RECENT CASES*

ALIENS

Discrimination

Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973).

In an action by a Mexican alien, following exhaustion of administrative remedies before the Equal Employment Opportunity Commission (EEOC), the plaintiff alleged that Farah Manufacturing Company had refused to hire her because of her Mexican citizenship. It was argued that this refusal constituted a violation of Section 703 of Title VII of the Civil Rights Act of 1964.[1] The district court granted plaintiff's motion for summary judgment[2] relying primarily on an EEOC guideline which provides that a lawful alien resident may not be discriminated against on the basis of citizenship.[3] The court of appeals reversed,[4] and the Supreme Court affirmed.

In holding that the Civil Rights Act of 1964 does not extend to discrimination based on alienage, the Supreme Court considered the history of the statute in construing the intent of its drafters. The Court noted that while the original draft included a bar against discrimination based on "ancestry," this classification was deleted prior to the bill's passage. Moreover, since 1914, the Government itself has, through Civil Service Commission regulations, engaged in discrimination against aliens by denying them the right to enter competitive examinations for federal employment. To further stress the fact that this citizenship requirement for federal employment does not constitute discrimination based on national origin, the Court stated:

> To interpret the term "national origin" to embrace citizenship requirements would require us to conclude that Congress itself has repeatedly flouted its own declaration of policy. This Court cannot lightly find such a breach of faith. So far as federal employment is concerned, we think it plain that Congress has assumed that the ban on national-origin discrimination in § 701(b) did not effect the historical practice of requiring citizenship as a condition of employment.[5]

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* Prepared by Peter A. Bieger, Milton Steven Blaut, David F. Everett, and Sue Meris Novick.

1. Civil Rights Act of 1964, tit. VII, § 703(a), 42 U.S.C. § 20000e-2(a) (1971) states:
   It shall be an unlawful employment practice for an employer—
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin . . . .
2. 343 F. Supp. 1205 (W.D. Tex. 1971).
3. 29 C.F.R. § 1606.1(d) (1972).
4. 462 F.2d 1331 (5th Cir. 1972).
5. 414 U.S. at 90-91 (citations omitted).

While the Court declared that the statute does not reach discrimination based on alienage or citizenship in general, it did qualify its statement so as to bar discrimination between aliens because of race, color, religion, sex, or national origin. Thus, to hire aliens of Anglo-Saxon background, but to refuse to hire aliens of Mexican or Spanish ancestry, would constitute discrimination in violation of the statute. Nonetheless, the significant point of the *Espinoza* decision, in the words of the Court, is that ". . . nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage."[6]

Jury Duty

Perkins v. Smith, 370 F. Supp. 134 (D. Md. 1974).

Plaintiff, a resident alien, initiated a class action challenging the constitutionality of federal and state statutes which barred him, solely on the basis of alienage, from serving on grand and petit jury panels in federal and state courts.[7] The plaintiff argued that statutes imposing a citizenship requirement for jurors deny him, and others similarly situated, equal protection of the law as guaranteed by the fifth and fourteenth amendments to the Constitution. The plaintiff further contended that no compelling state or federal interest justifies the disqualification of aliens, as a class, from jury service. In support of his position, the plaintiff cited cases extending constitutional protection to aliens in the area of economic rights.[8]

The court stated that both state and federal governments have a compelling interest in assuring that, under our system of justice, those who make the ultimate factual decisions on questions involving personal liberty and property rights be either native born or naturalized citizens. The court also noted that it may be fairly concluded that, as a class, citizens are more likely to make informed or just decisions in such matters than are non-citizens. Moreover, the court asserted that the state's obligation to "preserve the basic conception of a political community"[9] applies to grand and petit jurors in both state and federal courts because they are persons holding important nonelective judicial positions, who participate directly in the execution of the laws and "perform functions that go to the heart of representative government."[10] Therefore, the state has a compelling interest in the restriction of jury service to those who will be loyal to, interested in, and familiar with, the customs of this

6. *Id.* at 95.

7. See 28 U.S.C. § 1865 (1970) and Md. Code Ann. art. 51, § 1 (1972).

8. *In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

9. Dunn v. Blumstein, 405 U.S. 330, 344 (1972).

10. Sugarman v. Dougall, 413 U.S. 634, 647 (1973).

country. The court concluded that service on juries is the prime example of an instance where " 'citizenship bears some rational relationship to the special demands of the particular position.' "[11] This has been explicitly recognized, by dictum if not by holding, in several Supreme Court cases which have dealt with juror qualifications under the fourteenth amendment.[12]

Jury service may, therefore, appropriately be limited to citizen members of the political community.

CIVIL PROCEDURE

Judicial Notice

Rosman v. Trans World Airlines, 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974).

In two separate actions against an airline to recover for psychic trauma and bodily injuries suffered by passengers on a hijacked aircraft, the plaintiffs moved for summary judgments against the defendant on the issue of liability. Under the Convention for the Unification of Certain Rules Relating to International Transportation by Air[13] (the Warsaw Convention)—the official version of which is in French—the defendant's liability is absolute when the facts establish an injury as defined by article 17.[14] The respective trial courts granted the motions,[15] holding that no triable issue of fact had been presented by the airline on the issue of liability, and the First and Second Departments of the Appellate Division reversed.[16] The reversals were predicated on findings that the courts could not take judicial notice of the meaning of a foreign language; thus, triable issues of fact were presented as to the precise meaning of the French text of article 17. The plaintiffs appealed.

