Alienage Jurisdiction Over Stateless Corporations: Revealing the Folly of *Matimak Trading Company v. Khalily**

I. INTRODUCTION

The United States of America will enter the new millennium as the business leader of the world, but for how long will it be able to maintain this position? If the final years of the twentieth century are an indication of things to come, it is apparent that geographical and political borders will become even more irrelevant to the scope of business transactions. The increase in the number of offshore corporations[1] doing business on an international scale is evidence that the world's business leaders will readily change their locale in order to increase profits. Increasingly popular offshore jurisdictions, such as the Bahamas, Bermuda, the British Virgin Islands, and the Cayman Islands, offer many business advantages to corporations that conduct their operations on an international scale.[2] The number of business transactions involving parties from the United States and these offshore corporations will

* J.D. 1999, University of San Diego School of Law; B.A., Flagler College, 1996. I would like to thank Professor Shaun Martin, University of San Diego School of Law, for his guidance. In addition, I would like to thank John Zinke for introducing me to the subject matter of this comment. Most of all, I would like to thank my family and friends, who have never failed to support me in my endeavors.

1. "Offshore corporations" refers to corporations located outside of the United States.

2. These jurisdictions have been incredibly popular because they serve a multitude of diverse corporate needs, including an absence of income, corporate or capital gains tax, political stability, minimal governmental interference, well-developed infrastructures and telecommunications systems, well-developed banking systems, educated work forces, and familiar legal systems and laws. *See* Harold I. Steinbach & Heath A. Grayson, *Taxing? Hardly: Locating a Business in a Tax-Free Jurisdiction*, 7 BUS. LAW TODAY 33, 33-34 (1997); *see also* David D. Beazer, *The Mystique of "Going Offshore,"* 9 UTAH B. J. 19 (1996).

continue to increase as the global economy grows. One unavoidable consequence of increased interaction between citizens of the United States and these foreign businesses will be an increase in legal disputes involving parties from foreign countries. Often, the foreign party may wish to have the dispute heard in the federal courts of the United States. If foreign parties find that they lack access to a federal forum, they may be less inclined to conduct business with the citizens of the United States. Alternatively, if a U.S. company discovers that it would not be able to enforce its legal rights against a foreign party in the federal courts, it may limit the scope of its international transactions to more stable, though less profitable, endeavors. Therefore, if the United States wishes to maintain its status as a leader in international business, it should consider removing any obstacles that deny foreign parties access to a federal forum.

Many disputes arising out of international transactions are contractual in nature and thus do not raise a federal question.[3] Therefore, foreign litigants who wish to be heard in the federal courts need to establish the presence of alienage jurisdiction. Alienage jurisdiction, an aspect of diversity jurisdiction,[4] is the original subject matter jurisdiction federal district courts have over controversies between United States citizens and foreign citizens or subjects.[5] A clear case involving alienage jurisdiction would be an action between a citizen of the United States and a citizen of Great Britain.[6] Although alienage jurisdiction is the basis for only a small percentage of the cases brought to federal court,[7] its importance has been recognized by legislators and commentators alike.[8]

---

3. *See* U.S. CONST. art. III, § 2; 28 U.S.C. §1331 (1997). The district courts have original jurisdiction over all civil actions arising under the Constitution, laws or treaties of the United States. *See id.*

4. Many commentators and practitioners fail to distinguish alienage jurisdiction as a separate concept from diversity jurisdiction. *See* 15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 102 app. 01 (3rd. ed. 1997) [hereinafter MOORE].

5. *See* U.S. CONST. art. III, § 2 ("The judicial power shall extend to... controversies... between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."); 28 U.S.C. § 1332(a)(2) (1997) ("The district courts shall have original jurisdiction of all civil actions... between... citizens of a State and citizens or subjects of a foreign state."). Although alienage jurisdiction also refers to the jurisdiction of the courts to hear disputes between United States citizens and foreign States, this Comment does not deal with that aspect of the law.

6. Either party may bring the cause of action for alienage jurisdiction to exist.

7. In the fiscal year ending in March 30, 1994, 6.5% of diversity cases included a foreign citizen or subject as a party. *See* Kevin R. Johnson, *Why Alienage Jurisdiction? Historic Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1, 4 n.19 (1996).

8. *See id.* at 5. Many supporters of limiting or eliminating diversity jurisdiction make an exception for alienage jurisdiction. *See id.*; *see also* THE AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL

As the number of foreign parties entering U.S. courts grows, the courts could easily get bogged down if they lack clear rules specifying which parties can enter the federal courts under alienage jurisdiction. Despite the apparently plain language of the Constitution and United States Code section 1332(a)(2), courts continue to question who can sue or be sued in federal court under alienage jurisdiction. A recent decision of the Court of Appeals for the Second Circuit reveals that there is still dispute as to the scope of alienage jurisdiction. In *Matimak Trading Co. v. Khalily*,[9] the Second Circuit held that a Hong Kong corporation could not bring suit against an American defendant in federal court under alienage jurisdiction.[10] The majority of the court opined that a Hong Kong corporation was not a foreign citizen or subject within the meaning of the Constitution and section 1332(a)(2) because the Executive branch of the United States government had not recognized Hong Kong as an independent and sovereign entity by the time the action was initiated.[11] The majority based its holding on cases which have used a strict constructionist view that alienage jurisdiction exists only over citizens or subjects of foreign states which have been recognized by the United States as sovereign entities.[12]

A "stateless" individual is someone with no official residence or citizenship and no allegiance to any particular nation.[13] Stateless parties cannot sue or be sued in the federal courts under alienage jurisdiction because they are unable to clearly demonstrate that diversity exists.[14] According to *Matimak*, corporations that are citizens or subjects of foreign states that have not been recognized by the United States are

---

COURTS 108 (1969) (proposing many restrictions on diversity jurisdiction, but making an exception for jurisdiction over actions involving foreign parties because they need to be assured access to the best procedures the federal government can supply and the dignity and prestige of the United States).

9. 118 F.3d 76 (2d Cir. 1997).

10. *See id.* at 78.

11. *See id.*

12. *See id.* at 79-82.

13. *See* Christine Biancheria, *Restoring the Right To Have Rights: Statelessness and Alienage Jurisdiction In Light of* Abu-Zeineh v. Federal Laboratories, Inc., 11 AM. U. J. INT'L L. & POL'Y 195, 196 n. 3 (1996). Statelessness has also been defined as "not having a nationality under the law of any state." Ellen H. Greiper, *Stateless Persons and Their Lack of Access to Judicial Forums*, 11 BROOK J. INT'L. L. 439, n.1 (1985) (citing P. WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 161 (1979)).

14. *See* Turner v. Bank of N. Am., 4 U.S. (4 Dall.) 8, 10 (1799) (holding the plaintiff must allege in his complaint that the defendant is a citizen of one State and the plaintiff is a citizen of some other State).

"stateless."[15] Under the laws of the United States, corporations can have dual citizenship.[16] A foreign corporation is a citizen of both the country under whose laws it was incorporated and the country where it has its principle place of business.[17] Thus, a corporation is stateless if it was incorporated in an unrecognized foreign state and its principle place of business is not in a recognized foreign state.[18] Hong Kong was Matimak Trading Company's principal place of business and state of incorporation.[19] The Second Circuit held that because Matimak Trading Company was a citizen of Hong Kong, which had not been recognized by the United States as an independent and sovereign state, it was a "stateless corporation."[20] The court concluded that Matimak Trading Company could not bring suit in the federal district court because federal courts lack alienage jurisdiction over stateless corporations.[21]

The *Matimak* decision is significant because it may affect whether many offshore corporations can enter the federal courts under alienage jurisdiction. When Matimak Trading Company initiated its action, Hong Kong was a British Crown Colony.[22] Hong Kong's status has changed since then, although Bermuda, the British Virgin Islands, and the Cayman Islands are still British Crown Colonies.[23] These colonies are home to a great number of offshore corporations that conduct a substantial amount of trade with the United States.[24] The *Matimak* decision raises the question whether these corporations have access to the federal courts under alienage jurisdiction. The decision could have a serious chilling effect on the amount of business these corporations conduct with parties from the United States in the future.

American courts have been asking whether alienage jurisdiction should encompass stateless corporations for less than fifty years.[25] Prior

---

15. *Matimak*, 118 F.3d at 82.
16. *See* 28 U.S.C. § 1332(c)(1) (1997).
17. *See id.*
18. The term "stateless corporation" has been used by at least one commentator to refer to "firms with over three billion dollars in annual sales with at least forty percent of those sales outside their home nation." Roy D. Voorhees et al., *Global Logistics and Stateless Corporations*, 59 TRANSP. PRAC. J. 144, 146 (1992). However, the vast majority of commentators and practitioners use the term "stateless corporation" in the same manner as this Comment.
19. *See Matimak*, 118 F.3d at 78.
20. *Id* at 78.
21. *See id.*
22. *See id.*
23. *See id.* at 80 n. 1 (Altimari dissenting). The other British Crown Colonies are St. Helena, the Falkland Islands and Gibraltar. *See id.* This Comment focuses on the colonies mentioned in the text because the United States conducts a great deal of trade with them, but the *Matimak* decision will likely affect all of the Crown Colonies.
24. *See infra* notes 307-12 and accompanying text.
25. *See* Murarka v. Bachrack Bros., 215 F.2d 547 (2d Cir. 1954). This was the

to the first World War, the concept of statelessness had never been discussed by American courts.[26] The Framers of the Constitution don't appear to have anticipated that someone could be stateless.[27] Congress granted the federal district courts alienage jurisdiction, but in doing so it used terminology similar to that used in the Constitution without explaining how the courts should treat stateless corporations.[28] Due to this lack of direction, the courts have had difficulty deciding how to interpret the grant of alienage jurisdiction.[29] Some courts have simply recognized that jurisdiction exists without analyzing whether the foreign state is recognized by the United States as a free and independent sovereign.[30] Other courts have required formal recognition of the foreign state by the executive branch of the United States before granting alienage jurisdiction.[31] Still other courts have taken a middle ground by looking for de facto recognition based on non-formal relations with the United States or policy considerations.[32]

The purpose of this Comment is to determine whether alienage jurisdiction should be extended to cover stateless corporations. In Part II, the Comment seeks to determine why alienage jurisdiction was written into the Constitution. The Comment explores the background surrounding the Constitutional Convention, the comments of the Framers which reveal their intentions, and the terminology finally used in the Constitution. Part III delineates the evolution of the statutory grant of alienage jurisdiction. Although there have not been many alterations to the relevant statutes, the changes reveal whether Congress intended to include stateless individuals and corporations within the

---

first time a court had to determine if a *corporation* was stateless. *See id.*

26. *See* Houghton Mifflin Co. v. Stackpole Sons, Inc., 104 F.2d 306, 309-10 (2d Cir. 1939) ("True the problem of statelessness has only become acute of late years, but it promises to become increasingly more difficult as time goes on."). The first people recognized as stateless appear to have been the refugees of World War I who were displaced from their war-torn nations. *See id.*

27. *See* Biancheria, *supra* note 13, at 206 (commenting that the Framers of the Constitution and the Drafters of the statutory grant of alienage jurisdiction thought that they had included all non-Americans).

28. *See* 28 U.S.C. § 1332(a)(2) (1997).

29. *See* discussion *infra* Parts IV and V.

30. *See* Timco Eng'g Inc. v. Rex & Co., 603 F. Supp. 925 (E.D. Pa. 1985); Netherlands Shipmortgage Corp. v. Madias, 717 F.2d 731 (2d Cir. 1983).

