the Court:

> It should be emphasized that the concept of public policy in the context of the Community and where, in particular, it is used as a justification for derogating from the fundamental principle of freedom of movement for workers, *must be interpreted strictly*, so that its scope cannot be determined unilaterally by each Member State without being subject to review by the institutions of the Community.

2 CCH COMM. MKT. REP. ¶ 8283, at 7227, 15 Comm. Mkt. L.R. 1, 17 (1975) (emphasis added).

28. For analysis and commentary on the supremacy of Community law over national law viewed from the standpoint of direct applicability as the critical factor in determining supremacy see Bebr, *Directly Applicable Provisions of Community Law: The Development of a Community Concept*, 18 INT'L & COMP. L.Q. 257 (1970). For a recent study of jurisdiction and procedure of the Court of Justice see Note, 8 VAND. J. TRANSNAT'L L. 674 (1975). *See also* Hay & Thompson, *The Community Court and Supremacy of Community Law: A Progress Report*, 8 VAND. J. TRANSNAT'L L. 652 (1975).

IMPORT-EXPORT CLAUSE—STATE PERSONAL PROPERTY TAXES CAN BE ASSESSED UPON GOODS ARRIVING AT A DISTRIBUTION WAREHOUSE, THAT HAVE BEEN UNLOADED FROM THEIR IMPORTING CONTAINERS, SORTED, AND STORED WITH OTHER GOODS

Plaintiff, an importer and domestic distributor of tires and tubes,[1] brought an action to enjoin defendant, the Georgia State Tax Commissioner, from collecting an *ad valorem* tax against plaintiff's inventory of tires and tubes held in his warehouse. When defendant assessed the tax, plaintiff had unloaded the goods from their importing containers, sea van trailers, had sorted them, and had stored them with other goods. Because of the bulkiness of the tires, they had not been packed in cartons, but directly into the sea van trailer at the place of manufacture. The tubes, however, were placed in individual boxes, which were then packed in corrugated cartons to be loaded into the trailer. Trailers from the Canadian manufacturing plant were driven to plaintiff's distribution warehouse while the trailers from the French manufacturing plant were shipped by sea.[2] At the warehouse the tires were unloaded from the trailer, sorted, and stored with other goods. The corrugated cartons of tubes were unloaded from the trailer and stored unopened. Prior to the sale and delivery of these goods by common carrier to retail dealers in six southeastern states,[3] the State Tax Commissioner assessed a personal property tax on both the tires and the tubes. He analogized that since warehouses containing domestically manufactured goods must bear the costs of local police and fire protection, warehouses containing imported goods should also bear these costs. Otherwise taxes on domestic goods would be subsidizing the protection of imported goods. Plaintiff contended that his goods enjoyed constitutional immunity guaranteed by the import-export clause,[4] which he construed as exempt-

1. The plaintiff, Michelin Tire Corp., is a New York corporation qualified to do business in Georgia. It operates as an importer and United States wholesale distributor of automobile and truck tires and tubes manufactured by Michelin Tires, Ltd., in France and Nova Scotia, Canada.

2. Upon arrival of the French ship at the United States port of entry, the sea van trailers were unloaded and tractor-hauled to plaintiff's distribution warehouse after clearing customs and upon payment of a 4% federal import duty.

3. Plaintiff's warehouse was the distribution center for 250-300 franchised dealers in six southeastern states.

4. The import-export clause states: "No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imports, laid by any State on Imports or Exports, shall be for the Use

ing goods still in their original packages from state and local taxation. The State trial court agreed to constitutional immunity and granted plaintiff's request for an injunction against defendant's collection of the tax on both the tires and the tubes. On appeal, the Supreme Court of Georgia affirmed in part and reversed in part.[5] It agreed that since the tubes were stored in their original packages, the corrugated shipping cartons, they were immune from taxation, but it held that the tires lost their status as imports because they had been stored and incorporated with other shipments. The decision on the immunity of the tubes was not ap-

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of the Treasury of the United States; and all such laws shall be subject to the Revision and Control of the Congress." U.S. CONST. art. I, § 10. The clause expressly prohibits states from levying taxes on imports. It applies to imported goods themselves, as well as to taxes on the individual or corporate importer. The clause allows, however, a state to inspect all goods coming into the state, and to charge an inspection fee, on the grounds that states should be able to regulate the safety and healthfulness of products destined for use by its citizens. *See* Turner v. Maryland, 107 U.S. 38 (1883); Bowman v. Chicago & Nw. R.R., 125 U.S. 465 (1888).

The clause does not bar governmental port charges such as pilot and wharfage fees since they are imposed to defray the costs of conducting specific operations benefiting relatively few parties while importing duties are utilized for the general welfare of the states. *See* Cooley v. Board of Wardens of Port, 54 U.S. (12 How.) 299 (1851) (upheld pilotage fees imposed by the City of Philadelphia); Worsley v. Second Municipality, 19 La. (9 Rob.) 324 (1844). *See also* Huse v. Glover, 119 U.S. 543 (1886).

While imported goods are liable only for charges and inspection fees, whoever handles the goods is himself subject to taxation from the time at which the goods are placed on the dock, even though the goods retain immunity while on the dock and while in transit to their domestic buyer. Thus courts have held that handlers have immunity "up to the water's edge"; stevedores and ships are generally immune from taxation, but dock and domestic facilities are not. *Compare* Puget Sound Stevedoring Co. v. Tax Comm'n, 302 U.S. 90 (1937) (gross receipts tax on stevedores violated import-export clause) *and* Joseph v. Carter & Weeks Stevedoring Co., 330 U.S. 422 (1947) (gross receipts tax on stevedoring company that loaded and unloaded ships violated import-export and commerce clauses) *with* Canton R.R. v. Rogan, 340 U.S. 511 (1951) (tax levied on dock railroad and storage facilities did not violate import clause) *and* Western Md. Ry. v. Rogan, 340 U.S. 520 (1951) (domestic railroad taxable). Since commerce is impeded to a greater extent by gross receipts taxes than by net income taxes, a lower court decision has upheld a net income tax on stevedores. *See* Commonwealth Board of Finance & Revenue v. Northern Metal Co., 416 Pa. 75, 204 A.2d 467 (1967), *cert. denied*, 380 U.S. 944 (1965). On the gross-net distinction, *see generally* Peck & Co. v. Lowe, 247 U.S. 165 (1918); U.S. Glue Co. v. Town of Oak Creek, 247 U.S. 321 (1918).

5. Wages v. Michelin Tire Corp., 233 Ga. 712, 214 S.E.2d 349 (1975).

pealed. The United States Supreme Court, *held*, affirmed on the issue of the taxability of the tires. The import-export clause does not bar a state from assessing an *ad valorem* personal property tax on goods that have arrived at a distribution warehouse, been unloaded from their importing containers, and sorted and stored with other goods. *Michelin Tire Corp. v. Wages*, 96 S. Ct. 535 (1976).

The problem of taxing imports was not addressed by the Articles of Confederation. Under the Articles the states were free to tax goods passing through their harbors in transit to inland states. This practice fostered trade wars that substantially harmed the economic strength and cohesiveness of the purported nation-state.[6] The drafters of the Constitution fully recognized the problem. Therefore, they wrote the Constitution to prohibit state taxation of imports,[7] and to allow the federal government the exclusive power to tax imports[8] for needed revenue.[9] The judiciary was left with the task of determining when an article loses its import status. It has considered several approaches to the problem of locating the correct point among many; from foreign manufacture through shipping and storage to final sale. The original package doctrine was the first attempt at locating a satisfactory point between import immunity and domestic taxation. The doctrine states that imported goods do not become taxable until after the breaking of their original importing package. Its definitive form resulted from an uncritical and partial application[10] in *Low v. Austin*[11] of the

6. Inland manufacturers who imported their raw materials were forced to bear additional costs not borne by seaboard manufacturers. Because inland manufacturers had either to absorb the added costs or to raise the sale price of their products, they were being placed at a competitive disadvantage. To retaliate, inland states placed tariffs on all products crossing into their states.

7. *See* note 4 *supra*.

8. *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928) (where the constitutionality of federal taxation of imports was upheld).

9. The framers of the Constitution recognized that the survival of the infant nation depended on its ability to raise and maintain a constant flow of tax revenue. THE FEDERALIST NOS. 11, 12 (A. Hamilton).

10. *See* W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 295 (1953) [hereinafter cited as CROSSKEY]; Dankis, *The Protective Cloak of the Export-Import Clause: Immunity for the Goods or Immunity for the Process?*, 19 LA. L. REV. 747 (1959); Early & Weitzman, *A Century of Dissent: The Immunity of Goods Imported for Resale from Nondiscriminatory State Personal Property Taxes*, 7 S.W.U.L. REV. 247 (1975); Powell, *State Taxation of Imports—When Does an Import Cease to be an Import?*, 58 HARV. L. REV. 858 (1945).

11. 80 U.S. (13 Wall.) 29 (1871).

earlier Supreme Court decision of *Brown v. Maryland*.[12] The latter case concerned a Maryland statute that required importers to purchase a fifty dollar import license before importing foreign manufactured goods. Chief Justice Marshall's opinion held that the State license fee acted as a restraint upon the sale of any foreign goods, and consequently, violated the import clause.[13] He further noted that at some point in the import stream the goods and the sale of the goods would become subject to state taxation. The Chief Justice speculated that such a point might be the opening of the original importing package.[14] In *Low v. Austin* domestically warehoused cases of imported wine about to be sold at retail were held to be nontaxable because they had yet to be opened. Thus the Court reduced Marshall's theorizing to a practical test of import immunity, one that reigned for more than a century.[15] As an alternative to the original package doctrine, Chief Justice Marshall had also proposed an incorporated or mixed-up test,[16] which, though often discussed, lay in the shadow of the original package doctrine. This test ended immunity status when the imported goods became incorporated into the domestic stream of commerce. Under the original package doctrine, the importer, in determining when the original package would be opened, could himself decide when his goods lost immunity. The mixed-up text, however, sought to re-

12. 25 U.S. (12 Wheat.) 419 (1827).