Consolidating the two actions for a hearing, the New York Court of Appeals overruled the appellate division, and stated:

> While the treaty is written in French, it is nevertheless a domestic, not a foreign law. It is the supreme law of the land (U.S. Const., Art. VI,

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11. Dougall v. Sugarman, 339 F. Supp. 906, 911 (1973) (Lumbard, J., concurring).

12. Carter v. Jury Comm'n, 396 U.S. 320 (1970); Jugiro v. Brush, 140 U.S. 291 (1891); Strauder v. West Virginia, 100 U.S. 303 (1880).

13. Convention for the Unification of Certain Rules Relating to International Transportation by Air, June 27, 1934, 49 Stat. 3000, T.S. No. 876.

14. The English translation of article 17, which follows, is found at 49 Stat. 3018:
> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

15. 69 Misc. 2d 642, 330 N.Y.S.2d 829 (1972).

16. 40 App. Div. 2d 850, 337 N.Y.S.2d 827 (2d Dep't 1972) and 40 App. Div. 2d 963, 338 N.Y.S.2d 661 (1st Dep't 1972).

> cl. 2) of which New York courts are required to take judicial notice (CPLR 4511, subd. [a]). The "precise meaning" of the terms of the Convention, therefore, is to be determined by the court as a question of law (CPLR 4511, subd. [c]) and cannot be treated as a triable issue of fact so as to defeat consideration of a motion for summary judgment.[17]

In resolving the question of the meaning to be ascribed to the French words in article 17, the New York Court of Appeals decided that, where there is no dispute over the proper translation of the terms in controversy, and where, historically, parties to the Warsaw Convention have not considered themselves to be bound to the application of French law when dealing with questions arising under the Convention, it is not necessary to look to the internal law of France to determine the scope and meaning of the terms of article 17. The court distinguished *Block v. Compagnie Nationale*,[18] in which the United States Court of Appeals for the Fifth Circuit said: "[t]he binding meaning of the terms [of the Warsaw Convention] is the French legal meaning." *Block* applies to the act of translation from French into English. For the purposes of the present dispute, an accurate English translation already exists and may be found appended to the Convention in the *United States Statutes at Large*.[19]

The language of article 17 must be interpreted "according to its ordinary and natural meaning"[20] and given effect so as to uphold the underlying purposes of the Convention. An examination of the intent of the parties to the Warsaw Convention indicates that it was designed to promote uniformity between the signatories as to the laws applied to air carriers. Specifically, the provisions creating liability were designed to protect air carriers from excessive claims[21] and, as a counter-balance, to provide claimants with some definite basis for recovery.[22]

Applying this standard, the New York Court of Appeals determined that where there is a causal connection between the accident and some palpable physical injury, the claim for damages can be allowed. Psychic trauma may serve as a causal link between the event and the injury, but cannot by itself be regarded as a "bodily injury" for which recovery may be had. Once a causal link has been established between the event and any physical injury, however, any damages, such as mental suffering, which flow from such physical injury are compensable.

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17. 34 N.Y.2d at 392, 314 N.E.2d at 852, 358 N.Y.S.2d at 103.
18. 386 F.2d 323, 330 (5th Cir.), *cert. denied*, 392 U.S. 905 (1967).
19. 49 Stat. 3014 *et seq.*
20. 34 N.Y.2d at 396, 314 N.E.2d at 855, 358 N.Y.S.2d at 106.
21. Eck v. United Arab Airlines, 15 N.Y.2d 53, 59, 203 N.E.2d 640, 641, 255 N.Y.S.2d 249, 251 (1964).
22. 34 N.Y.2d at 395, 314 N.E.2d at 854, 358 N.Y.S.2d at 106.

Jurisdiction

Holden v. Commonwealth of Australia, 369 F. Supp. 1258 (N.D. Cal. 1974).

An action was brought against the Commonwealth of Australia, the United States, and certain individuals for injuries allegedly suffered as a result of a collision between an automobile in which the plaintiff was riding and an automobile owned by the United States. Process was served on the Consul General for the Commonwealth of Australia in San Francisco. The Commonwealth of Australia moved to dismiss the action for lack of personal jurisdiction. The issue before the district court was whether service of a complaint on a foreign consul was sufficient to obtain jurisdiction over the "person" of the country he represents.

The court dismissed the complaint as to the Commonwealth of Australia, stating that it was settled that, with at least one exception,[23] a consul is not the agent of the country he represents for the purpose of receiving service of process.[24]

COMMERCE

Arbitration

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

Alberto-Culver, a U.S. corporation, agreed to purchase from Fritz Scherk, a German citizen, three companies located in Germany. The contract, negotiated in the United States, Great Britain and Germany, signed in Austria, and closed in Switzerland, contained several express trademark warranties and an arbitration clause providing that:

> '[a]ny controversy or claim [that] shall arise out of this agreement or the breach thereof' would be referred to arbitration before the International Chamber of Commerce in Paris, France, and that '[t]he laws of the State of Illinois, U.S.A. shall apply to and govern this agreement, its interpretation and performance.[25]

Nearly one year after the contract closing, Alberto-Culver discovered that the trademark rights purchased from Scherk were subject to substantial encumbrances. The company then commenced an action for relief in a federal district court in Illinois contending that Scherk's

23. Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103 (2d Cir. 1966), where the Second Circuit concluded: "This is not to say that service on the sovereign may be effected on any representative of the sovereign." Rather, the court held that, "service on the branch which is a party to the contract sued upon is sufficient." 360 F.2d at 110. In *Petrol Shipping Corp.*, the branch of the sovereign, service on which was upheld as being valid, was the foreign sovereign's New York ministry of commerce, a party to the contract in question.