31. *See* Land Oberoesterreich v. Gude, 109 F.2d 635 (2d Cir. 1940); National Petrochemical Co. of Iran v. The M/T Stolt Sheaf, 860 F.2d 551 (2d Cir. 1988).

32. *See* Murarka v. Bachrack Bros., 215 F.2d 547 (2d Cir. 1954); Bank of Haw. v. Balos, 701 F. Supp. 744 (D. Haw. 1988).

grant of jurisdiction. In Part IV, the Comment will look at how the courts have distinguished between foreign states to determine whether their citizens or subjects should be granted alienage jurisdiction.

Part V addresses the decision of the Second Circuit in *Matimak*, and its potential effects on future jurisprudence. Part V will analyze the *Matimak* decision in light of the Constitutional, statutory, and judicial history of alienage jurisdiction. In Part VI, the Comment concludes that alienage jurisdiction should be given to all foreign corporations regardless of whether their place of incorporation has been recognized by the United States. In particular, the Supreme Court should take the next available opportunity to reverse the decision of the Second Circuit in *Matimak*.[33] Alternatively, Congress should amend 28 U.S.C. section 1332(a)(2) to prevent further misinterpretations by the Second Circuit and other courts.

II. THE CONSTITUTIONAL GRANT OF ALIENAGE JURISDICTION

Article Three, Section Two of the United States Constitution gives the federal judiciary jurisdiction to hear all controversies between citizens of the United States and foreign citizens or subjects.[34] In order to completely understand this grant of subject matter jurisdiction, we must examine the historical bases and justifications behind its creation.[35] Unfortunately, the Framers of the Constitution did not explain with great detail why they felt it was important to grant federal courts alienage jurisdiction.[36] Therefore, in order to gain insight into why the Framers granted the federal courts alienage jurisdiction, it is important to first look at the circumstances leading up to and surrounding the Constitutional Convention.[37]

The former colonies had been unified in their struggle to gain independence from Great Britain; however, when the war ended the states refused to submit to a strong federal government.[38] The Articles of Confederation failed to form a cohesive federal government that could govern the individual states in a manner beneficial to their combined interests.[39] The absence of federal control angered many British creditors who found themselves unable to enforce their claims in the

33. Matimak Trading Co. v. Khalily, 118 F.3d 76 (2d Cir. 1997).
34. *See* U.S. CONST. art. III, § 2.
35. *See* 15 MOORE, *supra* note 4, at § 102 app. 01.
36. *See* Johnson, *supra* note 7, at 3.
37. Once we have determined the state of mind of the Framers, their few comments concerning alienage jurisdiction will be clearer.
38. *See* Johnson, *supra* note 7, at 6-10.
39. *See id.*

state courts.[40]

Neither the British nor the American colonists complied with the provisions of the Treaty of Paris of 1783.[41] The British had neither paid for nor returned many of the slaves who joined the British during the war,[42] and continued to maintain nine frontier forts within United States' territory.[43] Meanwhile, the Americans also failed to comply with the provisions of the Treaty.[44] Section four of the Treaty assured British creditors that no lawful impediments would be placed on their recovery of private debts in the former colonies.[45] The commerce-oriented British considered this provision essential because many American farmers and businessmen had debts which had not been collected during the war.[46] However, despite section four, the British found themselves still unable to enforce their claims against Americans, who refused to acknowledge their obligations.[47] British creditors were furious when the state legislatures refused to repeal laws that kept these creditors from claiming their debts.[48] New York, Virginia, and other states continued to pass new laws which were contrary to the terms of the Treaty.[49] The state courts were also hostile to British creditors.[50] Almost half of the state

40. *See id*; *see also* Wythe Holt, *The Origins of Alienage Jurisdiction*, 14 OKLA. CITY U. L. REV. 547, 553-62 (1989).

41. *See* Holt, *supra* note 40, at 553.

42. *See id.* (commenting that it was common knowledge that a British commander refused to abide by the treaty because the British had encouraged the slaves to escape during the war, and he did not feel it would be right to return them to slavery).

43. *See id.* The forts were a constant reminder to the American states of the very real dangers of being dismembered or conquered. *See id.* at 553-54.

44. *See id.* at 554. The former colonists were still bitter after the seven and a half years of war, and lashed out at returning Loyalists, despite the terms of the Treaty which guaranteed a safe return so that they could get their estates in order. *See id.*

45. *See id.* at 554-55; *see also* Johnson, *supra* note 7, at 8.

46. *See* Holt, *supra* note 40, at 555. When the war began in 1775, American courts closed, and both British and American laws cut off all private commerce between the two opponents during the war, resulting in many debts not being paid. *See id.*

47. *See id.* The debtors had many reasons for not paying the British. Some were simply dishonest, and hoped to use their distance from Britain and the confusion after the war to avoid their debts. But many others believed that victory in the war for independence had extinguished all American debts to the British. Finally, among the Americans who acknowledged the validity of their debts and wished to pay, many lacked the wherewithal to do so. *See id.* at 557-59. To complicate matters further, during the war, every state legislature passed laws that restricted the power of British creditors to collect. *See id.* at 560.

48. *See id.* at 561.

49. *See id.* For instance, South Carolina enacted laws that postponed the payment of principle and interest on British debts into the future. *See id.*

50. *See id.* Not only did the American courts and juries enforce the hostile

courts went so far as to close their doors to the claims of British creditors.[51]

The Federalists and other commerce-oriented Americans were disturbed by this situation. These American leaders feared if the British had no way to protect their American investments, they would invest their money elsewhere.[52] Americans who relied on British capital to conduct their businesses recognized the need to offer creditors some way to protect investments in the United States.[53] The federal government created by the Articles of Confederation lacked the power to encourage or force state courts to treat foreign litigants as equals. In their search for a solution to this problem, many Americans considered granting foreigners access to a federal judiciary.[54]

In the spring of 1787, delegates met at the Constitutional Convention in Philadelphia "in Order to form a more perfect Union" and to "establish Justice."[55] Although the Framers made few statements concerning the need or scope of alienage jurisdiction, those comments that were recorded support its formation and reflect the Framers' intentions.[56] Alexander Contee Hanson of the Maryland State Convention explained that the general purpose in creating a federal judiciary with jurisdiction over disputes involving foreigners was to ensure the faithful execution of the national laws and to assure citizens, states, and foreigners that their disputes would be heard by an impartial judiciary.[57] Hanson's statement reflects the Framers' desire to provide foreigners with a forum free of the prejudices of the State courts.[58]

One of the main reasons for providing foreigners access to the less prejudicial federal courts was to avoid hostilities with other nations who may be affronted if their citizens are not treated fairly in American courts.[59] William Davie of North Carolina supported a federal judiciary

---

legislation, but they also refused to acknowledge British creditors' interest that had accrued during the war even if there was no applicable statute. *See id.*

51. *See id.* at 561-62.

52. *See* Johnson, *supra* note 7, at 8.

53. *See id.*

54. *See id*; *see also* Holt, *supra* note 40, at 562.

55. U.S. CONST. preamble. By stating that one purpose of forming a new government was to establish justice, the Framers revealed their belief that justice did not exist under the Articles of Confederation.

56. *See id.*; *see also infra* notes 57-68 and accompanying text.

57. *See* Johnson, *supra* note 7, at 11 n.55.

58. *See id.*

59. *See id.* at 11-12. In a letter to Charles Tillinghast, Timothy Pickering wrote:

> [T]here is a particular [and] very cogent reason for securing to *foreigners* a trial . . . in a *federal* court. With respect to *foreigners*, all of the states form but *one nation*. This *nation* is responsible for the conduct of all its members towards foreign nations, their citizens [and] subjects; and therefore ought to possess the power of doing justice to the latter. Without this power, a single

because it would help the United States avoid conflicts with other nations.[60] Alexander Hamilton agreed that the federal judiciary ought to have the authority to hear all cases "in which the State tribunals cannot be supposed to be impartial and unbiased."[61] In his famous *Federalist Papers*, Hamilton urged the formation of a federal judiciary which would provide an impartial forum to foreign parties.[62] Hamilton believed that alienage jurisdiction would help avoid hostilities with other nations.[63] James Wilson later expressed his approval of this basis for alienage jurisdiction because it provided Congress the ability to answer the accusations of foreign sovereigns who may question why their subjects were injured by state courts.[64]

---

state, or one of its citizens, might embroil the whole union in a foreign war.

Id. at 12 n.57 (quoting 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 204 (1983)).

60. *See* Johnson, *supra* note 7, at 12. Mr. Davie commented:

> If our courts of justice did not decide in favor of foreign citizens and subjects when they ought, it might involve the whole Union in a war. . . . [T]he denial of justice is one of the just causes of war. If these controversies were left to the decision of particular states, it would be in their power, at any time, to involve the continent in war. . . . It is certainly clear that where the peace of the Union is affected, the general judiciary ought to decide.

Id. at 12.

61. THE FEDERALIST NO. 80, at 434 (Alexander Hamilton) (E. H. Scott, ed., 1894).

62. *See id.* at 444. "State Judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws." *Id.* at 444.

63. *See id.* at 435-36. Hamilton wrote:

> [T]he peace of the *whole*, ought not to be left at the disposal of the *part*. The Union will undoubtedly be answerable to foreign Powers for the conduct of its members. And the responsibility for an injury, ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, is with reason classed among the just causes of war, it will follow that the Federal Judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. . . . [I]t is at least problematical, whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations of a treaty, or the general law of nations. . . . So great a proportion of the controversies in which foreigners are parties, involve national questions, that it is by far the most safe, and most expedient, to refer all those in which they are concerned to the national tribunals.

Id. at 435-36.

64. *See* Van Der Schelling v. U. S. News & World Report, Inc., 213 F. Supp. 756, 759 (E.D. Pa. 1963). James Wilson explained:

> If the United States are answerable for the injury [to foreigners], ought they not to possess the means of compelling that faulty state to repair it? They ought; and this is what is done here. For now, if complaint is made in

The other major reason expressed by the Framers for providing foreigners with a neutral forum was to encourage foreign businessmen to engage in commerce with the United States.[65] James Wilson of Pennsylvania, a leader in the drafting of Article III, supported diversity and alienage jurisdiction because he felt that these bases of jurisdiction in the federal courts were needed to restore to American merchants and businessmen the foreign credit that was lost during the war.[66] James Madison was also concerned with the effects state court prejudices were having on the commercial affairs of the United States.[67] Speaking at the Convention, Madison said: "We well know, sir, that foreigners cannot get justice done them in [the state] courts, and this has prevented many wealthy gentlemen from trading or residing among us."[68]

However, not all of the Framers supported the formation of a national judiciary.[69] The anti-federalists were concerned that British creditors would gain an advantage over American debtors if they were allowed to bring suit in federal courts, because traveling to distant federal courts would impose an additional economic burden on the debtor who desired to defend himself.[70] Patrick Henry of Virginia vehemently protested the alienage jurisdiction of federal courts.[71] He felt the state courts could be trusted to be impartial when foreigners came before them with claims against American citizens.[72] However, the fact that the State courts had mistreated British creditors under the Articles of Confederation was

---

> consequence of such injustice, Congress can answer, "Why did not *your subject* apply to the General Courts, where the unequal and partial laws of a particular state would have had no force?"

Id. at 759.

65. *See* Johnson, *supra* note 7, at 13; *see also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 634-35 (1833). In his commentary, Justice Story remarked:

> [I]t is of great national importance to advance public, as well as private credit, in our intercourse with foreign nations and their subjects. Nothing can be more beneficial in this respect, than to create an impartial tribunal, to which they may have resort upon all occasions, when it may be necessary to ascertain, or enforce their rights.