13. Even though the Maryland tax was not directly levied on the goods, but indirectly on the importer himself, the tax violated the clause because the inflow of goods was nonetheless restrained.

14. Chief Justice Marshall recognized the difficulty in constructing a rule. He acknowledged that: "*it might be premature to state any rule as being universal in its application.* It is sufficient for the present to say, *generally*, that when the importer had so acted upon the thing imported, that it has become incorporated and mixed-up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the states; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the Constitution." Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 441 (1827) (emphasis added).

15. As well as uncritically applying *Brown v. Maryland* dicta, the *Low v. Austin* Court also misread the *License Cases'* interpretation of *Brown*. The *License Cases* held that unpackaged imported goods subject to sale were taxable. The Court in *Low v. Austin* argued that the case stood for the proposition that packaged goods would be immune, while the instant decision interpreted the case to hold that when goods are subject to sale, they have come to rest within the state and are taxable. *See* License Cases, 46 U.S. (5 How.) 504 (1847).

16. *See* note 14 *supra*.

place the importer's power of decision with a more objective and less personal criterion for loss of immunity. Still, the mixed-up test only pushed the question back, for it defined import status with a concept that also required clarification. To say that goods lose their import status when they became "incorporated into the domestic stream of commerce" is to pose a problem, not to solve one, for "incorporated" is as nebulous a term as "import." Another alternative solution to the problem is to declare that goods proceeding to the distribution warehouse are "in transit" and immune from taxation; after arrival, goods stored at the warehouse are said to have "come to rest" and are taxable.[17] This criterion for loss of import immunity rests upon a clearly defined point at which goods may be classified as domestic and taxable, and it destroys the importer's prerogative to decide when immunity is lost. Further, this approach perfectly aligns with current interstate commerce[18] and export[19] case law, under which goods that have left the warehouse and have begun their interstate or export movement are immune from taxation. From this viewpoint it is unfortunate that the in transit test, like the mixed-up test, also hid in the shadow of the original package doctrine, which itself posed problems whose

17. The labels "in transit" and "come to rest" have been frequently used in import-export and commerce clause decisions. "In transit" refers to the period when goods are passing through a port or moving between two states, while "come to rest" refers to the time before and after the transit journey. When goods come to rest or stop in a state, they begin to receive police and fire protection and, as a *quid pro quo* for this protection, they are subject to state and local taxes. A mere short stoppage for transit purposes does not subject the goods to taxation. *See* Joy Oil Co., Ltd. v. State Tax Comm'n, 337 U.S. 286 (1949) (where a fifteen month stoppage subjected goods to taxation).

18. Under the Commerce Clause, goods before and after their interstate journey are considered to have "come to rest" and are taxable. But goods "in transit" through the states are immune from taxation. *See* LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 197 (1973). *See generally* Note, *Constitutional Law—State Taxation of Interstate Commerce—Commerce Clause Analysis*, 76 W. VA. L. REV. 380 (1974).

19. Kosydar v. National Cash Register Co., 417 U.S. 62 (1974). In *Kosydar* the Supreme Court used the mechanistic "in transit" test to determine when goods were taxable. Even though they were likely to be exported, goods stored in domestic warehouses were held to be subject to taxation simply because they were still so stored. The Court had previously used a certainty test that resulted in frequent litigation over whether it was "certain" the goods were destined for export. To bar the need for subjective arguments, the mechanistic "in transit" test was adopted. *See generally* Abramson, *State Taxation of Exports: The Stream of Constitutionality*, 54 N.C.L. REV. 59 (1975).

purported solutions were, if anything, more problematic still. The facts of the instant case illustrate the first problem, that of determining which "package" must be opened to end the immunity. At Michelin's foreign manufacturing plant, the tubes were packed in boxes that were in turn placed in corrugated cartons before being loaded into the sea van trailers. If the domestic unpackaging occurs in three distinct stages, the problem arises as to which stage actually ends the immunity: the opening of the sea van trailers, of the corrugated cartons, or of the individual boxes. The Supreme Court's only decision in the area occurred before the advent of containerized shipping. In that case, *May v. New Orleans*,[20] the Court had to decide whether immunity ended at the opening of the cartons or at the opening of the smaller boxes within the cartons. The Court recognized that if immunity ended at the opening of the smaller boxes the importer would be tempted to wrap each item separately in a box before placing it in the cartons. Upon arrival in the United States the cartons would be opened by the wholesaler but the boxes would be stored until sale to the retailer. The retailer would also store the goods, probably next to their domestic taxpaying counterparts, and open them only at the last possible moment. The Court found this plan unacceptable, since the domestic goods alone would be paying for benefits and protection also received by imported goods. The Court in this case held, therefore, that the opening of the cartons and not the boxes within them ended immunity. The Supreme Court has not granted certiorari, however, in a case involving containerized shipping—a practice that adds another candidate for the original package—and lower courts are split in determining whether immunity ceases at the opening of the smaller or larger container.[21] Apart from the determination of which container constitutes the original package, a second problem posed by the original package doctrine has arisen: determining the point at which raw materials, which are never "opened," lose their immunity. If the same manufacturer both imports and consumes unpackaged raw materials, they could escape taxation.

20. 178 U.S. 496 (1900).

21. *Compare* Volkswagen Pacific, Inc. v. City of Los Angeles, 12 Cal. App.3d 689, 90 Cal. Rptr. 902 (1970) (where containers were held to have been the original packages), *with* State Tax Comm'n v. Garmet Corp., 32 Mich. App. 715, 189 N.W.2d 72, *cert. denied*, 404 U.S. 992 (1971) (where containers were held not to have been the original package). *See also*, Note, *Shipping Containers as Original Packages: Are Containerized Imports Immune from State Taxation?*, 36 OHIO ST. L.J. 421 (1975).

First, there would be in this instance no importing packages to be broken.[22] Secondly, by not selling his goods to a domestic buyer, the importer would avoid yet another test for the end of immunity, for the action of resale has been considered as a point of loss of immunity alternative to the point described by the original package doctrine.[23] This second problem with the original package doctrine arises only when, as in the following cases, the importer is also the consumer. *Youngstown Sheet and Tube Co. v. Bowers*[24] and the companion case of *United States Plywood Co. v. City of Algoma*[25] held that raw materials committed to the manufacturing process by the importer-consumer were taxable even though they were never "opened." Paramount in the Court's mind, in creating the commitment-to-manufacturing concept as an alternative point of loss of immunity, was the inability of the original package doctrine to cope with the existence of the importer's immunity from taxation. For example, stored domestic goods were being forced to shoulder costs for police and fire protection which were also enjoyed by stored imported goods. These added costs placed the marketability of the domestic goods at a competitive disadvantage. Both the *Plywood* and *Youngstown* decisions had to contend with the earlier Supreme Court opinion in *Hooven & Allison Co. v. Evatt.*[26] That case held that imported Philippine hemp stored at the place of manufacture was immune from taxation. Hooven's stored hemp possibly would have been taxable if the case

22. Of course, if the raw materials were imported in packages, the original package doctrine would apply. Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U.S 218 (1933) (where a franchise tax was levied on a corporation that had imported 100 pound bags of nitrate since they were still being stored in their importing bags).

23. Waring v. Mayor, 75 U.S. (8 Wall.) 110 (1868).

24. The *Youngstown* opinion involved the importation of iron ore and its storage for three months on the grounds of an Ohio steel plant. Needed ore was taken from the storage piles and trucked to stock bins adjacent to the steel furnaces. After one or two days of storage in the bins, the ore was fed into the furnaces. The State of Ohio levied an *ad valorem* personal property tax on stored ore, both in piles and in bins. The United States Supreme Court sustained the tax on the grounds that during the storage period the ore had been destined or committed to the manufacturing process. Because the original package doctrine failed to provide a means of taxing raw materials the Court was forced to create this alternative point of loss of immunity. 358 U.S. 534 (1959).

25. In *Plywood* the Court held that sorted green lumber and bundled veneers had lost their tax immunity when stored while committed to the manufacturing process. 358 U.S. 534.

26. 324 U.S. 652 (1945).

had been decided after *Youngstown* and *Plywood*, since the facts of all three cases are the same. In order to distinguish the later cases from the holding in *Hooven*, the Court noted that *Hooven's* immunity was based solely on the storage of the goods[27] and not on their being committed to immediate manufacturing needs. Although *Youngstown's* committment-to-manufacturing concept and the refined definition of "package" seem to correct the shortcomings of the original package doctrine, the former concept might create future problems, while the latter has already lead to complications, as with containerized packaging, and will continue to do so. On the other hand, these shortcomings of the original package doctrine have led to fresh examinations of the wording of the import-export clause and of the problems which brought it about. W. Crosskey interprets the terms "impost" and "duties" as referring only to port-levied excise and custom duties, not to state and local taxes.[28] Since the Constitution's references to tax broadly denote state and local taxes as well as duties, Crosskey argues the import-export clause would have prohibited "taxes" not "imposts" and "duties," if it was meant to protect imported goods from any taxation whatsoever. Finally, the problems of the original package doctrine have highlighted the changes that have occurred in the importing process since the writing of the Constitution. When the Constitution was drafted there were only a few ports of entry into the United States, while today airports and additional harbors have greatly increased their number. At present, the need for a strong import-export prohibition against entry point taxation is not as pressing because competitive forces between ports tend to reduce any taxes charged. The problems presented by the doctrine, therefore, are sufficient in number and complexity to suggest the need for a new look at the policies underlying the import-export

27. 324 U.S. at 667.

28. 1 CROSSKEY at 296-97. *See also* 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION 305 (1911) [hereinafter cited as FARRAND], which reports a debate during the last draft of the import-export clause. The debaters recognized that the terms imposts and duties did not also encompass property taxes. "By the power to lay and collect taxes, [Congress] may proceed to *direct* taxation on *every individual*, either by *capitation* tax on their *heads*, or an *assessment* on their *property*. By this part of the section therefore, the government has power to lay what duties they please on *goods imported*; to lay what duties they please, afterwards, on whatever we *use* or *consume*; to impose *stamp duties* to what amount they please, and in whatever case they please; afterwards to impose on the people *direct taxes*, by capitation tax, or by assessment, to what amount they chose; . . . ." 3 FARRAND 203-04.

clause and at ways in which the clause may maintain its usefulness in the midst of changing commercial practices and increasing revenue requirements of state and local governments.