24. Purdy Co. v. Argentina, 333 F.2d 95 (7th Cir. 1964).

25. 417 U.S. at 508 (footnote omitted).

fraudulent representations violated the Securities Exchange Act of 1934.[26]

Scherk filed a motion to dismiss on the grounds that the district court lacked personal and subject-matter jurisdiction on the basis of *forum non conveniens*, and that the arbitration clause dictated that the International Chamber of Commerce in Paris, France, be the situs of the suit. Both the district court and the Seventh Circuit Court of Appeals[27] denied the motion.

The Supreme Court reversed, and emphasized that where a U.S. company negotiates a contract in Europe and America as to the purchase of European business entities, involving commerce with a foreign country, the value agreement providing for arbitration of disputes is covered by the Arbitration Act of 1925.[28] This Act provides that an arbitration agreement is valid, irrevocable and enforceable, unless there are grounds in law or equity for the revocation of the contract.[29] The Act also directs federal courts to order the parties to a contract to proceed to arbitration if there has been a failure, refusal or neglect of any party to follow the arbitration agreement.[30]

The Court distinguished *Wilko v. Sivan*[31] which held that arbitration clauses ordinarily permitted in contracts are not to be applicable to disputes brought under Section 12(2) of the Securities Act of 1933.[32] *Wilko* was further distinguished as being a purely domestic agreement involving no international business entities whereas the *Scherk* contract concerned the sale of business enterprises organized primarily under the laws of European countries. In *Wilko*, the Court noted that "[w]hen the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions."[33] In a buyer waiver situation, the security

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26. Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j (b) (1970).

27. 484 F.2d 611 (7th Cir. 1973).

28. 9 U.S.C. § 1 *et seq.* (1970).

29. *Id.* § 2.

30. *Id.* § 4; *see also id.* § 3, providing:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

31. 346 U.S. 427 (1953).

32. 15 U.S.C. § 77 (1970), which provided a defrauded purchaser with the "special right" of a private remedy for civil liability.

33. 346 U.S. at 435.

seller has a greater choice of venue. But a party to an international contract may resort to a foreign court to hinder access to an American court.

The Court noted that in *Bremen v. Zapata Off-Shore Co.*,[34] it rejected the doctrine that a contract's forum-selection clause would only be respected in an action brought in the United States, when the forum specified in the contract provided a more convenient forum than the state where the action is brought. In *Zapata*, the Court held that a "forum clause should control absent a strong showing that it should be set aside,"[35] the reason being that inconvenience to the parties may result if a suit could be brought in any jurisdiction in which an injury occurred and that the "elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensible element in international trade, commerce, and contracting."[36]

Consequently, the *Scherk* Court held that the provisions of the Arbitration Act cannot be ignored. Accordingly, under the facts presented in *Scherk*, an arbitration clause must be enforced with respect to a U.S. company's claims for damages and other relief for a seller's fraudulent representations concerning transferred trademarks in violation of the antifraud provisions of the Securities Exchange Act of 1934. Therefore, an arbitration agreement which specifies the tribunal which is to adjudicate disputes is a specialized forum-selection clause "that posits not only the situs of the suit but also the procedure to be used in resolving the dispute."[37] The Court concluded by stating that not all disputes must be resolved under American laws in a world of international trade and commerce.

National Labor Relations Board

Windward Shipping (London) Ltd. v. American Radio Association, AFL-CIO, 415 U.S. 104 (1974).

The owners of two foreign vessels,[38] composed entirely of foreign crewmen, sought injunctive relief in the Texas courts to prevent the picketing of their ships by several unions.[39] The trial court denied relief,

34. 407 U.S. 1 (1973).

35. *Id.* at 15.

36. *Id.* at 13-14.

37. 417 U.S. at 519 (footnote omitted). The Court also stated that under some circumstances, arbitration designated to take place at a specified situs may also be viewed as selecting the law of that situs to apply to the transaction in question.

38. Both ships were owned by Liberians and registered in Liberia, the *Northwind* by Westwind Africa Line Ltd., and the *Theomana* by the SPS Bulkcarriers Corporation and managed by Windward Shipping (London) Ltd., a British corporation.

39. Four picketers were assigned to each vessel carrying the following signs:

Attention to the Public the wages and benefits paid seamen aboard the vessels THEOMANA (NORTHWIND) are substandard to those of American seamen. This results in extreme damage to our wage standards and loss to our jobs.

finding that the activities "affected commerce" under the National Labor Relations Act,[40] and therefore were within the jurisdiction of the National Labor Relations Board and not that of the Texas courts.[41] The Texas Court of Civil Appeals affirmed,[42] and the plaintiff appealed.