Id. at 634-35.

66. *See* Johnson, *supra* note 7, at 13. Wilson said, "[I]s it not necessary, if we mean to restore either public or private credit, that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort? . . . [T]hey ought to have the same security against the state laws that . . . the citizens have . . . ." *Id.* at 13.

67. *See id.* at 14.

68. *Id.* at 14.

69. *See id.*

70. *See id.*

71. *See* Johnson, *supra* note 7, at 14.

72. *See id.* Henry asked: "Cannot we trust the state courts with disputes between a Frenchman, or an Englishman, and a citizen; or with disputes between two Frenchmen? This is disgraceful; it will annihilate your state judiciary: it will prostrate your legislature." *Id.* at 14.

proof that Henry was wrong to suppose that the courts could be trusted.[73]

Of the five plans presented at the Convention, four included provisions for jurisdiction over suits involving aliens.[74] The Virginia Plan, submitted by Edmund Randolph, provided for federal jurisdiction in "cases in which foreigners or citizens of other states applying to such jurisdictions may be interested."[75] After minor alterations, the Virginia plan was unanimously adopted by the delegates to the Convention.[76] The final draft of the Constitution states that "the Judicial Power shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects."[77] The legislative history does not reveal why the Framers settled upon this phrase. However, commentators have speculated that the Framers sought to include all cases involving parties of diverse citizenship as long as at least one of the parties was a citizen of the United States.[78] The Framers thought that this phrase would include any action between a United States citizen and a foreigner.[79]

The Framers apparently did not foresee a situation where a party could be neither a citizen nor subject of a foreign State.[80] The Framers formed a federal judiciary with alienage jurisdiction in order to protect foreign parties from both actual and feared local prejudice and influence in the state courts.[81] By affording foreigners a neutral forum, the Framers

---

73. *See supra* notes 41-51 and accompanying text.

74. *See* Wythe Holt, *"To Establish Justice": Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L. J. 1421, 1460 (1990); Johnson, *supra* note 7, at 10; Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 484 (1928); 15 MOORE, *supra* note 4, at § 102 app. 01.

75. Johnson, *supra* note 7, at 10. The New Jersey Plan stated that the courts would possess "authority to hear and determine . . . in all cases in which foreigners may be interested." Holt, *supra* note 74, at 1460 n.136. Hamilton's Plan gave the courts "jurisdiction . . . in all causes in which . . . the citizens of foreign nations are concerned." *Id.* Under Mason's plan, "jurisdiction . . . shall extend . . . to controversies . . . between a State and the citizens thereof and foreign States, citizens or subjects." *Id.*

76. *See* Johnson, *supra* note 7, at 10.

77. U.S. CONST. art. III, § 2, cl. 1.

78. *See* Biancheria, *supra* note 13, at 210.

79. *See id.*

80. *See id.* at 206.

81. *See* 15 MOORE, *supra* note 4, at § 102 app. 03. Also see Justice Curtis's dissenting opinion in *Dred Scott*, in which he stated:

> Its purpose was, to extend the judicial power to those controversies into which local feelings or interests might so enter as to disturb the course of justice, or give rise to suspicions that they had done so, and thus possibly give occasion to jealousy or ill will between different States, or a particular State and a foreign nation.

hoped both to avoid conflicts with foreign sovereigns and to encourage foreign businesses to trade with the United States.[82] Including stateless entities would not implicate the first purpose of alienage jurisdiction, avoiding conflicts with foreign sovereigns, because no foreign sovereign would be affronted by the mistreatment of these parties. However, the second purpose which alienage jurisdiction was designed to accomplish, namely to foster foreign commerce, warrants jurisdiction over stateless parties. Many stateless parties will be less inclined to engage in business with citizens of the United States if they are not given equal access to a neutral forum where they may seek enforcement of their legal rights and claims. Therefore, giving the federal courts the power to hear disputes between Americans and stateless parties would accomplish the objectives of the Framers.

III. THE STATUTORY GRANT OF ALIENAGE JURISDICTION

Although the Constitution was written to give the district courts expansive jurisdiction over parties of diverse citizenship, Congress is not obligated to extend the jurisdiction of the federal courts to the full extent granted by the Constitution.[83] The statutory evolution of alienage jurisdiction is important because it conveys to what extent Congress has interpreted the language of the Constitution and reveals what Congress intended to encompass with the current statutory language. Of particular importance is the Judiciary Act of 1789,[84] enacted by the First Congress, because many of the legislators who drafted this Act had previously been Framers of the Constitution.[85] The drafters of the Judiciary Act had particular insight into what the Framers of the Constitution intended to encompass with the words "controversies between . . . citizens . . . and foreign states, citizens or subjects."[86]

Oliver Ellsworth of Connecticut, reputed to have been the guiding genius behind the Judiciary Act of 1789,[87] indicated in a letter to Judge Richard Law that he wished to give the circuit courts original jurisdiction over "all cases involving foreigners and citizens of different

---

Dred Scott v. Sandford, 60 U.S. 393, 580 (1856) (Curtis, J., dissenting).

82. *See supra* notes 59-68 and accompanying text.

83. *See* U.S. CONST. art. III, § 1. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.*

84. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78-79.

85. *See* Biancheria, *supra* note 13, at 210.

86. *Id.* at 210-11.

87. *See* Friendly, *supra* note 74, at 500. Friendly mentions that Ellsworth's earlier experience on the committee appointed by the Congress of the Confederation to hear appeals in prize cases prepared him to be an advocate of a strong judiciary. *See id.*

states."[88] Instead of using the words "foreign citizens or subjects," the Judiciary Act gave federal circuit courts original jurisdiction over "all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and . . . an *alien* is a party."[89]

The First Congress's use of the term "alien" as a substitute for "foreign citizens or subjects" indicates their belief that the Framers intended to include all non-Americans within alienage jurisdiction.[90] This proposition is supported by the thoughts of Chief Justice Story, who wrote in 1833: "The inquiry may here be made, who are to be deemed aliens entitled to sue in the courts of the United States. The general answer is, any person, who is not a citizen of the United States."[91]

Although the drafters of the Judiciary Act did not give the courts general diversity jurisdiction to the full extent permitted by the Constitution,[92] the First Congress actually exceeded the Constitutional limits by granting jurisdiction in *all* actions where "an alien is a party."[93] Thus, under the Judiciary Act, a foreigner could bring suit against another foreigner in United States district courts.[94] In *Mossman v.*

88. *Id.* at 500 (citing WHARTON, STATE TRIALS 38 (1849)).

89. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78-79 (emphasis added).

90. The drafters of the Judiciary Act used "aliens," "foreigners," and "foreign citizens or subjects" as interchangeably as the Framers. *See* Friendly, *supra* note 74, at 501-02. The draft bill used the term "foreigner," but this was eventually changed to "alien." *See id.*

91. STORY, *supra* note 65, at 635. Justice Story added:

> A foreign corporation, established in a foreign country, all of whose members are aliens, is entitled to sue in the same manner, that an alien may personally sue in the courts of the Union . . . In relation to aliens, however, it should be stated, that they have a right to sue only, while peace exists between their country and our own. For if a war breaks out, and they thereby become alien enemies, their right to sue will be suspended until peace is resumed.

Id. at 636.

92. *See* 15 MOORE, *supra* note 4, at § 102 app. 04(1). The Constitution permits the federal courts to hear all controversies "between Citizens of Different States." U.S. CONST. art. III, § 2, cl. 2. The Judiciary Act of 1789 limited diversity jurisdiction to suits where the "dispute exceeds, exclusive of costs, . . . five hundred dollars" and where the "suit is between a citizen of the State where the suit is brought and a citizen of another State." 15 MOORE, *supra* note 4, at § 102 app. 04(1) n.7.

93. Judiciary Act of 1789, ch. 20 § 11, 1 Stat. 73, 78-79.

94. *See id.* This is contrary to the constitutional grant of jurisdiction, which required that at least one party be a citizen of the United States. *See* U.S. CONST. art. III, § 2.

Higginson,[95] the Supreme Court noted this defect in the Judiciary Act. Instead of declaring the Act unconstitutional, the Court simply read into the language of the statute the Constitutional requirement that one of the parties had to be an American citizen.[96] The Court did not comment on the Act's use of "alien" instead of "foreign citizen or subject," as used in the Constitution.[97] This failure to comment at a time when one would expect the Court to criticize every deficiency in the Act is evidence that the Court believed these phrases were synonymous and encompassed all non-Americans.[98] Indeed, the First Congress and the Supreme Court used the broad term "alien" interchangeably with "foreign citizens or subjects," just as the Framers of the Constitution had done earlier.

The requirement for diversity jurisdiction that the matter in dispute exceed five hundred dollars exclusive of costs was a compromise with Anti-federalists who did not want to give federal courts broad diversity jurisdiction in the Constitution.[99] The Anti-federalists insisted that this restriction be placed in the Judiciary Act, hoping to prevent British creditors from using the federal courts to the disadvantage of poor American debtors.[100] Imposing this requirement excluded a very large number of the British claims from federal court under alienage jurisdiction.[101]

In 1875, Congress amended the Judiciary Act to repair the defect made clear by the Supreme Court.[102] The new version of the Act, written to conform with the language of the Constitution,[103] gave the circuit

---

95. *See* 4 U.S. (4 Dall.) 12, 14 (1800). The Court stated "but as the legislative power of conferring jurisdiction on the federal courts, is, in this respect, confined to suits between citizens and foreigners, we must so expound the terms of the law, as to meet the case, 'where, indeed, an alien is one party,' but a citizen is the other." *Id.* at 14; *see also* Hodgson v. Bowerbank, 9 U.S. 303, 304 (1809) ("[T]he statute cannot extend the jurisdiction beyond the limits of the constitution.").

96. *See Mossman*, 4 U.S. at 14.

97. *See id.*

98. *Id.* In *Prentiss v. Brennan*, 19 F. Cas. 1278 (1851), the Court noted:

> Construing [the Judiciary Act of 1789], however, in connection with the provision of the constitution, there can be no difficulty as to the meaning intended by congress. The controversy, in order to give jurisdiction, must be between a state, or a citizen thereof, and a foreign state, or a citizen or subject thereof; that is, speaking with reference to individual parties, the suit must be one in which a *citizen of a state and an alien are parties.*

Id. at 1279 (emphasis added).

99. *See* Johnson, *supra* note 7, at 18-19.

100. *See id.*; *see also* WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC 53 (1995) ("Although the amount in controversy limitation was driven in part by a desire to bar British creditors from the federal courts, the limitation also was inserted to protect small debtors from being forced to travel long distances to defend minor claims.").

101. *See* Johnson, *supra* note 7, at 19.

102. 18 Stat. 470 (1875).

103. *See* Johnson, *supra* note 7, at 21.

courts original jurisdiction over controversies between "citizens of a State and foreign states, citizens, or subjects."[104] The only change Congress intended regarding alienage jurisdiction was preventing aliens from suing other aliens in federal court.[105] Congress did not mention any desire to limit alienage jurisdiction to certain foreigners.[106] By using the same language in the Act as the Framers used in the Constitution, Congress apparently intended the alienage jurisdiction of the circuit courts to reach as broadly as is constitutionally permissible, provided the action exceeded five hundred dollars exclusive of costs.[107]

Subsequent amendments to the statute have largely been directed to diversity jurisdiction as a whole, and have affected alienage jurisdiction only by association.[108] The most significant changes have been steady increases to the amount in controversy required to bring an action into federal court under diversity jurisdiction.[109] In 1887, Congress increased the minimum amount in controversy from five hundred to two thousand dollars.[110] The Judicial Code of 1911 further increased the necessary amount in controversy to three thousand dollars, and also transferred the duty to hear trials from the circuit courts to the district courts.[111]

The Judicial Code of 1948 "lumped" general diversity and alienage jurisdiction together under the title "Diversity Jurisdiction."[112] In 1958, Congress again increased the amount in controversy, this time to ten

---

104. 18 Stat. 470.