In the instant case, the Court acknowledged that the original package doctrine in effect fostered a taxation of domestic goods that was unfair insofar as it provided revenue used to buy protective services for untaxed imported goods. In addition, the Court found the doctrine to manifest two intrinsic complications. The doctrine does not provide clear guidelines either for determining which package, if opened, would decide the end of immunity, or for determining the taxability of stored raw materials committed to the manufacturing process. Moreover, the Court held that these complications have tended to mislead the courts into ignoring the original purpose of the terms of the import-export clause: that is, to bar port and in transit duties, not state and local taxes.[29] To remedy these past deficiencies, the instant Court expressly overruled *Low v. Austin*,[30] the prime exponent of the original package doctrine, noting that this case employed the speculative dicta of *Brown v. Maryland* without proper critical analysis.[31] Instead the Court viewed import immunity as effective when goods are in port and in common carrier transportation, but as ceasing upon their arrival and storage at domestic warehouses. This test of immunity, the in transit method, provides an alternative to the original package doctrine. Significantly, however, the instant holding is not necessarily inconsistent with the original package doctrine, for the instant facts include the opening of the sea van trailer, which could be interpreted as the breaking of the original package. Thus the holding of the instant case could have been based upon either the original package doctrine or the in transit approach, despite the Court's overruling of *Low v. Austin* and its dicta. Most narrowly applied, the Court's decision held that when imported goods have arrived at a distribution warehouse, have been unloaded from their importing containers, and have been sorted and stored with other goods, they are subject to state and local personal property taxes.[32]

29. *See* note 28 *supra* and accompanying text.

30. In the sole concurring opinion in the instant case, Justice White would have preferred not to have expressly overruled *Low v. Austin* without a more thorough consideration of all the potential implications. 96 S. Ct. at 548.

31. 96 S. Ct. at 539, 547.

32. Not all state and local taxes may be imposed on imported goods after they have come to rest within the state. A state may not pass a law which only taxes the retail sales of imported goods, while the retail sales of domestic goods goes untaxed. Such a tax, even though operating after the goods have come to rest,

The instant case reflects a willingness of the Court to overturn its original package doctrine and to adopt an in transit test. This new test will generally shorten the period during which goods remain immune from taxation. While previously the importer could retain immunity by storing his goods in the original package at the warehouse, henceforth the goods will be subject to taxation. Even though the Court overruled the case that principally expounded the original package doctrine, subsequent opinions could return to it. In the instant fact situation the containerized goods had been taken out of an importing package prior to their taxation. The decision, therefore, did not directly contravene the original package doctrine, but it does point out the hazards of the original package doctrine sufficiently to warrant its being discarded. Indeed, exactly what remains of the original package doctrine would have been ascertained had the Tax Commissioner appealed the State Supreme Court's decision that the tubes stored in their corrugated shipping cartons are immune from taxation.[33] One complication of such a test would lie in determining which container, the corrugated carton or the sea van trailer, comprised the original package. According to the principles of the instant case, however, this complication would be forestalled by the in transit method, the Tax Commissioner would probably be successful, and the last vestiges of the original package doctrine would perish. The instant case may also change the import status of raw materials: *Hooven's* storage immunity could be overruled, and *Youngstown's* commitment to the manufacturing test would be modified. The point of taxation of raw materials would be at the end of their process of transit, when they arrived at the manufacturing site. It is, then, not an overstatement to conclude that the holding of *Michelin Tire Corp. v. Wages* signals the imminent demise of the original package doctrine. Because of its severe limitations the original package doctrine cannot be adapted, as can the in transit approach, to the principles and practice of modern commerce. No less significantly, the current approach brings the import clause under the in transit umbrella already covering the export and commerce clauses.[34]

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acts as a discriminatory duty on imported goods. Cook v. Pennsylvania, 97 U.S. (8 Otto) 566 (1878).

33. 96 S. Ct. at 538.

34. *See* notes 18-19 *supra* and accompanying text.

JURISDICTION—ALIEN DEFENDANTS IN FEDERAL QUESTION ACTIONS—FEDERAL DISTRICT COURTS MAY LOOK AT ALIEN DEFENDANT'S AGGREGATE CONTACTS WITH THE UNITED STATES IN DECIDING WHETHER TO EXERCISE IN PERSONAM JURISDICTION

Defendants[1] manufacture and sell American-patented surgical instruments to various distributors in the United States (F.O.B. England) and provide technical assistance to the distributors and users of its products. The distributors sell to independent dealers as well as directly to hospitals and surgeons. Defendant also has a non-manufacturing licensee in Connecticut. Furthermore, defendant had allegedly negotiated with plaintiff,[2] an American surgical instruments manufacturer, concerning the American patents and had allegedly encouraged and supported a suit against plaintiff in Connecticut. Plaintiff brought a patent infringement suit[3] against defendant in federal district court in Connecticut, serving process under the Connecticut long-arm statute[4] as authorized by Federal Rule of Civil Procedure 4(e) and (i)(1)(D).[5] Defendant moved to

1. Spembly, Ltd. and Spembly Technical Products, Ltd. are related British corporations having their principal places of business in England. The two corporations will be referred to jointly as one corporate defendant.

2. Cryomedics, Inc., a Connecticut corporation, manufactures and sells surgical instruments under United States patent.

3. Civil patent infringement suits are authorized by 35 U.S.C. § 281 (1970). Plaintiff alleged direct infringement, active inducement of infringement, contributory infringement, and sought a declaration of the invalidity of defendant's patent. 35 U.S.C. § 271 (1970).

4. CONN. GEN. STAT. § 33-411(c) is as follows:

> Every foreign corporation shall be subject to suit in this state, by a resident of this state, or by a person having a usual place of business in this state, whether or not such foreign corporation is transacting or has transacted business in this state and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows: (1) out of any contract made in this state or to be performed in this state; or (2) out of any business solicited in this state by mail or otherwise if the corporation has repeatedly so solicited business, whether the orders or offers relating thereto were accepted within or without the state; or (3) out of the production, manufacture or distribution of goods by such corporation with the expectation that such goods by such corporation with the expectation that such goods are to be used or consumed in this state and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed or sold or whether or not through the medium of independent contractors or dealers; or (4) out of tortious conduct in this state, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance.

5. FED. R. CIV. P. 4(e):

dismiss for lack of in personam jurisdiction,[6] arguing that due process required that it have certain minimum contacts with the State of Connecticut,[7] and that its contacts with the State were insufficient to satisfy the due process standards. Plaintiff contended that it had alleged sufficient contacts with the State, and alternatively that defendant's status as an alien permitted the court to consider defendant's contacts with the United States as a whole rather than just with a particular state. The district court, *held*, motion to dismiss denied. A federal court may properly exercise in personam jurisdiction over an alien defendant in a suit arising from federal law if the alien's aggregate contacts with the United States satisfy the due process requirements of the fifth amendment and process is properly served according to the Federal Rules of Civil Procedure. *Cryomedics, Inc. v. Spembly, Ltd.*, 397 F. Supp. 287 (D. Conn. 1975).

Federal courts have wrestled with the extremely confused area of in personam jurisdiction in federal question cases[8] since 1875,

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Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed by the statute or rule.

FED. R. CIV. P. 4(i)(1):

Manner. When the federal or state law referred to in subdivision (c) 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 is made: . . . (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; . . . .

6. FED. R. CIV. P. 12(b)(1) and (2). Defendant also moved to dismiss for lack of subject matter jurisdiction.

7. Defendant relied on *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), which initiated the "fairness" doctrine.

8. Since diversity of citizenship jurisdictional matters involve different considerations, this discussion will focus upon cases of federal subject matter jurisdiction. For recent examples on diversity of citizenship cases based upon the long-

when district courts were first given jurisdiction over general cases "arising under" national law.[9] Under the 1875 law, venue[10] in federal question cases was proper in any district where the defendant was an "inhabitant" or "in which he shall be found."[11] Congress in 1888 restricted venue, however, to the district in which the defendant was an inhabitant.[12] In construing the federal question venue provision of the 1888 act, the Supreme Court decided that Congress intended for aliens to be without its coverage since they could not be residents of any district. Thus the Court held that suit against aliens was proper in any district in which service of process was possible.[13] The law remained substantially unchanged until

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arm statutes of 30 States, see Special Project, 9 VAND. J. TRANSNAT'L L. 345 (1976).

9. Judiciary Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470. For a thorough discussion of federal question jurisdiction see Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953).

10. It is important at this point to distinguish between jurisdiction, venue, and service of process. The United States has *jurisdiction, i.e.*, power, over any person, corporation, or property within its territory or that meets the minimum contacts requirement of due process under the fifth amendment. A particular district court must, however, also be competent to adjudicate the case. This competence is determined by the venue statutes, such as 28 U.S.C. § 1391 (1970). If there is federal jurisdiction and proper venue by statute, valid service of process is still necessary to satisfy due process by providing reasonable notice. Even if there is invalid service of process, the court still has power over the party and has competence to adjudicate the controversy. The exercise of the power, however, may be challenged on the basis of denial of due process. An improper service of process may be cured by a valid service, but usually the basis of jurisdiction over a party exists or does not exist by the time of suit in a case involving service under a long-arm statute. Barrett, *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608 (1954); Green, *Federal Jurisdiction In Personam of Corporations and Due Process*, 14 VAND. L. REV. 967, 968, 981 (1961). Service is regulated by Rule 4 of the Federal Rules of Civil Procedure and special federal statutes. *See, e.g.*, 15 U.S.C. § 1051(d) (1970) (foreign applicant registering for trademark); 28 U.S.C. § 1694 (1970) (patent infringement); 43 U.S.C. § 1062 (1970) (unlawful enclosure of public lands); 49 U.S.C. § 321(c) (1970) (agent in state for motor carriers); 2 J. MOORE, FEDERAL PRACTICE ¶ 4.14 (1975).

