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The Proposed Legislation on the Jurisdictional Immunities of Foreign States

In January, 1973, at the instance of the Department of State, bills were introduced in both houses of Congress "to define the circumstances in which foreign states are immune from the jurisdiction of the United States Courts and in which execution may not be levied on their assets, and for other purposes."[1] Senator Hruska, in introducing the legislation, made the following remarks about the first portion of the bill:

> At present the determination of whether a foreign state which is sued in a Court of the United States is entitled to immunity is largely governed by suggestions of the Department of State communicated to the courts through the Department of Justice. . . .
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> Legal scholars have long urged that sovereign immunity issues should be decided by the courts. The new bill would accomplish this as well as further particularize the restrictive theory of immunity. . . .[2]

In addition to the purpose of taking the Department of State out of the business of making suggestions for sovereign immunity, the bill contains provisions concerning the method of effecting service on foreign sovereigns when suit is brought against them in the courts of the United States. Those procedures have been worked out carefully by experts in the process of serving foreign defendants, and there is little controversy concerning that aspect of the legislation.[3]

There is considerably more difference of opinion concerning other portions of the bill. There are differences, for example, concerning the extent to which the legislation should impose, by statute, the "restrictive" theory of sovereign

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[1]S. 566 and H.R. 3493, 93d Cong., 1st Sess. (1973), 119 CONG. REC. S 1298 (daily ed. Jan. 26, 1973); 12 I.L.M. 118 (1973).

[2]119 CONG. REC. S 1298-S 1299 (daily ed. Jan. 26, 1973); see also Harvey M. Sklaver, *Sovereign Immunity in the United States: An Analysis of S. 677,* INT'L LAW., Vol. 8, No. 2, p. 408, July 1974.

[3]Some question has been raised, however, about the compatibility of § 1608 of the bill, authorizing service of process by the mailing of notification to the ambassador of the defendant foreign state, with Articles 29 and 31 of the Vienna Convention on Diplomatic Relations of 1961.

immunity. A note in the *American Journal of International Law*[4] has expressed the view that it would be unfortunate if, as provided in the bill as introduced, public debts of foreign nations were excepted from the "restrictive" theory, letting those debts continue to be immune from action in U.S. courts. There has also been considerable debate about the need and scope of the proposed withdrawal of power in the Secretary of State to make suggestions. My own opposition to the proposal that the Secretary of State defer to the judiciary in sovereign immunity in cases, instead of the reverse, was expressed a decade ago.[5]

There have also been differences of view as to the precise function of the proposed legislation, embodied in S. 566 and H. R. 3493. There have been discussions over whether the proposed bill is intended to affect jurisdiction over the person or over the subject matter, and whether it is some kind of "long arm" statute that might have repercussions for the act of state doctrine.

I am convinced that the proposed legislation is solely aimed at defining the circumstances when a plaintiff can effect personal service on a foreign government that will be effective to summon that government before the courts of the United States. It seems to me that it has nothing to do with jurisdiction over the subject matter or with the act of state doctrine, which is itself an aspect of subject-matter jurisdiction.

We have learned a black letter rule from Justice Holmes that jurisdiction over the person depends on "power." Originally, this meant the physical power of the court to reach the defendant, which could be exercised only within the geographical area in which the court exercised its jurisdiction. The concept of power has been refined over the years, so that a constructive reach by the court is sufficient. Today, we know that, in addition to actual presence within the geographical area, the doing of business or the carrying on of activities, or doing things in or sending things to the geographical area, also satisfies the constitutional requirements outlined in the *International Shoe*[6] and other cases.

Regardless of the basis for the power to exercise personal jurisdiction, there must be the element of notice to the defendant. The notice must be sufficient to enable the defendant to present his view of the case in court. This is even true when personal jurisdiction is obtained by attachment of the defendant's property within the jurisdiction, which has long been recognized in the United States as the equivalent of service on the defendant in person.