105. *See* Johnson, *supra* note 7, at 21; Biancheria; *supra* note 13, at 211.

106. *See* Biancheria, *supra* note 13, at 212 n.80.

107. *See* MOORE, *supra* note 4, at § 102 app. 04(3). Congress also expanded general diversity jurisdiction to the constitutional limits, subject only to the amount in controversy requirement. *See id.*

108. *See* Johnson, *supra* note 7, at 21. This may be because Congress and many commentators have failed to distinguish alienage jurisdiction from diversity jurisdiction, and the different purposes they serve.

109. *See id.* Congress' goal in increasing the amount in controversy has been to limit the number of diversity cases in the federal courts. *See id.*

110. *See* MOORE, *supra* note 4, at § 102 app. 04(3) & n.37 (citing 24 Stat. 552 (1887), *amended by* 25 Stat. 433 (1888)).

111. *See id.* at § 102 app. 04(3) (citing § 24, 36 Stat. 1087, 1091 (1911)).

112. *Id.* at § 102 app. 04(4). Section 1332 of the Code provided:

> a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:
>
> 1) Citizens of different States;
>
> 2) Citizens of a State, and foreign states or citizens or subjects thereof;
>
> 3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

Id.

thousand dollars, and added section 1332(c)(1).[113] In this new section, Congress recognized that a corporation may be treated as a citizen both in the state where it has its principal place of business and where it is incorporated.[114] In 1976, the Foreign Sovereign Immunities Act[115] amended section 1332(2) and (3) to delete reference to foreign states, and added subparagraph (4) and sections 1330 and 1603(a) to deal with jurisdiction over actions involving foreign states.[116] Section 1603(a) defined "foreign state," as used throughout Title 28 except in section 1608, to include political subdivisions, agencies and instrumentalities of foreign states.[117]

In 1988, Congress raised the amount in controversy, limiting jurisdiction to actions with claims in excess of fifty thousand dollars exclusive of costs.[118] Congress justified the increase by the potential reduction in the federal caseload and to reflect inflation since the last increase in 1958.[119] In the most recent change to diversity jurisdiction, and with it alienage jurisdiction, Congress again increased the amount in controversy to its present level of seventy-five thousand dollars

---

113. *See id.* at § 102 app. 04(5).

114. *See id.* For an excellent discussion about the confusion surrounding section 1332(c) and its application to alien corporations, see George M. Esahak, Comment, *Diversity Jurisdiction: The Dilemma of Dual Citizenship and Alien Corporations*, 77 NW. U. L. REV. 565 (1982). In his Comment, Mr. Esahak summarizes corporate citizenship prior to section 1332(c):

> Historically, dual citizenship for corporate entities has not been the rule. In the first case to construe the jurisdictional question of a corporation's citizenship, the Supreme Court stated that only natural persons could be deemed "citizens" for diversity purposes. Consequently, for years diversity jurisdiction depended on the citizenship of a corporation's shareholders, and not on the location of the business enterprise or its state of incorporation. In Louisville C. & *C.R.R. v. Letson*, however, the Court began to retreat from *Deveaux*. The Court in *Letson* held that a corporation may be considered a "person" and thus a citizen of the state in which it is incorporated. Thus, corporate citizenship could be found in the state of incorporation as well as in each state in which the corporation's shareholders were citizens. Later, in *Marshall v. Baltimore & Ohio R.R.*, the Court confined the situs of corporate citizenship solely to the state of incorporation by holding that a corporation's shareholders conclusively are presumed to be citizens of the state in which the business is incorporated.

Id. at n.3 (citations omitted).

115. Act of Oct. 21, 1976, P.L. 94-583, 90 Stat. 2891.

116. *See* MOORE, *supra* note 4, at § 102 app. 04(6). One of the main objectives of the Foreign Sovereign Immunities Act of 1976 was to codify the principle of sovereign immunity, such that it is restricted to suits involving a foreign state's public acts and does not afford a foreign state immunity from suits based on its commercial or private acts. *See* H.R. REP. NO. 94-1487, at 2 (1976).

117. *See* 28 U.S.C.A. § 1603(a) (Supp. 1997).

118. *See* 102 Stat. 4646 (1988).

119. *See* H.R. REP. NO. 100-889, at 45 (1988). By increasing the amount in controversy to fifty thousand dollars, Congress expected to reduce the diversity caseload by up to forty percent. *Id.*

exclusive of interest and costs.[120]

In the Judiciary Act of 1789, the First Congress gave the circuit courts jurisdiction to hear all cases involving aliens.[121] The legislature's use of the broad term "aliens" reveals that they believed the Constitutional grant of alienage jurisdiction covers actions between citizens of the United States and parties that are not citizens of the United States. Since 1875, Congress has authorized federal courts to exercise alienage jurisdiction to the full extent permitted by the Constitution, limiting these actions only by their amount in controversy. The current version of section 1332(a)(2) gives district courts original jurisdiction over all civil actions "where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of a State and citizens or subjects of a foreign state."[122]

IV. JUDICIAL EXERCISE OF ALIENAGE JURISDICTION

American courts have consistently held that in order for federal courts to exercise alienage jurisdiction over a foreign party, that party must allege that it is a citizen or subject of a foreign state. In *Wilson v. City Bank*, the plaintiffs' bill alleged that they were "of London, in England, and aliens to each and all of the United States," and that the defendant was of New York.[123] Circuit Justice Story sustained defendant's demurrer because, although the bill alleged that the plaintiffs were aliens, it did not allege that they were citizens or subjects of any foreign state.[124] Because the foreign party must allege citizenship in some country, stateless individuals have been unable to enter the federal courts through alienage jurisdiction.

In *Land Oberoesterreich v. Gude*, Judge Clark stated that even when a party alleges that it is a citizen or subject of a foreign state, the federal courts do not have alienage jurisdiction over the subject matter if the foreign state has not been recognized by the United States government.[125] The executive branch of the United States government must recognize foreign states before the state, its citizens and subjects, and its

120. *See* Act of Oct. 19, 1996, P.L. 104-317, 110 Stat. 3850.
121. *See* Judiciary Act of 1789, 1 Stat. 73, 78-79 (1789).
122. 28 U.S.C.A. § 1332(a)(2) (West Supp. 1998).
123. 30 F. Cas. 116, 116 (C.C.D. Mass. 1838).
124. *See id.*
125. 109 F.2d 635, 637 (2d Cir. 1940).

corporations may enter the federal courts under alienage jurisdiction.[126] Despite the fact that the constitutional and statutory grants of alienage jurisdiction have never included recognition by the United States as a prerequisite to the exercise of alienage jurisdiction, courts have enforced the rule established in *Land Oberoesterreich*.[127]

In *Blair Holdings Corp. v. Rubinstein*, the court inspected the constitutional and statutory history of alienage jurisdiction to determine whether it should apply to stateless individuals.[128] The court used Alexander Hamilton's writings in *The Federalist Papers* to come to the conclusion that the primary purpose of alienage jurisdiction was to avoid entanglements with other sovereigns which might ensue from failure to treat the legal controversies of aliens of a national level.[129] Because the mistreatment of stateless individuals in state courts does not implicate the foreign relations of the United States with respect to other sovereign nations, the court felt that the Framers intended to refer only to those aliens who were citizens or subjects of recognized foreign states.[130] Accordingly, the *Blair Holdings* court dismissed the action for lack of subject matter jurisdiction over the stateless defendant.[131]

According to the Third Restatement of the Foreign Relations Law of the United States, characteristics of a foreign state include a defined territory, a permanent population, and an autonomous government that has the capacity to engage in formal relations with other sovereign states.[132] It is the obligation of the executive branch of the United States

126. *See id.*

127. *See e.g.* Shoemaker v. Malaxia, 241 F.2d 129 (2d Cir. 1957) (holding a stateless alien is not a citizen or subject of a foreign state within the meaning of §1332(a)(2)); Factor v. Pennington Press, 238 F. Supp. 630 (N.D. Ill. 1964) (holding a stateless person is not a citizen of a state of the United States, nor of any foreign state for purposes of diversity).

128. 133 F. Supp. 496 (S.D.N.Y. 1955). The defendant had forfeited his Soviet citizenship, and the Portuguese government had canceled his Portuguese citizenship. *See id.* at 499. Accordingly, defendant had registered with the United States Department of Justice as a stateless person, and held a "Nansen" passport, issued to him by the League of Nations in recognition of his status as a stateless person. *See id.*

129. *See id.* at 500. The court also noted the Framers' concern for the states' failure to give protection to foreigners in accordance with treaties. *See id.* However, the court never mentioned the intent of the Framers to encourage foreign trade by offering a neutral forum. *See id.* at 496.

130. *See id.* at 500. The court additionally found that it was implicit in the holding of *Wilson v. City Bank*, 30 F.Cas. 116 (C.C.D. Mass. 1838), that the word "aliens" as used in the Judiciary Act of 1789 was not intended as a synonym for "non-citizens of the United States." *Id.*

131. *See id.* at 501. The court noted that the plaintiff is not denied justice because it may still sue in the state courts. *See id.*

132. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987).

government, not the judiciary, to recognize foreign states.[133] When foreign parties enter the federal courts on the basis of diversity, the courts have a duty to determine whether the United States has recognized the foreign entity as a state for purposes of alienage jurisdiction. In the vast majority of cases, the court will have little trouble deciding that the foreign state has been recognized by the United States.[134] However, the twentieth century has witnessed many changes to the make-up of the world order, and American courts have had difficulty deciding whether some international entities have been recognized by the United States.

A. Alienage Jurisdiction Over the Citizens of Emerging Foreign States

In the latter half of the twentieth century, many old empires have crumbled or been divided, resulting in an influx of new international entities. Initially, American courts limited alienage jurisdiction to nationals of foreign entities that had been *officially* recognized by the executive branch of the United States government as a sovereign state.[135] Because recognition of sovereignty is a political matter under the authority of the executive branch,[136] the courts felt bound to dismiss actions involving nationals of the new countries for lack of jurisdiction until the emerging state had been officially recognized by the executive branch of the United States government.[137] Eventually, courts realized

133. *See* Klausner v. Levy, 83 F. Supp. 599, 600 (E.D. Va. 1949).

134. Parties from well recognized countries, such as Spain, Mexico or Italy, are clearly foreign citizens or subjects for purposes of § 1332(a)(2).

135. *See* Land Oberoesterreich v. Gude, 109 F.2d 635, 637 (2d Cir. 1940).

136. The President's authority to recognize foreign states and to maintain diplomatic relations is implied from his constitutional power to appoint and receive ambassadors. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

137. *See Klausner*, 83 F. Supp. at 600. In *Klausner*, an American defendant challenged the jurisdiction of the court over an action brought by a Palestinian plaintiff under § 1332(a)(2). *See id.* at 599. Palestine had been established under the Treaty of Versailles in 1923 as a mandate of Great Britain. *See id.* at 600. As a mandate, the territory of Palestine lacked local autonomy and its inhabitants were not considered citizens of Great Britain. *See id.* The United States did not formally recognize Israel, which encompassed the territory of the plaintiff's citizenship, until several months after the action had commenced. *See id.* The court decided that without formal recognition by the executive branch of the government, the court could not treat Israel as a sovereign state. *See id.* Accordingly, the court dismissed the action for a lack of jurisdiction, because the plaintiff was not a citizen or subject of a foreign state within the meaning of the Constitution or Section 1332(a)(2). *See id.*

that requiring official recognition was not an appropriate standard.[138] It was clear that the citizens of emerging nations needed access to the federal judiciary if they were going to conduct business and have normal relations with citizens of the United States.