11. Judiciary Act of 1789, ch. 20, 1 Stat. 73, 78.

12. Act of August 13, 1888, ch. 866, § 1, 25 Stat. 433.

13. *In re* Hohorst, 150 U.S. 653 (1893) (patent infringement); Barrow S.S. Co. v. Kane, 170 U.S. 100 (1898) (civil assault). In *Barrow*, a New Jersey resident sued a British corporation (doing business in New York) in the U.S. Circuit Court [now district]. The defendant argued that the jurisdiction of United States courts within New York depended on the authority given by New York State statutes. The Supreme Court stated: "The fact that the legislature [of New York] has not seen fit to authorize like suits to be brought in its own courts . . .

Congress enacted the Judiciary Code of 1948, which included specific venue statutes for corporations and aliens.[14] At no time during this period was venue for aliens or alien corporations regulated by other than federal law. Whether federal or state law ultimately applies to service of process, however, has been a difficult issue up to the present. From 1872 until 1938, the Conformity Act required the district courts to apply the procedural rules of the state in which they sat in cases at law, and the federal rules and special statutes for cases at equity and admiralty.[15] Thus, under the Conformity Act, process in cases at law in federal courts was served pursuant to state law except that no service outside the state was permitted, notwithstanding a state statute allowing it. One of the primary uncertainties concerning the new Federal Rules of Civil Procedure[16] when they were introduced in 1938 was the extent to which state law would apply to disputes over service of process. The Supreme Court has never answered this question directly, but beginning with *Erie R.R. Co. v. Tompkins*,[17] the Court stressed a dichotomy between cases brought under diversity of citizenship and cases brought under federal question jurisdiction,[18] and has

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cannot deprive such citizens [of other states] of their right to invoke the jurisdiction of the national courts under the Constitution and the laws of the United States." 170 U.S. at 112. For a discussion of the rationale behind these decisions see 1 J. MOORE, FEDERAL PRACTICE ¶ 0.142 [6] (1975).

14. Act of June 25, 1948, ch. 646, 62 Stat. 869, 935. The relevant portions of that Act, § 1391(c) and (d), have not been amended. 28 U.S.C. § 1391 (1970).

15. Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197. The Act applied to the "practice, pleadings, and forms and modes of proceeding in civil causes, other than equity or admiralty causes . . . ." See DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE (1928) for a discussion of pre-1938 law and judicial interpretation of the Conformity Act.

16. The United States Supreme Court promulgated the new Rules pursuant to the authority given it by the Act of June 19, 1934, ch. 651, §§ 1, 2 (48 Stat. 1064), 28 U.S.C., § 2072 (1970). The Court transmitted the Rules to the Attorney General on December 20, 1937, and they became effective September 16, 1938. C. WRIGHT, FEDERAL COURTS 224 (1963). Among the provisions were new means for service of process. FED. R. CIV. P. 2, 4. Rule 4(d)(3) provides for personal service by delivery to an officer, or a managing or general agent of a domestic or foreign corporation or partnership. Rule 4(f) extends the territorial limits for this manner of service to a 100 mile radius from the court house for third party defendants or parties to a cross-claim or counterclaim. Otherwise, under 4(d)(7), one may serve process upon a defendant in accordance with the law of the state in which the court sits—the practice used before 1938.

17. 304 U.S. 64 (1938).

18. The following cases hold state law inapplicable when a federal court adjudicates a claim based on federal law: Levinson v. Deupree, 345 U.S. 648 (1953) (admiralty); Holmberg v. Albrecht, 327 U.S. 392 (1946) (Federal Farm Loan Act);

implicitly divided the use of service of process along these lines. *Erie* held that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."[19] That rule was applied to a diversity of citizenship case at law. In *Russell v. Todd*,[20] decided the same year, the Court held that state law had no application in a suit involving a federal equitable right. *Guaranty Trust Co. v. York*,[21] distinguished between federal and state created equitable rights and required the district court to apply the state statute of limitations in a diversity of citizenship case arising from a state equitable right. Thus, the real distinction was whether the suit's basis was federal or state-created rights and not whether the case was at law or equity. State substantive law applies in diversity of citizenship cases so far as is necessary to reach the same outcome as would be reached by state court. Thus, the exercise of jurisdiction of the federal court and its service of process extends only to the limits of state court jurisdiction and service of process. On the other hand, in federal question cases, state court jurisdictional (as distinguished from service of process) limitations do not affect the exercise of jurisdiction by the federal court sitting in that state. As to service of process under Rule 4(d)(7),[22] however, most federal district courts have followed the state interpretation of state long-

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Clearfield Trust Co. v. United States, 318 U.S. 363 (1942); D'Oench, Duhme & Co. v. F.D.I.C., 315 U.S. 447 (1942) (Federal Reserve Act); Deitrick v. Greaney, 309 U.S. 190 (1939) (National Bank Act); Board of Comm'ners v. United States, 308 U.S. 343 (1939) (tax exemption for Indians). Some decisions which uphold the application of state law in various legal matters are; Angel v. Bullington, 330 U.S. 183 (1947) ("door closing" statute); Klaxon Co. v. Stentor Co., 313 U.S. 487 (1940) (conflict of laws); Cities Service Co. v. Dunlap, 308 U.S. 208 (1939) (burden of proof).

19. 304 U.S. at 78.

20. 309 U.S. 280 (1939).

21. 326 U.S. 99 (1945).

22. FED. R. CIV. P. 4(d).

Summons: Personal Service. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows: . . . (7) upon a defendant of any class referred to in paragraph (1) [individuals] or (3) [corporations or associations] of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

arm statutes.[23] In recognizing this dichotomy between diversity and federal question cases, the district courts have generally approached amenability of a defendant to federal question suit by using a federal standard of fairness[24] extrapolated from *International Shoe Co. v. Washington*,[25] but they examine the defendant's contacts with the state in which the trial court sits.[26] Recently a few courts, however, have held that the fairness of claiming in personam jurisdiction over a corporate or individual defendant in a federal question suit depends upon contacts with the United States rather than the contacts with only the state, since a government's jurisdiction extends to all those within its geographical limits.[27] In the first case to apply this theory, *First*

23. In *Jaftex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508 (2d Cir. 1960), however, a two-judge majority said that the reach of service of process under Rule 4(d)(7) using the state long-arm statute is subject only to congressional policy and not to state court interpretation. Judge Friendly, in a separate concurring opinion, disagreed with that rationale and stated that the federal courts under these circumstances must use state interpretation of the long-arm statutes except "in fields . . . that are distinctively federal or where the Constitution, treaties, federal statutes, or rules having the force of law show an intent that the federal courts are to fashion federal law . . . ." 282 F.2d at 517. Subsequently *Jaftex* was overruled by *Arrowsmith v. United Press Int'l*, 320 F.2d 219 (2d Cir. 1963) (J. Friendly for the majority). This holding is strongly disapproved in 1A J. MOORE, FEDERAL PRACTICE ¶ 0.317 [5] and 2 J. MOORE, FEDERAL PRACTICE ¶ 4.25 [7] (1975), but the authors of that work admit that virtually all circuits now agree that state law of jurisdiction in diversity cases should be followed.

24. . United States v. Scophony Corp. of America, 333 U.S. 795, 807 (1948); Lone Star Package Car Co. v. Baltimore & O. Ry. Co., 212 F.2d 147, 155 (5th Cir. 1954).

25. 326 U.S. 310 (1945).

26. *See, e.g.*, United States v. Scophony Corp. of America, 333 U.S. 795 (1948) (antitrust); Lone Star Package Car Co. v. Baltimore & O. Ry. Co., 212 F.2d 147 (5th Cir. 1954) (Carmack amendment); Fraley v. Chesapeake & O. Ry. Co., 397 F.2d 1 (3d Cir. 1968) (Federal Employers Liability Act); Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137 (7th Cir. 1975) (patent infringement); Rheem Mfg. Co. v. Johnson Heater Corp., 370 F. Supp. 806 (D. Minn. 1974) (patent infringement); Vergara v. Aeroflot "Soviet Airlines," 390 F. Supp. 1266 (D. Neb. 1975) (Warsaw Convention damages); PPS, Inc. v. Jewelry Sales Representatives, Inc., 392 F. Supp. 275 (S.D.N.Y. 1975) (copyright).

27. The "presence" theory as set forth in *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714 (1877), and broadened by subsequent decisions including *International Shoe*, 326 U.S. 310 (1945), usually is applied to states within the federal system. In order to exercise state jurisdiction, the defendant must reside in the state, be found in the state, or have such close contacts with the state that it is as though he, or it, in the case of corporations, was present in the state. In the latter situation, service of process outside the state fulfills the function of notice of suit while the contacts fulfill the requirement that entertainment of the suit in that state be fundamen-

Flight Co. v. National Carloading Co.,[28] Judge Frank Wilson (now on the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States) stated that because the cause of action was federally created the relevant inquiry in determining jurisdiction concerned contacts with the United States as sovereign and not contacts with the territory of the district court. Since the third party defendant in that case was incorporated within the United States, the court found that the only limiting requirement upon exercise of its jurisdiction was proper service of process and that had been met by service on the only soliciting agent present in the state.[29] In a later case, *Edward J. Moriarty & Co. v. Gen. Tire & Rubber Co.*,[30] a Greek citizen doing business in the United States was a defendant in an antitrust action. The court found that the United States had personal jurisdiction on the basis of his business contacts within the country. Then, in considering the venue question, the court noted that although 15 U.S.C. § 22 provides for venue under the Sherman Act, 28 U.S.C. § 1391(d) provides that venue for aliens is appropriate in any district, and the latter special provision prevails. Process had been served under Rule 4(d)(7) and (e) in accordance with Ohio law which was satisfied by transaction of business within the state.[31] Since the *Moriarty* decision, several other courts have ap-

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tally fair. This is closely related to the territorial theory of international jurisdiction. A nation may also subject an alien to suit if there is proper notice of the suit and the alien has enough contacts with that nation to be considered equitably present for legal purposes. *See* Comment, *The Transnational Reach of Rule 10(b)(5)*, 121 U. PA. L. REV. 1363, 1368 (1973). Thus, in respect to actions involving alien individuals and corporations, the United States is an entity which should have jurisdiction over those within its territory or who have contacts sufficient to satisfy the fifth amendment. *Compare* Green, *Federal Jurisdiction In Personam of Corporations and Due Process*, 14 VAND. L. REV. 967, 970-72 (1961) *with* von Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1123-25 at note 6 (1966). For a discussion of the problems of federal process in such cases, see Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031, 1032-53 (1961).