When a foreign government is the defendant, there is no difficulty in

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[4]Delaume, *Public Debt and Sovereign Immunity: Some Considerations Pertinent to S. 566*, 67 A.J.I.L. 745 (1973).

[5]*Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?*, 48 CORNELL L. Q. 461 (1963).

[6]International Shoe Co. v. Washington, 326 U.S. 310 (1945).

identifying the contact with the United States that permits service of process, provided that the requisite notice is given. The activities of the embassy or of the consulate of the foreign government are clearly sufficient to support the exercise of the power of the courts. In this kind of situation, there is no need for a "long arm" provision that treats activity outside the United States, with ramifications or effects within the United States, as sufficient to support the exercise of personal jurisdiction.

When sovereign immunity is applicable to a defendant foreign government, the courts are, in effect, holding that the requisite contact with the United States does not exist. It is comparable with the action of a state in providing that service on an individual cannot be effective when it is done on Sunday, in a bedroom, or by the plaintiff himself. In those cases, the court dismisses the case on the ground that in personam jurisdiction cannot be obtained in that way. This, however, does not have any effect on the jurisdiction of the courts over the subject-matter of the case and there is no res judicata on the merits of the claim or available defenses. If the plaintiff effects service in another way or in another place where there is jurisdiction, the liability of the defendant continues. This is true of a defendant foreign government as well as any other defendant. When sovereign immunity protects it from suit in the courts in the United States, the claim can, for example, be espoused by the Department of State and the plaintiff's rights protected through the mechanism of a diplomatic claim.

Over twenty years ago, when the Tate Letter[7] was issued, the Department of State was giving notice that thereafter foreign governments could not expect to be immune from suit in the United States in connection with commercial activities. S. 566 is intended to refine this doctrine further. For example, it provides that immunity is not to be allowed when the action against a foreign government is "based upon a commercial activity carried on in the United States."[8] Proponents of the bill have advised that this expression is to be defined as meaning "commercial activity of such state having substantial contacts with the United States." This presumably means that, where the commercial activity does *not* have substantial contacts within the United States, sovereign immunity *will* prevent suit against the foreign government in our courts. In other words, the courts will be expected to hold that personal service, through notice given to the ambassador or otherwise, will not be effective to give jurisdiction over the person of the sovereign defendant.

It seems to me that the use of the expression, "substantial contacts in the United States," has given rise to some of the confusion over the nature of the

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[7]Letter of the Acting Legal Adviser of the Department of State, May 19, 1952, 26 DEP'T STATE BULL. 984 (1952).

[8]S. 566 and H.R. 3493, § 1605(2) and draft (for discussion purposes) of proposed paragraph (c) of § 1603.

proposed legislation. That expression is also used in connection with subject-matter jurisdiction, so that activities outside the United States with no "substantial contacts" or effects in the United States do not call into play the "territorial jurisdiction" of the United States. In other words, that kind of situation involves cases like *American Banana Company v. United Fruit Company,*[9] rather than *Pennoyer v. Neff*[10] and its progeny. Subject only to the limitations of our own constitution, the United States and its courts can change the rules of personal jurisdiction involved in *Pennoyer v. Neff.* We cannot, however, without involving the other members of the community of nations, change the rules reflected in the *American Banana* case, and more widely recognized as the rule of the *Lotus* case.[11] The Department of State has always been able, subject to the demands of comity, to make changes in the area of personal jurisdiction over foreign governments in our courts, by means of the suggestion process or a "Tate letter." It cannot do the same with respect to any of the five familiar principles of jurisdiction defined by international law. S. 566 seeks to provide a new answer to the question of what branch of our government should make the decisions as to the demands of comity with friendly foreign governments.

The debate over the proposed legislation should be less concerned with questions of procedure and more over the issue of whether the courts or the Department of State will make decisions concerning those demands.

[9]213 U.S. 347 (1909).
[10]95 U.S. 714 (1877).
[11]Case of the S.S. "Lotus," [1927] P.C.I.J., ser. A, No. 10.