1. The Introduction of De Facto *Recognition*

In *Murarka v. Bachrack Bros.*, the Court held that "[u]nless form rather than substance is to govern," foreign parties should not be restricted from the federal courts because their country of origin had not yet been formally recognized by the executive branch of the United States government.[139] *Murarka* arose out of an action initiated by an Indian corporation for breach of contract.[140] The Indian corporation filed its complaint on July 14, 1947,[141] a little more than a month before the United States formally recognized India as a sovereign and independent nation.[142] The court noted that under the standard previously used by American courts, the court lacked subject matter jurisdiction because India was not formally recognized by the United States as a sovereign state at the commencement of the suit.[143] Instead of looking at formalities, the court relied on the relationship between the United States and India prior to the formal recognition to come to the conclusion that the United States had de facto recognized India.[144] By finding de facto recognition when formal recognition did not exist, the *Murarka* court established a new standard for foreign parties to meet in order to enter the federal courts,[145] a standard which is sensitive to the intention of the Framers to open the federal courts to all foreigners that are able to allege

138. *See* Murarka v. Bachrack Bros., 215 F.2d 547 (2d Cir. 1954).
139. *Id.* at 552.
140. *See id.* at 549.
141. *See id.* at 552.
142. *See id.* at 551. India had been part of the British empire, but following the end of World War II, the British government had been trying to prepare India for independence. *See id.* The State Department informed the Court that the United States formally recognized India's independence from Great Britain on August 15, 1947. *See id.* at 551-52.
143. *See id.* at 552.
144. *See id.* The court found that the United States had taken steps to recognize the interim government of India by exchanging ambassadors in February and April of 1947. *See id.* For all intents and purposes, these acts constituted recognition of the Interim Government of India at a time when India's official independence was imminent. *See id.*
145. *See id.* A narrow view of the *Murarka* decision would restrict de facto recognition to circumstances where the emerging nation is on the verge of gaining independence and sovereignty, because this was the situation the court was faced with. *See id.* However, the court did not explicitly limit its decision in such a manner, and this Comment argues that de facto recognition is not limited to foreign countries with imminent formal recognition. *See id.*

foreign citizenship.[146]

2. *The Relinquishment of United States Sovereignty*

In 1947, the United States and the United Nations Security Council formed the Trust Territory of the Pacific Islands.[147] Under this agreement, the United States was entrusted with the administrative, legislative, and judicial authority over the Trust Territories.[148] Although the territories were to operate as if fully sovereign, technical sovereignty rested with the United States.[149] The relationship allowed the United States to receive preferential treatment in economic and commercial matters, and to declare all or any part of the territory a closed area (such that even the United Nations would be unable to enter) in order for the United States to exercise its trustee functions.[150]

Under this agreement, sovereignty clearly did not rest with any of the territories. At first, the courts did not permit alienage jurisdiction over citizens of the Trust Territory.[151] But as the individual territories began to gain more independence, the courts began to permit alienage jurisdiction over the citizens of the territories.[152] In doing this, one court

146. *See* discussion *supra* Part II.

147. *See* Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301; T.I.A.S. No. 1665. The Territory included Palau, the Northern Mariana Islands, the Marshall Islands, and the Federated States of Micronesia (made up of the districts of Truk, Ponape, Kosrae and Yap). *See* Morgan Guar. Trust Co. v. Republic of Palau, 924 F.2d 1237, 1239 (2d Cir. 1991).

148. *See Morgan Guar.*, 924 F.2d at 1239.

149. *See* People of Saipan v. United States Dept. of Interior, 356 F. Supp. 645, 653 (D. Haw. 1973).

150. *See id.* at 654.

151. *See* World Communications Corp. v. Micronesian Telecomms Corp., 456 F. Supp. 1122 (D. Haw. 1978). The defendant was incorporated under the laws of the Trust Territory of the Pacific Islands. *See id.* at 1123. Before the court granted the defendant's motion to dismiss, it noted that some of the considerations which underlie the existence of diversity jurisdiction may have been present, however the court felt that they did not justify an expansive judicial interpretation of § 1332(a)(2). *See id.* at 1125.

152. *See* Bank of Haw. v. Balos, 701 F. Supp. 744 (D. Haw. 1988). The Republic of the Marshall Islands technically was still a member of the Trust Territories, but the court found that the territory had de facto become a foreign state. *See also Morgan Guar. Trust Co*, 924 F.2d at 1238-41. The lower court had given the Republic of Palau de facto recognition on the basis of Palau's anticipated independence as negotiated in an agreement with the United States. However, after the lower court's decision, the Palauan people failed to give their final approval of the agreement, and Palau's status as a Trust Territory of the United States was never changed. Accordingly, the appellate court reversed the decision of the lower court because the United States continued to exercise sovereignty over Palau. *See id.* The Northern Mariana Islands and the Federated States

listed the following indications of sovereignty:

> the power to declare and wage war; to conclude peace; to maintain diplomatic ties with other sovereigns, to acquire territory by discovery and occupation, to make international agreements and treaties[;] . . . to exclude or expel aliens[;] . . . regulation of coinage systems, patents and copyrights and postal services[;] . . . and the selection of a flag or other national symbol.[153]

A court may look for these powers in a foreign state that has not been formally recognized when it is determining whether the United States has de facto recognized the foreign state.

B. Alienage Jurisdiction After the Severance of Formal Relations

Another issue which the courts have had to address on several occasions is whether the recognition requirement prohibits foreigners from entering federal courts under section 1332(a)(2) after the United States has ended formal relations with the government of their country of origin.[154] This issue arose several times during the Cold War as the United States government broke off official relations with countries that adopted communist governments.[155] The courts decided that a change in government does not affect whether the United States recognizes a foreign nation as an independent and sovereign entity.[156] In *Calderone v. Naviera Vacuba S/A*, the court held that if the executive branch felt that nationals of a formerly recognized nation should no longer be given access to the federal courts, it needed to advise the courts of this decision.[157]

In *Chang v. Northwestern Memorial Hospital*,[158] the Illinois court expanded the de facto recognition standard established in *Murarka*.[159]

---

of Micronesia concluded agreements with the United States to terminate their status as Trust Territories. *See id.* at 1239.

153. Morgan Guar. Trust Co. v. Republic of Palau, 639 F. Supp. 706, 712 (S.D.N.Y. 1986) (citations omitted).

154. *See e.g.* Banco Nacional De Cuba v. Sabbatino, 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964) (Cuba); Calderone v. Naviera Vacuba S/A, 325 F.2d 76 (2d Cir. 1963) (Cuba); Chang v. Northwestern Mem'l Hosp., 506 F. Supp. 975 (N.D. Ill. 1980) (Taiwan); Iran Handicraft and Carpet Export Ctr. v. Marjan Int'l Corp., 655 F. Supp. 1275 (S.D.N.Y. 1987) (Iran); National Petrochemical Co. of Iran v. The M/T Stolt Sheaf, 860 F.2d 551 (2d Cir. 1988) (Iran).

155. *See Sabbatino*, 307 F.2d at 845; *Calderone*, 325 F.2d at 76; *Chang*, 506 F. Supp. at 975.

156. *See Sabbatino*, 307 F. 2d at 855 (holding that American courts should not "pass on the validity of the acts of foreign governments performed in their capacities as sovereigns within their own territories."); *Calderone*, 325 F. 2d at 76.

157. *See Calderone*, 325 F. 2d at 77. The court in *Calderone* did not need to rely on the status quo in this case because the executive branch had urged that nationalized Cuban corporations be given access to America's federal courts. *See id.*

158. 506 F. Supp. 975.

159. *See* Murarka v. Bachrack Bros., 215 F.2d 547, 552 (2d Cir. 1954).

The United States had ended formal relations with Taiwan on December 30, 1978 as part of its recognition of the People's Republic of China as the sole government of China;[160] however the *Chang* court found that Taiwanese parties were still foreign citizens or subjects for purposes of section 1332(a)(2).[161] Chang, a Taiwanese national, had initiated her medical malpractice action in federal court under alienage jurisdiction twelve days before President Carter broke off official relations.[162] In determining whether the court had proper jurisdiction over the matter, the court looked to the historical bases of alienage jurisdiction and found that Taiwan had de facto recognition by the United States[163]

The *Chang* court rejected the requirement added in *Klausner v. Levy*[164] that the United States's formal recognition of the foreign state must be imminent, because such requirement is not supported by the historical bases for alienage jurisdiction.[165] Recognition of Taiwan by the United States as an independent and sovereign foreign state was far from imminent,[166] but the court held that de facto recognition must be flexible in order to meet the future needs of an increasingly international community.[167] The court concluded that the significant trade relations

160. *See Chang*, 506 F. Supp. at 976 (citing Presidential Memorandum of December 30, 1978, 3195-01-M, 44 FEDERAL REGISTER 1075 (Jan. 4, 1979)).

161. *See id.* at 979.

162. *See id.* at 976.

163. *See id.* at 977 n.1. Judge Grady noted that Taiwan must be recognized as a sovereign and independent entity for its nationals to be able to bring suit in federal court, and acknowledged that the United States had not formally recognized Taiwan. *See id.* at 976-77.

164. *See* Klausner v. Levy, 83 F. Supp. 599 (E.D. Va. 1949).

165. *See Chang*, 506 F. Supp. at 977 n.2.

166. *See id.* The imminence of formal recognition had been a major factor in the *Murarka* court's finding that the United States had granted India de facto recognition. *See* Murarka v. Bachrack Bros., 215 F.2d 547, 552 (2d Cir. 1954). The *Chang* decision is a departure from the requirement of imminent recognition. By recognizing the People's Republic of China as the sole legal government of China, the United States recognized that Taiwan was not a sovereign nation, and would not become one in the foreseeable future. *See Chang*, 506 F. Supp. at 976.

167. *See Chang*, 506 F. Supp. at 977 n.2. Judge Grady noted that:

> certain policy concerns support a mere "recognition" standard for alienage diversity jurisdiction. There must be flexibility in foreign affairs as we approach the 21st century, so that the United States and the citizens may maintain "commercial, cultural and other relations" with another nation and its citizens even in the absence of official diplomatic relations. . . . Allowing only foreign nationals of countries "formally recognized" by the United States to sue in our courts would impair that flexibility.

Id. (citations omitted).

and cultural or other contacts with Taiwan on a non-governmental level were evidence of de facto recognition.[168] The federal courts could exercise alienage jurisdiction over Taiwanese nationals despite the retraction of formal recognition by the executive branch of the government.[169]

In *Chang*, the executive branch of the United States had broken off official relations with the government of Taiwan because it no longer recognized Taiwan to be an independent and sovereign nation.[170] This situation needs to be distinguished from cases where the United States concludes official relations with a foreign government, but continues to recognize the foreign state as an independent and sovereign entity.[171] Foreign parties fall under alienage jurisdiction regardless of the type of government that exists in their country.[172] Therefore, when the government of a sovereign nation is replaced by a new government, which the executive branch of the United States refuses to officially recognize or conduct relations with, the federal courts may continue exercising alienage jurisdiction over the citizens of that foreign state.[173]

Because the courts must defer to the executive branch's recognition of foreign states,[174] decisions by the State Department that citizens of a non-

---

168. *See id.* at 978 n.3. De facto recognition cannot be based on contacts and relations which "violate the letter or intent of any treaty, executive order, emergency regulation, or other directive of the executive branch." *Id.*

169. *See id.* at 979. To avoid any possible confusion, the court sought the opinion of the U.S. State Department, which agreed that Taiwanese citizens should be permitted access to federal courts. *See id.* at 978.