28. 209 F. Supp. 730 (E.D. Tenn. 1962).

29. Normally, a defendant could argue for a transfer under *forum non conveniens*, 28 U.S.C. § 1404(a), when contacts are so minimal. In this case, however, the contesting party was a third party defendant and not entitled to raise that issue except as relating to the allowance of the third party suit.

30. 289 F. Supp. 381 (S.D. Ohio 1967) (Sherman Act conspiracy action).

31. The court in *Moriarty* went through the same analysis concerning contacts with the United States as appeared in *First Flight Co.*, 209 F. Supp. 730 (E.D. Tenn. 1962), and critically suggested that a federal rule or statute allowing substi-

proved the United States entity concept and have at least partially justified the exercise of in personam jurisdiction by the defendant's aggregate contacts with the United States.[32]

The court in the instant case first examined defendant's alleged contacts with Connecticut[33] and admitted that there might not be sufficient contacts to entertain the suit solely on that basis. But the court rejected defendant's contention that minimum contacts

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tuted service of process upon an alien corporation with minimum contacts would be logical and appropriate. 289 F. Supp. at 390.

32. In *Holt v. Klosters Rederi A/S*, 355 F. Supp. 354 (W.D. Mich. 1973), the defendant Norwegian ship line solicited passenger business throughout the United States and picked up a large percentage of its passengers in Florida. After holding that there were sufficient contacts with the United States, the court transferred the case to the Southern District of Florida under 28 U.S.C. § 1404, *forum non conveniens*. The court in *Engineered Sports Products v. Brunswick Corp.*, 362 F. Supp. 722 (D. Utah 1973) (patent infringement) explored thoroughly the policies on both sides of the jurisdiction issue and noted that if the aggregate contacts approach was not used, there might be no other possible forum for the infringement action although a manufacturer was intentionally sending the infringing products into the United States in great quantities. In considering the policy issue of the burden on international trade of these suits, the court admitted that amenability to suit might deter some foreign manufacturers from exporting to the United States. The court commented that the alternative, granting a nationwide injunction halting importation of allegedly infringing equipment, would stop future infringement but would impose liability upon the importers and distributors only, fail to reach the manufacturer for the past harm caused, and disrupt international trade to an extent greater than would the payment of monetary damages by the manufacturer. 362 F.Supp. at 729. The court in *Alco Standard Corp v. Benalal*, 345 F. Supp. 14 (E.D. Pa. 1972), exercised jurisdiction in a Securities and Exchange Act § 10(b) suit against Spanish defendants who had negotiated with plaintiffs in New York, Tampa, and Chicago. *Compare* Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d at 1143, note 2. There, the Seventh Circuit noted the possibility of using the aggregate contacts approach but declined and based jurisdiction on the numerous contacts with the State of Illinois in that patent infringement suit.

33. The court also dealt with the foreseeability of the defendant's alleged contacts with the State of Connecticut. For recovery of injury caused within a state by conduct occurring outside the state, the plaintiff must show that the defendant "must know, or have good reason to know, that this conduct will have effects in the state seeking to assert jurisdiction over him." Leasco Data Processing Corp. v. Maxwell, 468 F.2d 1326, 1341 (2d Cir. 1972), commented upon in 6 VAND. J. TRANSNAT'L L. 687 (1973). This viewpoint seems anomalous in a federal question suit because it is not Connecticut which is asserting jurisdiction, but rather the *state* of the United States. For a brief discussion of the theory of international jurisdiction relating to conduct in one nation causing effects in another, see Comment, *The Transnational Reach of Rule 10(b)(5)*, 121 U. PA. L. REV. 1363, 1368 (1973). *See also* RESTATEMENT (SECOND), CONFLICT OF LAWS §§ 49, 50 (1971).

with Connecticut were the sole basis for exercising jurisdiction. On the contrary, the court focused on the dichotomy between federal question and diversity jurisdiction and stated that the United States is the appropriate unit of government with which there must be contacts in federal question suits. The court supported this viewpoint by reviewing the rationale that the geographical limits of the unit of government of which the court is a part determine the extent of the court's jurisdiction rather than the territory of the state where it is located.[34] The court thus refused to apply the standards of *International Shoe* on the ground that *International Shoe* dealt with state court jurisdiction and not with federal court jurisdiction in a federally-created cause of action. The court criticised those courts which have imported the *International Shoe* restrictions into federal question litigation involving alien defendants. The court distinguished the fact situation in *International Shoe* by noting that *forum conveniens*, an important consideration in that case, was not significant here because defendant is an alien corporation doing business in the United States only through other companies. The court implied that it should not matter to a British corporation without a permanent office in the United States whether it defends a suit in Connecticut or any other state. The court then applied the fairness standard of the fifth amendment's due process clause and found that the plaintiff had alleged sufficient contacts with the United States to justify exercise of jurisdiction. A pending suit against this defendant in the Eastern District of Pennsylvania, in which jurisdiction had been found, was a significant indication to the court of the defendant's contacts with the United States.[35] Therefore, the court ruled that plaintiff should be allowed to prove the contacts alleged and denied the motion to dismiss.[36]

The court's decision in the instant case gives great support to a

34. The court cited the following cases in support of plaintiff's contentions: Holt v. Klosters Rederi A/S, 355 F. Supp. 354 (W.D. Mich. 1973) (Death on the High Seas Act suit against Norwegian corporationz; Alco Standard Corp. v. Benalal, 345 F. Supp. 14 (E.D. Pa. 1972) (Securities and Exchange Act suit against Canadian citizen); Edward J. Moriarty & Co. v. Gen. Tire & Rubber Co., 289 F. Supp. 381 (S.D. Ohio 1967) (Sherman Act conspiracy suit against a Greek citizen).

35. The court suggested that defendant could remedy the problem of multiple litigation by moving to stay one or more of the proceedings.

36. Furthermore, there was sufficient showing of conflict over the patents to justify the exercise of subject matter jurisdiction over the count seeking a declaration that defendant's patent was void and not infringed. *See* note 6 *supra*.

new standard for in personam jurisdiction over alien defendants in federal question suits to replace the existing quagmire of case law in this area. At present, the fragmentation of federal law caused by the necessary use of differing state long-arm statutes and the determination of minimum contacts with the particular state means that the effective benefit and protection of many federally-created rights can be limited by the reach of the law of the state in which the district court sits.[37] While a district court adjudicating a case under diversity of citizenship jurisdiction may be expected to reach a result substantially similar to that which would be reached in a state court, this should not occur in the federal system when a special federal right is involved. Statutes creating federal rights are by definition national in scope and uniform national application is implicit in that national character. Hopefully the instant decision and the few cases preceding it will promote greater uniformity of treatment in actions involving alien defendants who sometimes try to insulate themselves from amenability to suit. In each case of this type, the equity of not forcing an alien to defend against an action far from the principal place of business is balanced against that of the protection of rights of domestic plaintiffs for whom no other remedy may be adequate or available. If the aggregate contacts approach were common, substantially greater justice might be achieved as alien defendants are forced as a condition of being allowed to cultivate and reap profits from a foreign country's market, to recognize their responsibility to the foreign country that consumes their product. Admittedly, however, an extreme extension of the aggregate contacts rationale could lead to an unjust result upon occasion. But the general fairness standard of fifth amendment due process and the doctrine of *forum non conveniens*, with which federal courts are most familiar, serve to militate against such occurrences. Besides the equity factor, the examination of minimum contacts from the national perspective seems a more logical parallel to the relationship between state courts and state jurisdiction.[38] Ultimately, more deci-

37. It may be argued that the differences in reach between different states' long-arm statutes undoubtedly leads to a certain amount of "forum shopping." A plaintiff suffering harm in interstate trade will bring suit in district court in that state in which the long-arm statute reaches the furthest. This may occur less frequently as more state statutes are amended and construed as reaching to the constitutional limits of due process of the fourteenth amendment.

38. Within a state, statutes define proper venue for a common law or statutory action. *See, e.g.*, CAL. CIV. CODE § 395(a) (West 1973); FLA. STAT. ANN. § 47.011 (1961); ILL. ANN. STAT. 110 § 5 (1962); N.Y. CIV. P. LAW § 503 (McKinney 1963);

sions following this line of reasoning should cause Congress or the Supreme Court to examine and remedy the statutes and rules concerning jurisdiction and provide the necessary and desirable uniformity of jurisdictional treatment in federal question cases. One method of implementation would be substituted service of process upon the United States Secretary of State with direction to notify the alien defendant, a procedure similar to that existing in many states under various types of statutes.[39] Alternatively, nationwide service of process could be instituted providing that notice of suit be given to any domestic "agents" and to the alien defendant if the latter is not found within the United States.[40] Perhaps then, with respect to such cases and defendants, federally-created rights may be enforced equally by plaintiffs throughout the United States without regard to state law.

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TEX. REV. CIV. STAT. ANN. art. 2390 (1971); WIS. STAT. ANN. 261.01 (1957). Venue in transitory actions is generally based on *forum conveniens* considerations except for actions against non-residents. These usually may be brought in the court of any county, but certain statutes restrict such actions to the county where plaintiff resides. When the circuit or county court looks to the exercise of jurisdiction over the non-resident defendant, the relevant question is whether that defendant has sufficient contacts with or may be found within the state, not of sufficient contacts with the county.