The Supreme Court decided that the unions' activities, which were solely designed to force the foreign vessels to raise their operating costs to levels comparable to U.S. shippers, were not "affecting commerce" under the Act, and that the Act did not prohibit the Texas courts from entertaining an injunction suit. The picketing activities, according to the Court, did not involve an intrusion in the foreign vessels' affairs. The pickets were not engaged in a dispute as to unionization complaining that non-unionized American labor should be hired. Nor were the unions protesting wages paid to American workers. The Court noted that these activities would "affect commerce," and that Congress, when it used the words "in commerce" in the Labor Management Relations Act of 1947 (LMRA), did not desire that the Act should eliminate the principles of comity and accommodation in international maritime trade.[43]

In concerning itself with the situation of foreign vessels, the Court stated:

> A decision [by foreign owners] to boycott American ports in order to avoid the difficulties induced by the picketing would be detrimental not only to the private balance sheets of the foreign shipowners but to the citizenry of a country as dependent on goods carried in foreign bottoms as is ours.[44]

Moreover, the Court warned that the respondents' picketing might in-

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Please do not patronize this vessel. Help the American seamen. We have no dispute with any other vessel on this site.

40. National Labor Relations Act, § 2(6), (7), 29 U.S.C. §§ 152(6), (7) (1970) provides:

> (6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.
>
> (7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

41. The trial court found that the conduct met the test of San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

42. 482 S.W.2d 675 (Tex. Civ. App. 1972).

43. 415 U.S. at 112-13. *See* Lauritzen v. Larson, 345 U.S. 571 (1953).

44. 415 U.S. at 114.

duce retaliatory action against the U.S. vessels in foreign ports.[45]

In arriving at its decision the Court distinguished *Benz v. Campania Naviera Hidalgo*[46] and *International Longshoremen's Local 1416 v. Ariadne Shipping Co.*[47] The issue in *Benz* was whether the LMRA precluded a diversity suit for damages brought in a district court by foreign shipowners against several picketing American unions who supported striking foreign crews employed by foreign owners. The Court decided that the LMRA did not pre-empt the shipowners' action and that the Act was not intended to govern disputes between foreign crews and owners, domestic labor law should not become involved in foreign trade absent a congressional mandate allowing such an intrusion.[48]

In the *Ariadne* decision, the Court noted that only the picketing of foreign ships in protest of substandard wages paid by foreign owners to non-union American longshoremen was "in 'commerce' within the meaning of § 2(6), and thus might have been subject to the regulatory power of the National Labor Relations Board," since the dispute "centered on wages to be paid American residents."[49]

Therefore, the Court in *Windward Shipping* stated that this case falls under the *Benz* holding rather than *Ariadne*[50] and that the respondents' activities cannot force the foreign vessels to raise their operating costs to American shippers' levels since this would have a detrimental effect on the foreign vessels' maritime operations.

CONSTITUTIONAL LAW

Banking

California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974).

Several California banks, depositors, the bankers' association, and the American Civil Liberties Union (A.C.L.U.) brought an action to enjoin the Secretary of the Treasury and heads of other federal agencies from enforcing the regulations of the Bank Secrecy Act of 1970.[51] Congress passed this Act to ensure the availability of foreign and domestic bank records of customers thought to be violating criminal, tax, and other regulatory laws. Title I of the Act requires financial institutions to maintain records of their customers' identities, to make microfilm copies of checks and similar instruments and to keep records of certain

45. *Id.*

46. 353 U.S. 138 (1957).

47. 397 U.S. 195 (1970).

48. *See* Incres Steamship Co. v. International Maritime Workers Union, 372 U.S. 24 (1963); McCullock v. Sociedad Nacional, 372 U.S. 10 (1963).

49. 397 U.S. at 199-200.

50. 415 U.S. at 115.

51. *See* 12 U.S.C.A. § 1829b (Supp. 1975) and 31 U.S.C.A. §§ 1051-1122 (Supp. 1975).

other items,[52] while Title II of the Act requires the reporting to the Government of certain foreign and domestic transactions.[53] The three-judge district court upheld the reporting and recordkeeping provisions of the Act but concluded that the domestic reporting provision was invalid on its face and under the fourth amendment and enjoined its enforcement.[54]

On appeal, the Supreme Court held that the Secretary's regulations requiring recordkeeping did not deprive banks of due process. The plaintiffs' claims must be weighed against the purpose of the Act which was to aid the Government in preventing organized crime, to establish an equitable administration of taxes, and to assist the enforcement of other regulatory laws.

According to the Court the maintenance of records by the banks, as compelled by the regulations, did not constitute a seizure. The keeping of records, the Court noted, is standard practice for many banks and the costs are not unreasonable. No violation of the due process clause of the seventh amendment was found, since the Government had not sought disclosure of the bankers association membership or contributors. Moreover, the deposition rights were deemed protected, and there was no violation of the fifth amendment, since the requisition of records can only be accomplished through existing legal process.

The plaintiffs also raised a fourth amendment challenge to the foreign reporting requirements.[55] The plaintiffs contended that Congress, in exercising its plenary authority to regulate foreign commerce, had delegated significant portions of this regulatory power to the Executive. When both the Congress and the Secretary of the Treasury exercise their authority to require reporting of previously described foreign financial transactions, plaintiffs' rights were abridged. The Court determined that since a statute requiring the filing and subsequent publication of a corporate tax return has been upheld against fourth amendment challenges,[56] the reporting requirements under the Act are not per se violations of the fourth amendment. The Court emphasized the nation's 60 year history of self-assessment of individual and corporate income taxes and the importance of the self-regulatory aspects of that system. The reporting requirements of the Act and the settled practice of the tax collection process were deemed similar.