170. *See id.* at 976.

171. *See* Iran Handicraft and Carpet Export Ctr. v. Marjan Int'l Corp., 655 F. Supp. 1275, 1276 (S.D.N.Y. 1987); National Petrochemical Co. of Iran v. The M/T Stolt Sheaf, 860 F.2d 551, 552-53 (2d Cir. 1988).

172. *See Iran Handicraft*, 655 F. Supp. at 1277; *National Petrochemical Co.*, 860 F.2d at 553; Banco Nacional De Cuba v. Sabbatino, 307 F.2d 845, 852 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964).

173. *Iran Handicraft*, 655 F. Supp. at 1277; *National Petrochemical Co.*, 860 F.2d at 553. The courts continued to exercise alienage jurisdiction over Iranian corporations after the United States refused to recognize Khomeini's revolutionary government. *See id.* Judge Cannella explained the reasoning in *Iran Handicraft*:

> Recognition of a new State must not be confused with recognition of a new Head or Government of an old State. Recognition of a change in the headship of a State, or in the form of its Government, or of a change in the title of an old State, are matters of importance. But the granting or refusing of these recognitions has nothing to do with recognition of the State itself. If a foreign State refuses to recognize a new Head or a change in the form of the Government of an Old State, the latter does not thereby lose its recognition as an International Person, although no official intercourse is henceforth possible between the two States as long as recognition is not given either expressly or tacitly.

Iran Handicraft, 655 F. Supp. at 1277-78 (quoting OPPENHEIM'S INTERNATIONAL LAW § 73, at 129-30 (8th ed. 1955)).

174. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318-20

recognized foreign state should have access to federal courts are a key factor in determining whether recognition exists.[175] The State Department may recommend giving foreign parties access to a federal forum, and at the same time refuse to officially recognize the entity as a foreign state. When there are no diplomatic relations, a statement by the State Department that the foreign party's presence in federal court should be permitted will typically remove any lingering obstacles to jurisdiction.[176]

C. Alienage Jurisdiction over the Citizens of Semi-Autonomous States

Although the courts have been able to establish clear standards for exercising alienage jurisdiction over the previously mentioned categories of foreign states,[177] the courts have had difficulty deciding how to treat colonial territories. These entities have clearly not been recognized by the United States as independent or sovereign foreign states, and yet they often are at least semi-autonomous. Because foreign states must be recognized by the United States for the federal courts to exercise alienage jurisdiction, courts have had to carefully examine the extent of the relationship between the United States and these special territories. The courts will grant jurisdiction if they find that the United States has granted the territory de facto recognition as a sovereign entity.[178] The courts will also grant parties from semi-autonomous states access to the federal courts under alienage jurisdiction if the party can claim both citizenship in the territory and status as a subject of a different foreign state that has clearly been recognized by the United States.[179]

(1936).

175. *See* Calderone v. Naviera Vacuba S/A, 325 F.2d 76, 77 (2d. Cir 1963) (recommending that Cuban corporation be given access); *National Petrochemical Co.*, 860 F.2d at 553 (submitting an amicus brief recommending that an Iranian corporation be granted access); Windert Watch Co. v. Remex Elecs. Ltd., 468 F. Supp. 1242, 1245 (S.D.N.Y. 1979) (communicating that the United States considers Hong Kong to be a colony of Great Britain).

176. *See* Transportes Aeros De Angola v. Ronair, Inc., 544 F. Supp. 858, 863-64 (D. Del. 1982) (permitting a corporation owned by the People's Republic of Angola to sue in federal court under alienage jurisdiction despite a lack of diplomatic relations.)

177. *See supra* Part IV.A-B.

178. *See* Murarka v. Bachrack Bros., 215 F.2d 547, 552 (2d Cir. 1954); Chang v. Northwestern Mem'l Hosp., 506 F. Supp. 975 (N.D. Ill. 1980).

179. This is because the Constitution and § 1332(a)(2) grant alienage jurisdiction over subjects of foreign states. *See* U.S. CONST. art. III, § 2; 28 U.S.C. § 1332(a)(2) (1994).

Corporations from the British Crown Colonies have given American courts the most trouble when deciding whether alienage jurisdiction exists. Hong Kong is no longer a Crown Colony because Great Britain returned sovereignty to the People's Republic of China on July 1, 1997;[180] but Bermuda, the British Virgin Islands, the Cayman Islands, Gibraltar, the Falkland Islands, and St. Helena are all still Crown Colonies.[181] These Colonies, unlike the Trust Territories previously protected by the United States, have not received independence from Great Britain. Apparently uncertain about what standard should apply, American courts have both given and denied jurisdiction without clearly differentiating their reasons.

The Crown Colonies plainly lack independence or sovereignty. Each Crown Colony is administered by a governor who is appointed by, and is a representative of, the Queen of England.[182] The Governors act with the advice and consent of a local legislative counsel, however the Governor has the final say in all matters.[183] Individuals from the Crown Colonies are treated as citizens or subjects within the meaning of section 1332(a)(2) because the United Kingdom considers natural persons with citizenship in the colonies to also be subjects of the Crown.[184] However, the United Kingdom has not extended this status to those corporations that are citizens of the colonies.[185]

In *Windert Watch Co. v. Remex Electronics Ltd.*, the initial case involving a corporation from one of the Crown Colonies, the Southern District of New York dismissed the action because the court lacked subject matter jurisdiction.[186] The court decided that the defendant Hong Kong corporation could not be sued in federal court under alienage jurisdiction because the United States had neither formally nor de facto recognized Hong Kong.[187] In determining whether de facto recognition existed under the principles laid out in *Murarka v. Bachrack Bros.*,[188] the *Windert* court noted that the United States conducts no direct dealings with Hong Kong because it is a colony of the United Kingdom,[189] and under British law Hong Kong corporations are neither citizens nor

180. *See* H.K.S.A.R. CONST. (BASIC LAW) preamble, 29 I.L.M. 1511 (April 4, 1990).
181. *See* Matimak Trading Co., v. Khalily, 118 F.3d 76, 88 n.1 (2d Cir. 1997).
182. *See* Windert Watch Co., v. Remex Elecs. Ltd., 468 F. Supp. 1242, 1245 (S.D.N.Y. 1979).
183. *See id.*
184. *See id.* at 1246 (citing the British Nationality Act 1948 §1). As subjects of the United Kingdom, these parties fall within the alienage jurisdiction of the federal courts.
185. *See id.*
186. *See id.*
187. *See id.* at 1245.
188. 215 F.2d 547, 552 (2d Cir. 1954).
189. *See Windert*, 468 F. Supp. at 1245.

subjects of the Crown.[190] The plaintiff argued that because Hong Kong is a political subdivision of the United Kingdom, citizens of Hong Kong are necessarily citizens of a foreign state.[191] The court rejected this claim,[192] and noted that because the Sovereign Immunities Act of 1976 did not cross-reference section 1332(a)(2) to section 1603(a), but did cross-reference sections 1330 and 1332(4), "foreign state" as used in section (a)(2) did include political subdivisions.[193] The *Windert* court accordingly dismissed the action for lack of alienage jurisdiction.[194]

Three years after *Windert* was decided, the Eastern District of New York, in *Windsor Industries, Inc. v. EACA International Ltd.*, found that alienage jurisdiction existed over an action brought against two corporations from Hong Kong.[195] Unfortunately for the purposes of this Comment, the court did not give any basis for making this decision.[196] In *Netherlands Shipmortgage Corp. v. Madias*, the Court of Appeals for the Second Circuit decided that alienage jurisdiction existed over a corporation from Bermuda, another Crown Colony.[197] Surprisingly, the Second Circuit did not address the decisions of the lower courts in *Windert* and *Windsor*, and it did not apply nearly the same depth of analysis used earlier by the Southern District of New York in *Windert*.[198] The court acknowledged its duty to construe jurisdictional statutes with precision and fidelity to the intentions of Congress,[199] but the court then stated that "[t]here is no question that diversity jurisdiction exists" under the statutory and constitutional requirements of section 1332.[200] The court ultimately remanded the action to the district court due to a lack of admiralty jurisdiction.[201]

---

190. *See id.* at 1246.
191. *See id.* at 1245.
192. *See id.* The court dismissed a letter from the Hong Kong consul and relied instead on the Act of Parliament which did not include Hong Kong in its list of regions that constitute the United Kingdom. *See id.*
193. *See id.* at 1245 & n.3.
194. *See id.* at 1246.
195. 548 F. Supp. 635, 636 (E.D.N.Y. 1982).
196. *See id.* It appears that the court was not aware of the decision in *Windert* or of the subsequent changes made to the de facto standard by *Chang v. Northwestern Mem'l Hosp.* *See supra* notes 158-69, 186-94 and accompanying text.
197. 717 F.2d 731, 735 (2d Cir. 1983).
198. *See id.*
199. *See id.* at 733.
200. *Id.* at 735.
201. *See id.* at 732.

In *Great China Trading Co. v. Cimex U.S.A., Inc.*,[202] the Central District of California refused to follow *Windert* and held that a Hong Kong corporation should be considered a citizen of Great Britain for purposes of alienage jurisdiction.[203] The court's first reason for its decision was that Hong Kong corporations owe their allegiance to the British Crown, despite the fact that the laws of the United Kingdom and Hong Kong refuse to recognize the fiction of citizenship for corporations.[204] The court decided that it would be "neither sensible nor equitable" to hold that a Hong Kong business could not bring suit in federal court because it had been organized as a corporation.[205] The *Great China* court's second reason was that although Hong Kong was not a subdivision of Great Britain, Hong Kong should be considered a "creature or member" of Great Britain because it is a colony, and since the plaintiff was a citizen of Hong Kong, the plaintiff should also be considered a citizen of Great Britain.[206]

The final reason given by the court in *Great China* for considering alienage jurisdiction to be proper over a Hong Kong corporation was based on the policies behind the creation of alienage jurisdiction.[207] The Framers' fear that states would not protect foreigners in accordance with treaties, and their apprehension that failure to treat the controversies of aliens on a national level could lead to entanglements with other sovereigns, was just as relevant when one of the parties is a Hong Kong corporation as when it is a British corporation or a Hong Kong partnership.[208] The *Great China* court concluded that the Hong Kong corporation was a foreign citizen or subject for purposes of alienage jurisdiction.[209]

In *Tetra Finance (HK) Ltd. v. Shaheen*, the Southern District of New York re-addressed whether a Hong Kong corporation is a foreign citizen or subject for purposes of section 1332(a)(2).[210] The *Tetra* court stated, in dicta, that it no longer agreed with its earlier decision in *Windert*.[211]

---

202. No. 80-4221 (C.D. Cal. Mar. 17, 1982).

203. *See* Neil J. Rubenstein, *Alienage Jurisdiction in the Federal Courts*, 17 INT'L LAW. 283, 291-92 n.37 (1983).

204. *See id.* Individuals that are citizens of the United Kingdom or its colonies are given the status of a British subject by the British Nationality Act of 1948, but this does not include corporations. *See id.*

205. *Id.* The court noted that if the business had been organized as a partnership instead of a corporation, it would have been a British subject under the laws of the United Kingdom. *See id.*

206. *Id.*

207. *See id.*

208. *See id.*

209. *See id.*

210. 584 F. Supp. 847, 848 (S.D.N.Y. 1984).