39. *E.g.*, DEL. CODE ANN. 8 §§ 376, 381, 382 (1975) (agent for foreign corporations); ILL. ANN. STAT. 140 § 10 (1973) (agent for registration of trademarks); MICH. COMP. LAWS ANN. § 9.2103 (1973) (agent for non-resident motorists).

40. *See* Barrett, *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608, 635 (1954). The Supreme Court has long and often stated that Congress has the power to provide nationwide service of process. Toland v. Sprague, 37 U.S. (12 Pet.) 300, 328 (1838); United States v. Union Pac. R.R. Co., 98 U.S. 569, 604 (1878); Robertson v. Railroad Labor Board, 268 U.S. 619, 622 (1925).

TRADE EXPANSION ACT OF 1962—DELEGATES AUTHORITY TO THE EXECUTIVE TO ADJUST THE IMPORTATION OF PETROLEUM AND PETROLEUM PRODUCTS TO PROTECT THE NATIONAL SECURITY ONLY THROUGH DIRECT MECHANISMS—A PROGRAM OF LICENSE FEES AND A SUPPLEMENTARY FEE PER BARREL IS AN INDIRECT MECHANISM BEYOND THE SCOPE OF § 1862(b)

Plaintiffs, eight states,[1] their governors,[2] ten utility companies,[3] and one member of Congress,[4] brought suit to overturn the imposition of license fees and a supplementary fee per barrel on the importation of oil and petroleum products as required by Proclamations 4210 and 4341[5] issued by Presidents Nixon and Ford on the grounds, *inter alia*, that the executives had exceeded their authority under the Trade Expansion Act of 1962.[6] Plaintiffs based

1. State of Connecticut, State of Maine, Commonwealth of Massachusetts, State of New Jersey, State of New York, Commonwealth of Pennsylvania, State of Rhode Island, State of Vermont. The State of Minnesota subsequently intervened as plaintiff.

2. Governors Ella Grasso, James B. Longley, Michael S. Dukakis, Brendan T. Byrne, Hugh Carey, Milton J. Shapp, Phillip W. Noel, Thomas P. Salmon.

3. Algonquin SNG, Inc., New England Power Co., New Bedford Gas & Edison Light Co., Cambridge Electric Light Co., Canal Electric Co., Montaup Electric Co., the Connecticut Light and Power Co., the Hartford Electric Light Co., Western Massachusetts Electric Light Co., Holyoke Water Co.

4. Representative Robert P. Drinan, S.J. (Dem., Mass.).

5. Proclamation 4341 follows President Nixon's Proclamation 4210, which took effect on May 1, 1973, in all major respects. Proclamation 4210 abolished the quota system whereby limits were set for various Districts of the United States to limit the importation of oil; President Nixon's plan involved the issuance of licenses which were conditioned on a schedule of license fees. Fee-free imports were allowed up to the individual's previous quota; the fee-free allocations were to be gradually phased out until 1980 when license fees would be required on all oil imports covered by the Proclamation. Proclamation 4341, signed January 23, 1975, provided for an increase in the license fees. The fee schedules announced in 1973 were accelerated to the maximum levels of $0.21 per barrel on imported crude oil and $0.63 per barrel on imported petroleum products. Supplemental fees of $3 per barrel on imported crude oil and $1.20 per barrel on petroleum products were imposed. On February 19, 1975, Congress passed a bill imposing a 90 day moratorium on Proclamation 4341. On March 4, President Ford vetoed the bill but suspended the imposition of supplemental fees for two months and then continued the suspension for 30 more days. On June 1, President Ford imposed the second dollar of the supplemental fee. 518 F.2d 1051, 1054 (1975).

6. 19 U.S.C. § 1862(b) (1970) provides:

(b) Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Director of the Office of Emergency Planning (hereinafter in this section referred to as the "Director") shall immediately make an appropriate investigation, in the

their complaint on the following arguments: (1) that § 1862(b) was an unconstitutional delegation of legislative authority by the Congress; (2) that, even if the statute was constitutional, it did not give the President the power to enact this type of indirect regulation of imports; and (3) that the President did not comply with the procedural requirements set forth in the statute.[8] Plaintiffs sought a preliminary injunction to restrain defendants[9] from enforcing Pro-

course of which he shall seek information and advice from other appropriate departments and agencies, to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion. If, as a result of such investigation, the Director is of the opinion that the said article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall promptly so advise the President, and, unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security as set forth in this section, he shall take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not so threaten to impair the national security.

7. Plaintiffs also argued that the program failed to meet the standards of the National Environmental Policy Act, 42 U.S.C. § 4331 (1970), in that an environmental impact statement was not filed before action was taken.

8. 19 U.S.C. § 1862(c) (1970) provides:

(c) For the purpose of this section, the Director and the President shall, in the light of the requirements of national security and without excluding other relevant factors, give consideration to domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements. In the administration of this section, the Director and the President shall further recognize the close relation of the economic welfare of the nation to our national security and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.

9. William F. Simon, Secretary of the Treasury and Administrator of the Federal Energy Administration.

clamation 4341, which requires an import license subject to the payment of fees in order to import oil and petroleum products into the United States. Defendants contended that plaintiff's plea for relief was barred by the Anti-Injunction Act,[10] that plaintiffs had in any case failed to meet the requirements for injunctive relief,[11] that the public interest would be harmed by a delay in the implementation of the Presidential Proclamation, that § 1862(b) clearly delegated to the Executive the authority to take such action, and that the program was a fee system to support the administrative structure, rather than a tax system to raise revenue.[12] Plaintiffs conceded at the outset that the executive decision that action was required in the interests of the national security was not an issue subject to judicial review.[13] They challenged only the program instituted as a result of that executive determination. The District Court for the District of Columbia found jurisdiction[14] and recognized irreparable injury sustained by plaintiffs, but the court accepted defendants' latter three contentions and denied plaintiffs' motion for a preliminary injunction. On appeal to the District of Columbia Circuit Court of Appeals, *held*, reversed and remanded. When the President deems that importation of any product threatens the national security, he may under § 1862(b) adjust the imports of that article through direct means such as quotas or embargoes, but not through indirect mechanisms such as import license fees. *Algonquin SNG, Inc. v. Federal Energy Admin.*, 518 F.2d 1051 (D.C. Cir. 1975), *cert. granted*, 44 U.S.L.W. 3263 (U.S. Nov. 4, 1975) (no. 75-382).

Article I, § 8, paragraph 3 of the Constitution gives Congress the

10. 26 U.S.C. § 7421 (1970).

11. The four criteria recognized by the District Court as required to grant the equitable relief of a preliminary injunction are:

(a) a strong showing that plaintiff is likely to prevail on the merits of the case;

(b) irreparable injury;

(c) possibility of harm to others not parties but interested in the proceedings;

(d) public interest.

518 F.2d 1051, 1069 (1975).

12. For discussion of the distinction between a legitimate fee which the Executive may impose to support the program and a tax which only Congress may constitutionally impose, *see* notes 44-46 and accompanying text *infra*.

13. 518 F.2d 1051, 1055 (1975).

14. The court used 28 U.S.C. §§ 1331, 1340 (1970) which provide, respectively, for federal question jurisdiction and jurisdiction over claims arising under Congressional acts concerning revenue from imports.

power to "regulate commerce with foreign nations, and among the several states . . . ."[15] Although the sentence may be read as creating two distinct congressional powers, *e.g.*, to regulate commerce among the states and the power to regulate foreign commerce, Chief Justice Marshall stated the interpretation that has been followed since 1824 in *Gibbons v. Ogden*[16] when he noted that the sentence was a single unit that conferred a single power of regulation to the Congress. The word power "must carry the same meaning throughout the sentence."[17] Thus, Congress has the same authority to regulate foreign as domestic commerce. The modern Supreme Court has broadly construed the Commerce Clause to allow Congress to regulate any activity, foreign or domestic, that touches commerce in any manner.[18] Under the doctrine of separation of powers, given Congress's broad power to regulate commerce, the authority of the executive branch in that area is severely limited. Despite significant congressional authority over foreign commerce, the President possesses power in the field of foreign affairs which is derived from three distinct sources: article II of the Constitution;[19] inherent authority based on his position as leader of a sovereign state; and power delegated from the legislature. Congress, however, can neither delegate its full legislative powers to the executive branch, nor, generally, delegate authority giving unfettered discretion to the President.[20] The charge of improper delegation of legislative authority arises when Congress has left too much discretion to the Executive, fails to provide sufficiently clear guidelines to the Executive or administrative agency,

15. U.S. Const. art. I, § 8.

16. 22 U.S. (9 Wheat.) 1 (1824).

17. 22 U.S. (9 Wheat.) 1, 194 (1824).

18. *See, e.g.*, Perez v. United States, 402 U.S. 145 (1971) (interstate extortionate credit transactions are subject to regulation under the commerce power); Wickard v. Filburn, 317 U.S. 111 (1942) (Congress can regulate production of a home-consumed crop); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942) (Congress can regulate the price of milk sold in one state); N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (production employees guaranteed the right to organize collectively). *See generally*, *Recent Developments Affecting the Scope of Executive Power to Regulate Foreign Commerce*, 16 B.C. IND. & COM. L. REV. 778 (1975).

19. The defendant executive agency did not claim that the regulations at issue in the instant case were based on art. II, §§ 2, 3 powers of the President.

20. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). *See generally*, Jaffe, *An Essay on Delegation of Legislative Power*, in SELECTED ESSAYS ON CONSTITUTIONAL LAW 1938-1962 at 89 (Ass'n of Am. Law Schools ed. 1963).

or attempts to abdicate its responsibility by delegating its constitutional legislative authority. In *Panama Refining Co. v. Ryan*,[21] one of the few cases finding an improper delegation of power, the Supreme Court held that if no policy or standards, express or implied, to guide the President were stated in the delegation by which to judge whether the President was obeying the congressional will, then the delegation would be found improper.[22] In subsequent cases of delegation the Court has upheld very broad grants giving wide discretion,[23] and broad delegations of authority over international affairs have almost unanimously been upheld.[24] The Court has followed the reasoning laid down in *United States v. Curtiss-Wright Export Corp.*,[25] where Justice Sutherland noted that in the field of foreign affairs the rules requiring clear congressional standards and prohibiting extensive delegations of power do not apply because the President, as sovereign, needs great discretion to deal with international conflicts and has access to information not available to Congress. For example, in upholding executive power under the Trade Agreements Act of 1934 to vary import duties by

21. 293 U.S. 388 (1935).

22. Notice that the unlawful delegation of authority would have permitted the executive to prohibit the transportation in interstate or foreign commerce of petroleum withdrawn from storage in excess of amounts allowed by state regulation. Because of the lack of clear standards in the section, the court was unable to decide whether the purpose of the delegation was to protect domestic resources and national commerce or to encourage the free flow of foreign commerce. 293 U.S. at 418. Therefore, this is not a case clearly involving executive authority over foreign affairs.

23. Yakus v. United States, 321 U.S. 414 (1944) (the Administrator was given authority to fix fair and equitable prices to effectuate the policy of the Act.) *See also* Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); Dakota Central Tel. Co. v. South Dakota, 250 U.S. 163 (1919).

24. *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 411 (1928) (the President can raise or lower import duties based on criteria stated by Congress to equalize differences between costs of domestically and foreign produced goods); Field v. Clark, 143 U.S. 649, 693 (1892) (the President is Congress' agent and possesses discretion to raise or lower import tariffs); Star-Kist Foods v. United States, 275 F.2d 472 (Cust. Pat. App. 1959) (regarding Presidential power to vary import duties, Congress can delegate broad discretion in legislation inherently bearing on foreign affairs). An exception to this general trend is *Kent v. Dulles*, 357 U.S. 116 (1958), where the Supreme Court held that broad executive discretion in the granting of passports was an unlawful delegation of Congress' law-making authority. That case, however, involved the Constitutional right to travel and is distinguishable from the instant case involving economic regulations, not a First Amendment right.

25. 299 U.S. 304 (1936).

as much as fifty per cent, the Court expressly stated that Congress can give the President broader discretionary power in legislation relating to his conduct of foreign affairs than to domestic matters,[26] therefore, restrictions imposed on congressional delegation of duty are no longer a significant barrier to legislation.[27] The Executive can also claim some measure of authority based on the inherent power of that branch. The *Steel Seizure* case[28] is the most comprehensive explication of inherent executive power. President Truman had directed seizure of the steel industry to avoid a strike which Truman claimed would have slowed production and had an adverse effect on the national defense. The opinion of the Court noted merely that the President lacked all authority to act alone in an area where Congress could have delegated power, thus stating that in delegable areas there is no inherent executive authority. The separate opinions tend, however, to affirm some inherent power in the President, at least where he does not act in a manner incompatible with the will of Congress.[29] The theory of inherent executive authority was strongly supported in dicta in *Curtiss-Wright* where the Court stressed that in the field of foreign affairs the President need not depend on either an express article II grant or a congressional delegation of power for the authority to act.[30] The history of

26. Star-Kist Foods v. United States, 275 F.2d 472, 480 (Cust. Pat. App. 1959).

27. The only cases that found delegations of power to the Executive unconstitutional were *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1925), which are now 40 years old and are not followed in more recent cases involving congressional delegations of authority, especially in the field of foreign affairs.

28. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

29. The concurring opinion by Justices Jackson and Clark divides Presidential authority to act into three distinct situations: when the President acts in opposition to the will of Congress his power is at its nadir consisting only of inherent executive authority; when the President acts pursuant to the expressed or implied will of Congress his power is at its height; and when the President acts alone without the assent or disagreement of Congress he possesses his own constitutional authority and some undefined concurrent power with Congress. Only Justices Black, Douglas, and Burton clearly rejected the theory of inherent executive authority. Professor Bernard Schwartz concludes that a majority of the Court did not deny the theory of inherent executive authority to act to meet emergencies. Schwartz, Constitutional Law 149-50 (1972).

30. 299 U.S. 304 (1936). L. Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION (1972); Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 Seton Hall L. Rev. 527 (1974); Henkin, *"A More Effective System" for Foreign Relations: The Constitutional Framework*, 61 VA. L. REV. 751 (1975); Lofgren, *United States v. Curtiss-Wright*

the regulation of oil imports, therefore, must be read in light of the legitimacy of broad legislative delegations *and* the existence of some inherent executive power over foreign affairs.[31] Early regulation of oil imports, which began in 1957 with the establishment of the Voluntary Oil Import Program that set quotas for imports to different areas of the country and provided for "jawboning" techniques to encourage voluntary reduction of crude oil imports to meet the quotas, proved unsuccessful because the lack of sanctions allowed the oil industry to ignore the quotas with impunity.[32] Congress recognized, however, that importation of oil in excessive amounts could cause serious domestic problems because the importation of crude oil and refined oil at low costs threatened to impair national security by slowing development of domestic production and refining. This recognition led to the establishment of the Mandatory Oil Import Program (MOIP) in 1959.[33] President Eisenhower issued Proclamation 3279, pursuant to § 1862(b),[34] requiring that each importer secure a license[35] and establishing absolute import quotas.[36] The two Presidential proclamations at issue in the instant case were issued pursuant to § 1862(b) and radically changed the existing system. No. 4210 abolished the quota system and provided for the issuance of import licenses based on a schedule of license fees.[37] No. 4341 provided for acceleration of the 1973

Export Corp.: An Historical Reassessment, 83 YALE L.J. 1 (1973); Thurow, *Presidential Discretion in Foreign Affairs*, 7 VAND. J. TRANSNAT'L L. 71 (1973).

31. *See* Metzger, *United States Foreign Trade: Past, Present, and Future*, 6 VILL. L. REV. 503 (1961).

32. *See* CHARLES RIVER ASSOCIATES, AN ANALYSIS OF THE U.S. OIL IMPORT QUOTA (1970); Schwartz & Kindred, *American Regulation of Oil Imports: Law, Policy and Institutional Responsibility*, 5 J. WORLD TRADE L. 267 (1971); Dam, *Implementation of Import Quotas: The Case of Oil*, 14 J. LAW & ECON. 1 (1971).

33. The program remained in effect until May 1, 1973, despite some twenty-five amendments to the system. *See generally*, Note, *National Security and Oil Import Regulation: The License Fee Approach*, 15 VA. J. INT'L L. 399 (1975); Note, *The Mandatory Oil Import Program: A Review of Present Regulations and Proposals for Change in the 1970's*, 7 TEX. INT'L L.J. 373 (1972); Note, *United States Oil Import Restrictions: A Program in Need of Reform*, 3 N.Y.U.J. INT'L L. & POL. 343 (1970).

34. 19 U.S.C. § 1862(b) (1970).

35. The country was divided into five districts with absolute quotas set for each district.

36. The program provided for the Secretary of the Interior to allocate quotas to importers based on import history and existing refinery capacity. *See* UNITED STATES TARIFF COMMISSION, WORLD OIL DEVELOPMENTS AND U.S. IMPORT POLICIES 632 (T.C. Publication 1973).

37. *See* note 5 *supra*.

fee schedules and a supplementary fee per barrel on imported petroleum products and crude oil.[38] Recent cases applicable to § 1862(b) and executive action taken pursuant thereto have considered three separate factors: Presidential authority and delegation of duty; the nature of the license fees; and statutory interpretation. In *Yoshida Int'l*[39] the Customs Court dealt with a Presidential proclamation based on § 1981, the so-called "escape clause" of the Trade Expansion Act of 1962, allowing executive action to protect American business.[40] The court held that the broad clause could not be read as delegating a significant amount of authority to the President because an amendment to the Act, § 353,[41] expressly giving the power asserted was rejected by the Senate in 1962.[42] The deletion of § 353, the court found, showed that Congress was unwilling to grant such broad discretionary powers to the President and was a recognition that such an unrestrained grant might have been an invalid delegation of legislative authority.[43] In *New Eng-*

38. *Id.*

39. Yoshida Int'l Inc. v. United States, 378 F. Supp. 1155 (Cust. Ct. 1974); (rev'd on other grounds), 526 F.2d 560 (C.C.P.A. 1975).

40. 19 U.S.C. 1981(a)(1) (1970) provides:

> After receiving an affirmative finding of the Tariff Commission under section 1901(b) of this title with respect to an industry, the President may proclaim such increase in, or imposition of, any duty or other import restriction on the article causing or threatening to cause serious injury to such industry as he determines to be necessary to prevent or remedy serious injury to such industry.

41. Section 353 states:

> Notwithstanding any other provision of law, the President may, when he finds it in the national interest, proclaim with respect to any article imported into the United States—(1) the increase of any existing duty on such article to such rate as he finds necessary, (2) the imposition of a duty on such article (if it is not otherwise subject to duty) at such rate as he finds necessary, and (3) the imposition of such other import restrictions as he finds necessary. 108 CONG. REC. 19875 (1962).

42. Senator Byrd explained the section as proposing to give unlimited and undefined power to impose quotas or tariffs to protect the national security. He called the deleted section, ". . . a sword which could cut two ways: First, one problem was that there was no procedure prescribed for ascertaining the facts and second, the other problem was that the Congress did not retain the same opportunity for review as the other sections of the bill provide." 108 CONG. REC. 22182 (1962).