Boyd v. United States[57] was cited by the Court as holding that the fourth amendment does not prohibit all requirements that information

52. 12 U.S.C.A. §§ 1829b(c), (d) (Supp. 1975).
53. 31 U.S.C.A. §§ 1051-1122 (Supp. 1975).
54. 347 F. Supp. 1242 (N.D. Cal. 1972).
55. 416 U.S. at 59.
56. Flint v. Stone Tracy Co., 220 U.S. 107, 174-76 (1911).
57. 116 U.S. 616 (1886).

be made available to the Government:

> [T]he supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures.[58]

The Court concluded by emphasizing that the Secretary's regulations did not authorize indiscriminate rummaging among the records of the plaintiffs; foreign financial reports required by the regulations must include information as to a limited group of financial transactions in foreign commerce and are reasonably related to the statutory purpose of assisting the enforcement of U.S. laws. Therefore, the plenary authority of Congress over foreign commerce is not open to dispute. Congress is not limited to any one approach in effectuating its concern that negotiable instruments moving in commerce are aiding a criminal enterprise.[59]

Foreign Judgments

British Midland Airways Ltd. v. International Travel, Inc., 497 F.2d 869 (9th Cir. 1974).

An action was brought by a British corporation to enforce a judgment obtained against an American corporation in the High Court of Justice in England.

The appellee, British Midland Airways (BMA) was a corporation organized under the laws of the United Kingdom, and the appellant, International Travel, Inc., was incorporated in Washington. The parties had entered into a contract regarding charter flights from the United States and Canada to England. The contract contained a clause which stated that the parties agreed to be governed by the laws of England and to submit any dispute arising from the contract to the High Court of Justice in England. Subsequent to the signing of the contract, a dispute occurred and BMA initiated an action in the British courts against International Travel for breach of contract.

Pursuant to a judgment for BMA, the plaintiff brought an action in U.S. district court to enforce the decision. The district court found the British judgment to be valid and enforceable. On appeal the defendant based its opposition to the judgment for BMA on principles of comity. It contended that the British courts denied due process by requiring that there be a deposit as a prerequisite to defending the lawsuit and holding International Travel in default for failing to comply with

58. *Id.* at 623-24.
59. 416 U.S. at 46.

that order, and by not recording the proceeding and not allowing proof of damages to be submitted.

In affirming the judgment for the plaintiff the court noted that it was "unnecessary to decide BMA's contention that any foreign judgment is conclusive under Washington law unless the foreign court exceeded its jurisdiction."[60] Moreover, the court stated that U.S. courts have inherited major portions of judicial procedure and tradition from Britain, and that the Queen's Bench should not be considered a "kangaroo court." It was held that the British court afforded the defendant a sufficient opportunity to present affidavits and argue its case, and that International Travel did not pursue the matter on appeal.[61] The court also stressed that the defendant agreed to be bound by British law and that a U.S. court should not disturb such a choice.

Therefore, the court echoed the holding by the Supreme Court in *Hilton v. Guyot*,[62] that it has been long established that unless the judgments of a foreign country are the result of outrageous departures from civilized notions of jurisprudence, comity should not be refused.

Import-Export Clause

Kosydar v. National Cash Register Co., 417 U.S. 62 (1974).

In an action by the Ohio State Tax Commissioner to recover unpaid *ad valorem* personal property taxes from the National Cash Register Company, the defendant argued that the taxes were improperly assessed against goods which were immune from local taxation under the import-export clause of the Constitution.[63] The items in controversy were certain machines manufactured by the defendant to the specifications of foreign buyers, and stored in an Ohio warehouse awaiting shipment. As designed, the items were not suited for use inside the United States.

The Ohio State Board of Tax Appeals upheld the levy; the defen-

60. 497 F.2d at 871 (footnote omitted). The Court cited Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972) which held that English procedure comports with American standards of due process. In *Somportex*, the plaintiff brought an action to enforce a default judgment obtained in England. The U.S. District Court of Pennsylvania entered summary judgment for the plaintiff and the defendant appealed. Since the British court's judgment, and not the underlying contract upon which suit had been brought in England, was at issue, the court dismissed the complaint affirming the British court's discretion.

61. 497 F.2d at 871.

62. 159 U.S. 113, 205 (1895).

63. The Import-Export Clause of the Constitution, art. 1, § 10, cl. 2, provides:
No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's Inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States, and all such Laws shall be subject to the Revision and Controul of the Congress.

dant appealed and the Supreme Court of Ohio reversed.[64] The U.S. Supreme Court granted continuance.