211. *See id.* The court did not decide whether alienage jurisdiction was proper over

Applying the standard for de facto recognition that was used in *Chang*,[212] Judge Werker explained:

> It would seem hypertechnical to preclude Hong Kong corporations from asserting claims in our courts simply because Hong Kong has not been formally recognized by the United States as a foreign sovereign in its own right.... The commercial and cultural realities of the modern world dictate that diversity jurisdiction should be granted to certain governmental entities that have not been formally recognized.[213]

Corporations from other Crown Colonies had been allowed to proceed in federal court,[214] and since the United States has similar relations with all the Crown Colonies, corporations from Hong Kong should also have access to federal courts under alienage jurisdiction.[215]

Following this decision, courts that addressed alienage jurisdiction over Crown Colony corporations agreed that the rationales in *Tetra Finance*[216] and *Chang*[217] were persuasive.[218] In *Timco Engineering, Inc. v. Rex & Co.*, the court noted, in dicta, that it approved of the reasoning of *Tetra Finance*, and held that for purposes of section 1332(a)(3), subject matter jurisdiction exists over an action involving a Hong Kong citizen and otherwise diverse United States citizens.[219] In *Creative Distributors, Ltd. v. Sari Niketan, Inc.*, the court applied the reasoning of

---

the plaintiff Hong Kong corporations because their claims had been assigned to court appointed liquidators who were citizens of the United Kingdom, making alienage jurisdiction clear. *See id.* at 849.

212. *See* Chang v. Northwestern Mem'l Hosp., 506 F. Supp. 975, 977 (N.D. Ill. 1980).

213. *Tetra Finance*, 584 F. Supp. at 848. In its search for de facto recognition, the court pointed to the fact that the United States was Hong Kong's largest foreign investor and trading partner, with total trade between the two countries in 1983 reaching almost $9 billion. *See id.*

214. *See id.*; Netherlands Shipmortgage Corp. v. Madias, 717 F.2d 731 (2d Cir. 1983) (permitting a Bermuda corporation to bring suit under alienage jurisdiction); Lehman v. Humphrey Cayman Ltd., 713 F.2d 339 (8th Cir. 1983) (finding alienage jurisdiction over a suit against a corporation from the Cayman Islands).

215. *See Tetra Finance*, 584 F. Supp. at 848. The court concluded that "the uniqueness of the Hong Kong situation militates strongly in favor of a finding that Hong Kong is a 'foreign state' within the meaning of 28 U.S.C. § 1332(a)(2)." *Id.* at 848.

216. *See id.*

217. *See Chang*, 506 F. Supp. at 975.

218. *See* Wilson v. Humphreys (Cayman) Ltd., 916 F.2d 1239 (7th Cir. 1990) (approving of *Tetra Finance* in dicta); Creative Distribs., Ltd. v. Sari Niketan, Inc., No. 89-3614C, 1989 WL 105210 (N.D. Ill. Sept. 1, 1989); Timco Eng'g, Inc. v. Rex & Co., 603 F. Supp. 925 (E.D. Pa. 1985) (approving of *Tetra Finance* in dicta). All of these courts rejected the reasoning of *Windert*.

219. *See* 603 F. Supp. at 930 n.8.

the courts in *Chang* and *Tetra Finance* to hold that a corporation from Hong Kong could bring suit in federal court under section 1332(a)(2).[220] Even when formal recognition is absent, de facto recognition can develop from an exchange of ambassadors or significant trade relations or cultural contacts with the foreign state.[221] The court in *Creative Distributors* found that the great amount of trade and investment between the United States and Hong Kong was sufficient contact to find de facto recognition.[222] In *Wilson v. Humphreys (Cayman) Ltd.*, the court agreed with the reasoning of *Tetra Finance* and decided that jurisdiction is proper over corporations from the Cayman Islands under section 1332(a)(3).[223] The court held that by exercising judicial authority over the citizens of British Crown colonies, American courts implicate the relationship between the United States and the United Kingdom, thus justifying alienage jurisdiction.[224] The *Wilson* court concluded that unless "'form rather than substance'" is to govern, corporations from the Crown Colonies should be viewed as foreign citizens or subjects for purposes of section 1332.[225]

When the district court for the Southern District of New York decided *Windert* in 1979, it did not extend de facto recognition beyond situations similar to that in *Murarka v. Bachrack Bros.* where official recognition was imminent.[226] The following year, the *Chang* court expanded the standard for de facto recognition in order to better accomplish the goals of the Framers of the Constitution.[227] Since *Chang* was decided, every court that has addressed the issue, including the district court for the Southern District of New York, has agreed that the reasoning set forth in *Chang* is more persuasive and more in accordance with the intentions of the Framers than the reasoning used by the *Windert* court.[228] These decisions established that corporations from the Crown Colonies should have access to the federal courts under alienage jurisdiction because the Crown Colonies had been de facto recognized by the United States.[229]

---

220. *See Creative Distributors*, 1989 WL 105210, at *2.
221. *See id.* at *1; (citing *Murarka v. Bachrack Bros.*, 215 F. 2d 547 (2d Cir. 1954); *Chang*, 506 F. Supp. at 977).
222. *See id.* at *2.
223. 916 F.2d at 1243.
224. *See id.* Since this was one of the purposes behind the creation of alienage jurisdiction, the court felt that corporations from Crown Colonies should have access to federal courts. *See id.*
225. *Id.* (quoting *Murarka v. Bachrack Bros.*, 215 F.2d 547, 552 (2d Cir. 1954)).
226. Windert Watch Co. v. Remex Elecs. Ltd., 468 F. Supp. 1242, 1244 (S.D.N.Y. 1979).
227. *See* Chang v. Northwestern Mem'l Hosp., 506 F. Supp. 975, 977 n.2 (N.D. Ill. 1980).
228. *See supra* notes 195-225 and accompanying text.
229. *See supra* notes 195-225 and accompanying text.

De facto recognition could be established by an exchange of ambassadors and other preliminary diplomatic relations in preparation for official recognition. De facto recognition could also be established by cultural and commercial relations of such magnitude that to hold that the United States does not recognize the entity as a foreign state would let form rather than substance govern.

V. *MATIMAK*: A CHANGE IN DIRECTION

A. The District Court's Decision

Despite the consensus that corporations from the Crown Colonies should have access to the federal courts under alienage jurisdiction, the issue was not laid to rest. On August 17, 1995, Matimak Trading Company, a Hong Kong corporation that had its principal place of business in Hong Kong, brought an action for breach of contract in the district court for the Southern District of New York against New York defendants Albert Khalily and D.A.Y. Kids Sportswear.[230] On June 10, 1996, District Judge Kimba Wood sua sponte raised the issue of whether jurisdiction was proper, and invited the parties to submit letter briefs concerning the issue of subject matter jurisdiction.[231] Finding that Matimak was not a foreign citizen or subject for purposes of section 1332(a)(2) because Hong Kong has not been recognized by the United States, Judge Wood dismissed the action without prejudice to its being refiled in state court.[232]

Judge Wood relied primarily on *Murarka*[233] in her analysis of whether Hong Kong had been de facto recognized.[234] In *Murarka*, the court found de facto recognition due to the imminency of India's independence in relation to when the complaint was filed.[235] Since Hong Kong was not about to become a sovereign state in the near future, but rather was reverting to Chinese sovereignty on July 1, 1997, Judge

230. *See* Appellate Brief Submitted Amicus Curae by the Government of the Hong Kong Special Administrative Region in Support of Plaintiff-Appellant at 3, Matimak Trading Co. v. Khalily, 936 F. Supp. 151 (S.D.N.Y. 1996) (No. 96-9117) (on file with author).
231. *See Matimak*, 936 F. Supp at 152.
232. *See id.* at 153.
233. Murarka v. Bachrack Bros., 215 F.2d 547 (2d Cir. 1954).
234. *See Matimak*, 936 F. Supp. at 152.
235. *See Murarka*, 215 F.2d at 551-52.

Wood did not believe Hong Kong deserved de facto recognition.[236] Jim Hergen, Assistant Legal Supervisor for the State Department, urged the court to recognize Hong Kong as a de facto foreign state for the purposes of section 1332(a)(2).[237] However, the court relied instead on a previous letter by Mr. Hergen, submitted to the court during an earlier case, in which he confirmed that the United States had not recognized Hong Kong as a sovereign state.[238] In her conclusion, Judge Wood found the reasoning behind *Netherlands Shipmortgage*,[239] *Wilson*,[240] and *Tetra Finance*[241] to be unpersuasive because they were primarily based on policy and the fact that district courts in the past have heard cases involving Hong Kong judgments and applied Hong Kong law.[242]

B. The Majority Opinion

On review, the Court of Appeals for the Second Circuit affirmed the circuit court in a two-to-one decision.[243] Writing for the majority, Circuit Judge McLaughlin agreed with Judge Wood's view that a Hong Kong corporation was not a foreign citizen or subject for purposes of alienage jurisdiction.[244] In light of the imminent change of sovereignty over Hong Kong, the court addressed three principle issues: (1) whether Hong Kong had been recognized by the United States as a foreign state; (2) whether Matimak was a citizen or subject of the United Kingdom by virtue of Hong Kong's status as a Crown Colony; and (3) whether alienage jurisdiction should apply to all non-citizens of the United States.[245]

The majority began its opinion by stating that the general rule is that a foreign state as used for purposes of alienage jurisdiction is one that has been formally recognized by the executive branch.[246] Matimak did not

---

236. *See Matimak*, 936 F. Supp. at 152-53.
237. *See id.* at 152.
238. *See id.* (referring to *Dunsky Ltd. v. Judy-Phillipine, Inc.*, No. 95 Civ. 2035 (S.D.N.Y. 1995)).
239. Netherlands Shipmortgage Corp. v. Madias, 717 F.2d 731, 735 (2d Cir. 1983).
240. Wilson v. Humphreys (Cayman) Ltd., 916 F. 2d 1239, 1242 (7th Cir. 1990).
241. Tetra Finance (HK), Ltd. v. Shaheen, 584 F. Supp. 847, 848 (S.D.N.Y. 1984).
242. *See Matimak*, 936 F. Supp. at 153 & n.2.
243. *See* Matimak Trading Co. v. Khalily, 118 F. 3d 76 (2d Cir. 1997).
244. *See id.* at 78.
245. *See id.* at 79. The last issue, not raised by the parties, was the focus of Judge Altimari's dissenting opinion and thus also considered by the majority. *Id.*
246. *See id.* The court extracted this rule from the previous decision in *Iran Handicraft and Carpet Export Ctr. v. Marjan Int'l Corp.*, 655 F. Supp. 1275, 1275-76 (S.D.N.Y. 1987), in which the court focused on whether Iran, undergoing revolutionary change at the time the complaint was filed, was recognized by the United States as a free and independent sovereign. The court relied on a letter from the State Department to conclude that the United States did continue to recognize Iran as an independent sovereign nation. *See id.*

dispute the fact that the United States had not formally recognized Hong Kong, but contended that various diplomatic and economic ties were evidence that the United States had de facto recognized Hong Kong as a foreign state.[247] The court looked to its decision in *Murarka v. Bachrack Bros.*[248] to determine the standard for determining de facto recognition.[249] The majority concluded that when the court found that India had de facto recognition, the *Murarka* court was doing nothing more than acknowledging the United States's imminent formal recognition of a sovereign state.[250] Under this standard for de facto recognition, Hong Kong could not be de facto recognized because it was merely changing fealty, not gaining independence.[251] As additional support for this conclusion, the court pointed to an amicus brief by the Justice Department noting that the State Department no longer urged treatment of Hong Kong as a foreign state.[252]

The majority of the *Matimak* court believed that their decision not to recognize Hong Kong as a foreign state for purposes of alienage jurisdiction satisfied the rationales underlying alienage jurisdiction.[253] The court found the primary reason the Framers granted the federal courts alienage jurisdiction was to avoid entanglements with other sovereigns that might ensue if the United States failed to treat the legal controversies of aliens on a national level.[254] With this reasoning in

247. *See Matimak*, 118 F.3d at 80. As a British Crown Colony, Hong Kong maintained some independence in its international economic and diplomatic relationships, but remained dependent on the United Kingdom in matters of defense and foreign affairs. *See id.* at 81. United States' businesses have invested almost twelve billion dollars in Hong Kong, making it the United States' twelfth-largest trading partner. *See id.*

248. 215 F.2d 547 (2d Cir. 1954).