43. 378 F. Supp. at 1166. Equally tenable, however, is the inference that Congress believed that the proposed change was already incorporated in the existing legislation. *See* Wilderness Soc'y v. Morton, 479 F.2d 842, 856 (D.C. Cir. 1973) (in statutory interpretation nothing should be inferred from congressional failure to adopt an amendment).

land Power[44] and *National Cable*[45] the Supreme Court distinguished between fees that may be assessed by the Executive to financially support the program he administers, and taxes that are solely within the power of Congress to levy. A statute giving the Executive legitimate legislative power also gives him some discretion to establish the machinery to use that power. A fee can thus be assessed to support the administration of the executive program if it is assessed in proportion to the benefit given to the specific individual or corporation.[46] The fee must be related to the benefits conferred rather than to the ability to pay or to a desire to raise revenue which constitutionally is the power of Congress. In deciding what powers § 1862(b) or any other statutory provision confers on the President the courts must construe the statutory language. The plain meaning of a statute is a significant factor in its interpretation[47] but is subject to the overriding requirement that all sources of the statute be considered.[48] The legislative history of § 1862(b), at the time of the original passage[49] and at reenactment, is ambiguous as to whether Congress limited the section to direct executive action or empowered the President to use the gamut of regulatory measures, direct and indirect.[50] Section

44. F.P.C. v. New England Power Co., 415 U.S. 345 (1974).

45. Nat'l Cable Television Ass'n., Inc. v. United States, 415 U.S. 336 (1974).

46. A tax can be arbitrarily imposed without regard to the benefits given, but the Court held that a fee must be related to the benefits bestowed. 415 U.S. at 341. The revenue to be generated by the license fee program was eventually expected to be $4.8 billion dollars annually.

47. Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.D.C. 1973).

48. "The 'plain meaning' doctrine has always been subservient to a truly discernible legislative purpose however discerned." Wilderness Soc'y v. Morton, 479 F.2d 842, 855 (D.C. Cir. 1973). Courts should consider congressional committee reports, statements of sponsors, statements made on the floor of Congress, and pronouncements of later Congresses, *Banco Nacional De Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967); and also all sources of the legislation and expressed or implied policies underlying the legislation, *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.D.C. 1973).

49. S. REP. No. 232, 84th Cong., 1st Sess. 4 (1955). The Senate Committee report on § 1862(b) stated, "the President, if he finds a threat to the national security exists, shall take whatever action is necessary to adjust imports to a level that will not threaten to impair the national security."

50. Senator Byrd stated, "[I]t simply leaves to the President the power, in his discretion, to impose a quota or to reduce the imports." 101 CONG. REC. 5297 (1955). Senator Millikin stated that the section "grants to the President authority to take whatever action he deems necessary to adjust imports if they should threaten to impair the national security. He may use tariffs, quotas, import taxes, or other methods of import restriction." *Id.* at 5299. *See also Id.* at 5288 (statement of Senator Bennett); H.R. REP No. 745, 84th Cong., 1st Sess. 6 (1955).

1862(b), in an attempt to give the President appropriate authority to deal with continuing problems of domestic industry and national security caused by overdependence on foreign oil, raises the persistent problems of delegation of power to the Executive by the legislature and the extent of inherent executive authority to deal with foreign affairs.

The instant court based its decision on three factors: that, given the clearly-defined manner in which Congress generally delegates authority over foreign commerce, a broad construction of § 1862(b) allowing direct and indirect controls would be an anomalous departure from tradition; that the legislative history of the section, at its origination in 1955 and at its re-enactment in 1962, supports a narrow reading of the statute; and that recent Supreme Court decisions dealing with the Trade Expansion Act and the distinction between fees and taxes fail to support the government's liberal construction of the statute as giving the President the authority claimed. The court noted first that the majority of trade provisions delegating power to the Executive have been narrow and explicit.[51] Considering that Congress has clearly occupied the field of trade regulation and that to be constitutional a delegation must be narrow and specific, the court stated that the intent of Congress would be scrutinized to ascertain the precise extent of the delegation. The court found the legislative history, especially the 1955 floor debate, a significant key to the intent of the statute.[52] The court referred to *Yoshida Int'l* and agreed that the rejection by Congress of the proposed amendment[53] indicated that Congress did not intend to confer upon the Executive the authority that defendants claimed in defending the Presidential proclamations. The court did not find congressional ratification in its failure to react to the proclamations.[54] Turning to defendants' arguments, the court agreed that an executive determination that action must be taken to protect the national security was not reviewable by the courts.[55]

51. The instant court cited several examples of trade provisions where the congressional delegations of authority have been narrow and explicit. *See* 19 U.S.C. § 1901, 1981 (injuries to domestic industry); 19 U.S.C. § 1351 (modification of duties); 19 U.S.C.A. §§ 2251, 2253 (import relief for domestic injuries).

52. *See* S. REP. No. 232, 84th Cong., 1st Sess. 4 (1955); 101 CONG. REC. 5288, 5292, 5299, 5572, 5584 (1955).

53. *See* § 353, the rejected amendment to the Trade Expansion Act note 41 and accompanying text *supra*.

54. Algonquin SNG, Inc. v. Federal Energy Admin., 518 F.2d 1051, 1060 (D.C. Cir. 1975).

55. The District Court for the District of Columbia observed, ". . . plaintiffs

However, the particular action taken was subject to review to determine whether it was within the statutory grant of authority and whether the statute itself was a legitimate constitutional delegation. The court in the instant case did not reach the constitutional question of delegation, finding that Congress had not delegated the power asserted by defendants.[56] The court then examined defendants' final contention that the surcharges levied by the challenged proclamations were not taxes or tariffs, which could only be imposed by Congress or through a proper delegation of authority, but rather were fees imposed to offset the administrative costs of the program. The court concluded that a fee must be related to the benefit conferred, as in payment for a license which grants privileges and benefits to its owner.[57] The court characterized the import surcharges in the instant case as duties for the purpose of regulating imports and raising revenue rather than fees, and as a regulatory measure the license fees imposed upon plaintiffs constituted an indirect means of controlling imports not authorized by § 1862(b). The court concluded that while the President was not authorized to regulate oil imports to protect national security by indirect methods, he could either have imposed direct controls, *e.g.*, quotas or an embargo, or sought authorization from Congress to impose indirect controls.

The dissent looked to the plain meaning of the statute and noted that the legislative histories of the section and the rejected amendment were ambiguous and concluded that the statute appeared to delegate broad power to the President. The dissent argued that the statute does not forbid the President to do indirectly what he can do directly and the majority's reading of the statute creates a distinction without a difference. The dissent concluded that in the area of foreign commerce Congress can delegate broad discretion to the Executive without overstepping constitutional limitations regarding delegation of legislative authority.

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have conceded that the President's determination that his program is required in the interests of national security is a finding which is not subject to judicial review." 518 F.2d 1051, 1065 (1975). Therefore, that question was not at issue at the Circuit Court level.

56. 518 F.2d at 1062. That question was specifically reserved: ". . . we do not say that Congress cannot constitutionally delegate, accompanied by an intelligible standard, such authority to the President; we merely find that they have not done so by this statute."

57. *See* the discussion of fees as decided by the Supreme Court in *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336 (1974) and *FPC v. New England Power Co.*, 415 U.S. 345 (1974), note 46 *supra* and accompanying text.

The instant case, dealing with the issue of whether the Executive can apply indirect as well as direct means to control the importation of oil into the United States when he deems that excessive importation is or could be detrimental to national security, grows out of long attempts by Congress and the President to reduce American overdependence on foreign oil. The remaining question, specifically reserved by the instant court, is whether Congress can constitutionally delegate the power to the President to control imports indirectly, by a system of license fees instead of quotas or by an embargo. The majority decision implies that a clear delegation supported by guidelines and unequivocal legislative history would be a proper one. In the instant situation, the court correctly looked beyond the plain meaning of the statute, but four factors mandate against the court's construction of the section. First, the legislative history of § 1862(b) is ambiguous both at the time of passage of the section[58] and at the time of its re-enactment.[59] Secondly, although the court relies heavily on the *Yoshida* case,[60] that decision was based on a section whose purpose was to support American business rather than to protect national security;[61] and the effect of the Senate's failure to enact § 353 supports the theory that Congress believed that the broad power to adjust imports given in § 353 was contained in the existing law as well as it supports the court's reasoning that Congress did not want to make a broad grant of authority. Thirdly, the court, in stating that delegations must be clear and circumscribed, relied on old decisions[62]

58. Senate Committee Report and statements from the floor, *supra* notes 41, 42, 49, 50, 52.

59. *Id.*

60. *Supra* note 39. *See* Note, *United States Trade Law at the Crossroads*, 8 N.Y.U.J. INT'L L. & POL. 63 (1975); Note, *Yoshida Int'l v. United States: Was the 1971 Import Surcharge Legally Imposed?*, 73 MICH. L. REV. 952 (1975).

61. The disputed section in *Yoshida Int'l* was § 1981(a)(1) which deals with Presidential power to take action to adjust imports when the importation of an article impairs or threatens to impair the welfare of domestic business. This can be contrasted with § 1862(b) of the same act which allows the President to adjust imports to protect the national security. While the term national security is nowhere defined in the Act, § 1862(b) clearly deals with foreign affairs. Thus, the Executive can claim broader authority on his own, as well as receive more delegations from the Congress, while § 1981(a)(1) arguably deals with domestic affairs and any delegation to the Executive would have to be more clear and circumscribed. It is unwise to assume that everything the Customs Court said about § 1981(a)(1) applies to § 1862(b).

62. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

that have been consistently undermined by judicial affirmation of broad and discretionary delegations.[63] Finally, and most significantly, the instant case involves a delegation of power not over national but over foreign affairs. In cases involving such delegations the Supreme Court has almost universally upheld practically unfettered authority given to the Executive on the theory that the President must have discretion as the head of a sovereign state[64] or on the *Curtiss-Wright* theory of inherent power over foreign affairs. Because the President did not act contrary to the expressed will of Congress and because the instant case involves international rather than domestic affairs, the *Steel Seizure* case provides support for the District Court's decision to uphold the license fees. Moreover, the generally recognized need to provide for a practical and flexible program to protect domestic industry and to alleviate the national security problems inherent in the overdependence on foreign oil imports compels a liberal construction of § 1862(b) in line with other cases dealing with delegation of authority to the President to deal with foreign affairs.

Susan Beth Farmer

63. Cases cited *supra* notes 9-11.
64. Field v. Clark, 143 U.S. 649 (1892).