In its decision the Supreme Court of Ohio relied on the evidence submitted to find that, since the class of items in question were unique in design, unsalable in the United States, and had always been exported and never returned, a "certainty of export" existed in respect to the specific items in controversy. Because of that certainty, the Ohio court decided that the question of whether or not the machines had begun their journey to a foreign country was irrelevant.[65]

The Supreme Court, in an opinion delivered by Justice Stewart, determined that the Supreme Court of Ohio had misconstrued the purpose and thrust of the import-export clause. The Court relied on *Coe v. Errol*,[66] the first case to deal with this issue. The Court reaffirmed that the intent of the owner of the goods had no relevance to the key question of when "State jurisdiction over the commodities of commerce begins and ends."[67] *Coe* established that a state's jurisdiction over goods continues "*until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey.*"[68]

Since *Coe*, the question before the courts has been the factual one of determing "whether a sufficient commencement of the process of exportation has occurred so as to immunize the article at issue from state taxation."[69] In *Empresa Siderurgica v. County of Merced*,[70] a cement plant had been purchased by a Colombian company and was being dismantled for shipment to Colombia. After 12 percent of the plant had been shipped, Merced County levied a tax on the remaining 88 percent, some of which was crated and ready for shipment. The Supreme Court upheld the tax, deciding that the 88 percent of the plant remaining in Merced County had not yet begun the process of exportation.

Comparing the present case to *Empresa*, Justice Stewart stated that: "Title and possession were in NCR, payment had not yet been made by the putative purchasers, no export license had issued, and the machines were in the complete control of the respondent."[71] Thus, it cannot be said that, in light of *Empresa* and *Coe*, the machines had become exports; they were still subject to state taxation.

64. National Cash Register Co. v. Kosydar, 35 Ohio St. 2d 166, 298 N.E.2d 559 (1973).
65. *Id.* at 168, 298 N.E.2d at 562.
66. 116 U.S. 517 (1886).
67. *Id.* at 526.
68. *Id.* at 527 (emphasis not in original).
69. 417 U.S. at 67.
70. 337 U.S. 154 (1949).
71. 417 U.S. at 69.

Trust Territories

Porter v. United States, 496 F.2d 583 (Ct. Cl. 1974).

In an action by 16 named shareholders of a sea transportation company against the United States, plaintiffs sought to recover damages for an alleged breach of contract, and a taking of property without due process of law, by officials serving as administrators for the United States Pacific Island Trust Territory. The defendant moved for summary judgment, arguing that the Court of Claims lacked jurisdiction to decide the issue.

In the Court of Claims' general jurisdictional statute, Congress waived the immunity of the United States to claims based upon express or implied contracts.[72] At issue here is whether the ". . . Trust Territory government was an agency or instrumentality of the United States acting within the scope of its authority in entering into the disputed agreement and thereby binding defendant as a principal to it."[73]

The United States became the administering authority over the Pacific Islands Trust Territory under an agreement between the United Nations and the United States. The agreement was ratified by the Security Council on April 2, 1947, and approved by a joint resolution of Congress on July 18, 1947.[74] The United States has asserted that it did not obtain sovereignty over the area under this agreement.[75] This position has been accepted by the courts in a series of cases which held that the Trust Territory is either a "foreign country" or an entity which is not a "federal agency."[76]

In *Best v. United States*,[77] the court refused to find a contract negotiated by the U.S. Army in occupied Germany binding on the United States. The court held that the U.S. Army was an agent of the Allied High Commission—an international entity—and not an agent of the United States.[78] In the present case, the Court of Claims found the situation to be analogous to *Best* and determined that officials acting as administrators of the Trust Territory were not agents of the United States. Thus, no jurisdiction existed for the breach of contract claim.

The Court of Claims dismissed the plaintiff's argument of an unconstitutional taking of property because the plaintiffs had failed to

72. 28 U.S.C. § 1491 (Supp. II 1972).

73. 496 F.2d at 587.

74. [1947] 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189.

75. 16 DEP'T STATE BULL. 416, 417 (1947).

76. People of Saipan v. Department of the Interior, 356 F. Supp. 645, 648 (D. Haw. 1973); Callas v. United States, 253 F.2d 838, 841-42 (2d Cir. 1958); Brunell v. United States, 77 F. Supp. 68, 72 (S.D.N.Y. 1948).

77. 292 F.2d 274, 154 Ct. Cl. 827 (1961).

78. Fleming v. United States, 352 F.2d 533, 173 Ct. Cl. 426 (1965); Seery v. United States, 127 F. Supp. 601, 130 Ct. Cl. 481 (1955); Turney v. United States, 115 F. Supp. 457, 126 Ct. Cl. 202 (1953).

demonstrate that the United States carried out the alleged taking of property.

CRIMINAL LAW

Contempt

United States v. Lansky, 496 F.2d 1063 (5th Cir. 1974).

A federal grand jury in Miami was investigating concealment and distribution of income of a Las Vegas hotel in connection with possible violations of federal income tax laws. Defendant Lansky, an American citizen residing in Israel, was subpoenaed to return to the United States and testify because the grand jury determined that his testimony was necessary to its investigation. The subpoena was issued under the Walsh Act[79] which governs the issuance of a subpoena on an American national who is in a foreign country. The defendant did not appear at the designated time and he was subsequently indicted for criminal contempt under a general contempt statute,[80] rather than under the specific enforcement section of the Walsh Act,[81] because he "did knowingly, wilfully, and contumaciously disobey and resist said lawful subpoena and order by refusing to appear before said Grand Jury . . . ."[82] Defendant was later expelled from Israel and arrested in the United States for his contempt. A jury returned a verdict of guilty and defendant appealed.

Defendant argued that the trial court erred in denying his motion for acquittal, and that the Walsh Act provided for the exclusive procedure and penalty for failure to comply with a subpoena issued under it. The court of appeals reversed the district court's conviction.

The court of appeals first upheld the issuance of the subpoena as proper. The Walsh Act had been passed by Congress in 1926 in an attempt to secure the return to the United States of persons involved in the Teapot Dome scandal. The constitutionality of the Act was upheld by the Supreme Court in *Blackmer v. United States.*[83] The power of Congress to provide, legislatively, for the service of subpoenas on American citizens outside the United States derived from the fact that "the United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal."[84]

The court of appeals then set out the test for considering the defen-

79. 28 U.S.C. § 1783 (1970).
80. 18 U.S.C. § 401 (1970).
81. 28 U.S.C. § 1784 (1970).
82. 496 F.2d at 1067.
83. 284 U.S. 421 (1932).
84. *Id.* at 437.

dant's motion for acquittal: whether there was substantial evidence upon which a jury might reasonably base a finding that the accused was guilty beyond a reasonable doubt.[85] The court concluded that the Government's case against Lansky failed for lack of sufficient evidence to establish guilt beyond a reasonable doubt. Based on his familiarity with the defendant's physical condition, Lansky's doctor in Israel had stated that it was his medical opinion that it would be dangerous to his health for the defendant to make the trip to the United States. The Government's expert witness, also a doctor, rebutted the testimony of the defendant's doctor to the extent that more tests should have been taken by the Israeli doctor before announcing his diagnosis. But he conceded that a doctor with similar experience, background, and tests might have given the same advice. Therefore, the Government did not prove beyond a reasonable doubt that defendant was guilty of wilful and contumacious conduct sufficient to justify a verdict of guilty of contempt. When the Government requested on March 9, 1971, that the court fix March 11 as the return date of the subpoena, it made compliance by the defendant virtually impossible. Furthermore, it failed to make out a case of fraud and collusion between the defendant and his doctor. The court concluded that the motion for acquittal should have been granted.

DIPLOMATIC AND CONSULAR OFFICERS

Consular Privileges

United States v. Wilburn, 497 F.2d 946 (5th Cir. 1974).

The defendants, clerk of a county district court and county sheriff, issued and executed a subpoena which summoned the Mexican Vice-Consul to testify in a case at trial and to bring with her an application by one of the parties to the action for an ordinary tourist card to visit Mexico. The record did not disclose at whose instance the present action for a preliminary injunction was filed, but the District Court for the Southern District of Texas immediately entered a temporary restraining order and, after a hearing, entered a preliminary injunction prohibiting the defendants from issuing any process or subpoenas to the Mexican consulate.

On appeal the United States asserted that Articles 28 through 35 of the Vienna Convention on Consular Relations[86] provide for complete immunity for consular officials, records, and premises from seizure, subpoena, or arrest under state process.[87] The defendants argued that in

85. Blachly v. United States, 380 F.2d 665, 675 (5th Cir. 1967).

86. [1970] 21 U.S.T. 77, T.I.A.S. No. 6820. The Vienna Convention was ratified by the Republic of Mexico and the United States prior to the institution of the instant action.

87. Article 31 specifies that authorities of the host state shall not enter that part of the consular premises which is used exclusively for the work of the consular post without

these circumstances whatever immunity may exist is specifically qualified under Article 44 of the Convention, which provides that although members of a consular post may be called upon to attend as witnesses in the course of judicial or administrative proceedings, the members are under no obligation to give evidence connected with the exercise of their functions.

The court of appeals reversed the district court and remanded with directions to vacate the preliminary injunctive order. The district court had failed to give consideration to article 44, since under it the Vice-Consul was eligible to be called upon to attend as a witness, but would have had the right to elect whether to testify or produce the requested documents. The issuance of the subpoena was held lawful; it was the province of the Vice-Consul, and not the district court, to determine whether the application sought by the subpoena was a document relating to the exercise of consular functions.

INTERNATIONAL LAW

Historic Bays

United States v. State of Alaska, 497 F.2d 1155 (9th Cir. 1974).

The United States sued the State of Alaska to quiet title to the lower part of Cook Inlet, located on the Alaska coast, and to enjoin Alaska from offering oil and gas leases for sale in the area. The United States did not contest Alaska's right to the upper part of Cook Inlet. The tract in controversy is located more than three geographic miles seaward of the low-water line, the closing lines of rivers and small bays within Cook Inlet, and the 24 mile fallback line drawn across the narrows of Kalgin Island. The United States argued that the Alaska coastline should be at the 24 mile fallback line at Kalgin Island. The State of Alaska argued that the coastline should be located at the 47 mile opening of Cook Inlet. The district court found in favor of Alaska and the United States appealed.[88] The question before the court of appeals was whether Cook Inlet was a seabed over which there were "inland waters" as denominated in, but not defined by, the Submerged Lands Act of 1953,[89] entitling Alaska to the natural resources of gas and oil.

In *United States v. California*,[90] the Supreme Court adopted the definition of inland waters as contained in the Convention on the Territorial Sea and the Contiguous Zone.[91] However Cook Inlet fails to meet

consent. Article 33 provides that the consular archives shall be inviolable at all times wherever located.

88. 352 F. Supp. 815 (D. Alas. 1972).

89. 43 U.S.C. §§ 1301-43 (1970).

90. 381 U.S. 139 (1965).

91. [1964] 15 U.S.T. 1606, T.I.A.S. No. 5639.

the requirement of having no more than 24 miles between the natural entrance points of the bay, as prescribed by Article 7 of the Convention.[92] Nevertheless, in *United States v. Louisiana*,[93] the Supreme Court also recognized that whether on not a body of water is inland may depend upon historical as well as geographical factors. As to historic bays, the court of appeals quoted from the Supreme Court's *California* decision that it is generally agreed that historic title can be claimed only when: "[A] coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations."[94] As to the applicability of international law principles to a domestic controversy, the Supreme Court stated in *United States v. Louisiana* that it would be inequitable not to treat a state's claim to historic waters as if it were being made by the national sovereign and opposed by another nation.[95]

In *Louisiana* the Supreme Court further noted with apparent ap-

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92. Article 7:

1. This article relates only to bays the coasts of which belong to a single State.

2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in article 4 is applied.

93. 394 U.S. 11 (1969).

94. 381 U.S. at 172.

95. 394 U.S. at 77-78.

The Convention was, of course, designed with an eye to affairs between nations rather than domestic disputes. But, as we suggested in *United States v. California*, it would be inequitable in adapting the principles of international law to the resolution of a domestic controversy, to permit the National Government to distort those principles, in the name of its power over foreign relations

proval a recent United Nations study recommended by the International Law Commission.[96] The Commission concluded that there were at least three factors which must be considered in determining whether a state has acquired historic title to a maritime area: (1) the exercise of authority over the area by the state claiming the historic right; (2) the continuity of this exercise of authority; and (3) the attitude of foreign states. In light of the above decisions, the court of appeals concluded that the district court had correctly adopted this three-pronged test.

Since the district court correctly applied the law, the only remaining question for review was whether the facts found by the trial court were "clearly erroneous."[97] The United States succeeded in demonstrating that the evidence was in conflict and that the question of determining the ultimate inferences to be drawn was close. But it failed to show the findings to be clearly erroneous. Therefore, the court of appeals affirmed for the State of Alaska.

TREATIES

Taxation

Compagnie Financiere de Suez v. United States, 492 F.2d 798 (Ct. Cl. 1974).

The Suez Canal Company sought a refund of taxes withheld at the source of interest and dividends for the period 1952 through 1956. The Suez Co. alleged that it was a French, not Egyptian corporation, and was entitled to the benefit of the preferential 15 percent maximum withholding rate under Article 6A of the Income Tax Convention[98] between the United States and France. The problem before the court was to determine whether or not the Suez Co. was in fact a French corporation, since it was formed pursuant to the permission of the Viceroy of Egypt, had its head offices in Egypt, but had its administrative office in France.

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and external affairs, by denying any effect to past events. The only fair way to apply the Convention's recognition of historic bays to this case, then, is to treat the claim of the historic waters as if it were being made by the national sovereign and opposed by another nation. To the extent that the United States could rely on the state activities advancing such a claim, they are relevant to the determination of the issue in this case.

96. *Id.* at 23-24 n.27. The report was entitled Juridical Regime of Historic Waters, Including Historic Bays, [1962] 2 Y.B. INT'L L. COMM'N 1, 13, U.N. Doc. A/CN. 4/143 (1962).

97. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

98. The Income Tax Convention between the United States and France was signed on July 25, 1939, and October 18, 1946, as modified and supplemented by the Supplementary Convention signed on June 22, 1956. Article 6A was a product of the 1956 Convention made retroactive to January 1, 1952.

The court found that the Suez Co. had been deemed to be a French corporation for a particular purpose primarily of interest to France, and therefore held that as a matter of law the corporation was not entitled to recover. The court based its findings on the facts that Egypt had demonstrated its sovereign power and authority over the corporation by creating it, approving its articles of incorporation, and appointing its first chief executive officer. Therefore, the court concluded that the state of incorporation was Egypt. Furthermore, the location of corporate administrative offices in a particular jurisdiction was not the same as being created or organized within that jurisdiction for purposes of establishing nationality of the corporation. France at most acquiesced in the company's granted powers by allowing the company to administer its business from within French territory.

Finally, the court determined that the purpose and intention of the Tax Convention between the United States and France was to avoid double taxation so as to remove an obstacle to the flow of trade and investment between the two countries. However, for the years in question, the Suez Co. did not have a "fiscal domicile" or "residence" in France for French income tax purposes. The company was never actually subject to or subjected to tax in France, so there was no possibility of double taxation. Therefore, since there was no double taxation obstacle to trade in the case of the Suez Co., there should be no tax benefit as provided for in the Convention. The court quoted in support a court of appeals decision which held that a treaty, "being a pact between two sovereigns, must be construed broadly to accomplish the intent of the contracting parties."[99] Furthermore, the court quoted the Supreme Court's decision of *Maximov v. United States*: "To say that we should give a broad and efficacious scope to a treaty does not mean that we must sweep within the Convention what are legally and traditionally recognized to be . . . taxpayers not clearly within its protections . . . ."[100] And again, "We cannot . . . read the treaty to accord unintended benefits inconsistent with its words and not compellingly indicated by its implications."[101]

In addition, the court held that an adverse determination such as finding the company not to be French would not violate the rule of comity where the only tax authority involved was that of the United States, since France had disclaimed its right to tax the company's income.

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99. *Citing* American Trust Co. v. Smyth, 247 F.2d 149, 152 (9th Cir. 1957).
100. 373 U.S. 49, 56 (1963).
101. *Id.* at 55.

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