249. *See Matimak*, 118 F.3d at 80.

250. *See id.*

251. *See id.*

252. *See id.* at 82. The State Department informed the court of this change in stance in a footnote. *Id.* at 82 n.1. The majority stated:

> Although we need not resolve this issue here, we note that the State Department's unexplained change in stance following the district court's opinion might under different circumstances require further inquiry into its ulterior motives. . . . No reason is apparent, and none is suggested, for refusing to defer to the State Department in this case.

Id. at 82 (citation omitted). Despite its willingness to defer to a footnote in the State Department's brief, the court refused to defer to the primary argument being made by the State Department: that Matimak should be treated as a subject of the United Kingdom for purposes of § 1332(a)(2). *See id.* at 86.

253. *See id.* at 82-85.

254. *See id.* at 82-83; Iran Handicraft and Carpet Export Ctr. v. Marjan Int'l Corp.,

mind, the court held that there is no justification for granting citizens of non-recognized states access to the federal judiciary.[255] "Where the executive branch determines that a foreign entity is not a 'sovereign,' there is no threat of entanglement with a sovereign stemming from the refusal of a federal court to treat that entity's citizen in a national forum."[256]

The court also found that the statutory history of section 1332 supports the decision that Hong Kong cannot be recognized as a foreign state.[257] The court focused its attention on the way the Foreign Sovereign Immunities Act of 1976 affected the subsections of 1332.[258] Congress defined the term "foreign state" in the new section 1332(a)(4) by referencing it to section 1603(a), which included subdivisions of a foreign state.[259] Because Congress did not similarly define "foreign state" in section 1332(a)(2) at this time, the court decided that section 1332(a)(2) does not include instrumentalities and political subdivisions when it refers to "foreign states."[260] However, "[i]t does not suggest that 'foreign state,' as *undefined* in section 1603 or section 1332(a)(2), should get different meanings."[261] Therefore, the Second Circuit ruled that since it has already decided that the foreign state must be recognized for purposes of section 1332(a)(4), the "foreign state" mentioned in section 1332(a)(2) must also be recognized.[262]

The majority of the court was aware that previous courts had concluded that Hong Kong is a foreign state for purposes of alienage jurisdiction, but the court did not find these decisions to be persuasive.[263] Despite the fact that *Windert Watch Co. v. Remex Electronics Ltd.*[264] had been rejected by many courts up until the time of this decision,[265] the

655 F. Supp. 1275, 1277 (2d Cir. 1988); Sadat v. Mertes, 615 F.2d 1176, 1186 (7th Cir. 1980); Van der Schelling v. U.S. News & World Report, 324 F.2d 956, 956 (3d Cir. 1963); Blair Holdings Corp. v. Rubinstein, 133 F. Supp. 496, 500 (S.D.N.Y. 1955); Johnson, *supra* note 7, at 10-16.

255. *Matimak*, 118 F.3d at 83.

256. *Id.*

257. *See id.* at 83-84.

258. *See id.*

259. *See id.* at 83.

260. *Id.*

261. *Id.* at 83-84 (emphasis added).

262. *See id.* at 84.

263. *See id.* at 84-85. The court criticized the decisions in the following cases: *Timco Eng'g, Inc. v. Rex & Co.*, 603 F. Supp. 925, 930 n.8 (E.D. Pa. 1985), *Refco, Inc. v. Troika Inv. Ltd.*, 702 F. Supp. 684, 685 n.2 (N.D. Ill. 1988), *Creative Distributors, Ltd. v. Sari Niketan, Inc.*, 1989 WL 105210, at *2 (N.D. Ill. Sept. 1, 1989), *Tetra Finance (HK) Ltd. v. Shaheen*, 584 F. Supp. 847, 848 (S.D.N.Y. 1984), *Netherlands Shipmortgage Corp. v. Madias*, 717 F.2d 731, 735 (2d Cir. 1983), *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1242-43 & n.5 (7th Cir. 1990). *See Matimak*, 118 F.3d at 84-85.

264. 468 F. Supp. 1242 (S.D.N.Y. 1979).

265. *See supra* Part IV.C.

Matimak court approved of the *Windert* rationale because it was the only decision which "conscientiously applied the standards outlined in *Murarka*."[266]

The Justice Department, as amicus, argued that the second issue before the court should be answered in the affirmative; Matimak should be treated by the courts as a subject of the United Kingdom for purposes of section 1332.[267] However, the court refused to defer to the executive branch on this issue, and decided that Matimak was neither a citizen nor subject of a foreign state.[268] The court supported its rationale for this decision by stating that a foreign state is entitled to define who are its citizens or subjects.[269] According to the court, the terms "citizen" and "subject," as used in section 1332(a)(2), do not connote a different status or allegiance to a foreign state; rather these terms are meant to encompass persons living under distinct forms of government.[270] Because British law does not confer citizenship on corporations formed under the laws of Hong Kong, Hong Kong corporations are specifically not citizens and implicitly not subjects of the United Kingdom.[271]

Finally, the *Matimak* majority felt that both precedent and policy arguments failed to support the idea that "foreign citizen or subject" in section 1332(a)(2) describes all non-citizens of the United States.[272] The statutory grant of alienage jurisdiction can equal, but never exceed the constitutional grant of jurisdiction.[273] The plain language of section 1332(a)(2) does not grant jurisdiction over all non-citizens of the United States,[274] but this may be overcome by clear legislative intent to the

266. *Matimak*, 118 F.3d at 84-85. Surprisingly, the court never approved nor disapproved of the new standard for de facto recognition established in *Chang v. Northwestern Memorial Hospital*, 506 F. Supp. 975, 978 n.3 (N.D. Ill. 1980). *See supra* notes 158-69 and accompanying text.

267. *See Matimak*, 118 F.3d at 86.

268. *See id.* By deciding in this manner, the court disobeyed the rule it had approved of earlier that courts should defer to the executive branch when determining whether the United States has recognized a foreign state. *See id.* at 83-85.

269. *See id.* at 85.

270. *See id.* "'A monarchy has subjects; a republic has citizens.'" *Id.* at 85 (quoting 1 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.75 (3d ed. 1996)).

271. *See Matimak*, 118 F.3d at 85-86.

272. *See id.* at 86-88.

273. *See id.* at 86.

274. *See id.* at 87. The majority noted that the dissent agrees with this statement. *Id.*; *see also* Christine Biancheria, *Restoring the Right to Have Rights: Statelessness and Alienage Jurisdiction in Light of* Abu-Zeineh v. Federal Labs., Inc., 11 AM. U. J. INT'L L. & POL'Y 195, 208 (1996).

contrary.[275] The majority dismissed the dissent's conclusion that the Framers intended to invoke alienage jurisdiction over all foreigners, because the Framers had not contemplated the idea of statelessness and therefore could not have intended to include stateless people when they used the phrase "foreign citizens or subjects."[276] Finally, the majority held that the overriding purpose of alienage jurisdiction, to avoid entanglements with foreign states and sovereigns, does not justify extending jurisdiction to stateless persons.[277] "If a foreign state has determined that a person is not entitled to citizenship it should certainly be unconcerned with that person's treatment in a court in the United States."[278] The Framers were concerned only with protecting foreign relations; they were not concerned with possibly affronting individual foreigners.[279] Therefore, the majority concluded that Matimak, a stateless corporation, is not a citizen or subject of a foreign state under section 1332(a)(2).[280]

C. The Dissenting Opinion

According to Circuit Judge Altimari, the *Matimak* majority's decision is contrary to the purposes of alienage jurisdiction.[281] The fact that the First Congress used the terms "foreigner" and "alien" instead of "subject" and "citizen" in the Judiciary Act of 1789 strongly suggests that the Framers intended to grant alienage jurisdiction to all aliens involved in litigation with citizens of the United States.[282] The Framers

---

275. *See Matimak*, 118 F.3d at 87.

276. *See id.* The court reasoned:

> The "idea of statelessnesss" was simply not in [the Framers] "contemplation. . . ." The basic assumption of the framers—if indeed it was ever valid—no longer holds true: not every "foreigner" is a citizen or subject of some foreign state. As noted [earlier], the notion of statelessness is now well embedded in international law. Accordingly, the dissent's conclusion that the drafters in the late-eighteenth century intended that all "foreigners," including stateless persons, be entitled to invoke alienage jurisdiction over a United States citizen ignores the fact that the term in 1787 did not include stateless persons—a category of people unknown to the drafters of the Constitution.

Id. This author questions the logic of this argument. If stateless persons are not citizens of the United States, then they are foreigners. If the Framers meant to include all foreigners, then they would have included stateless persons too, because stateless persons are a type of foreigner. The argument used by the majority here seems to be based on circular logic.

277. *See id.*

278. *Id.*

279. *See id.* at 88.

280. *See id.*

281. *See id.* (Altimari, J., dissenting).

282. *See id.* at 89. When Congress amended the Act, it gave no indication that it intended to limit federal jurisdiction. *See id.*

likely intended to encompass anyone who was not a citizen of the United States with the phrase "citizens or subjects of foreign states."[283] Judge Altimari commented that American courts have wrongly excluded stateless persons from the federal courts, and should not extend this bar to stateless corporations.[284] The primary reason for alienage jurisdiction was to provide foreigners a neutral forum, thus avoiding the appearance of injustice and grounds for resentment by other nations.[285] Judge Altimari warned that the decision of the majority risked antagonizing two world forces, the United Kingdom and China, because they both have an interest in protecting Hong Kong interests.[286]

Judge Altimari did not believe it was wise to continue deferring to foreign law to determine who foreign citizens are for purposes of alienage jurisdiction.[287] "We would not allow foreign law to grant privileges in the United States, why should we allow foreign law to deny privileges afforded under the Constitution?"[288] Judge Altimari warned that by basing jurisdiction on another country's definition of its citizenry, American courts may unintentionally promote discrimination against certain classes of people or entities.[289]

Judge Altimari also dissented because he felt that Hong Kong had been recognized by the United States.[290] *Windert*[291] and *Iran Handicraft*,[292] the cases primarily relied upon by the majority, used "form" rather than "substance."[293] *Windert*'s reasoning was challenged and rejected by subsequent cases.[294] Although the executive branch withdrew support for de facto recognition of Hong Kong, it urged the

283. *See id.*
284. *See id.* "A stateless corporation is an oxymoron" because corporations cannot be created without the permission of a state. *Id.*
285. *See id.* at 88.
286. *See id.*
287. *See id.* at 89. In *Murarka*, the court held that every country has the right to determine who its nationals are, and other nations should accept this determination. *See* Murarka v. Bachrack Bros., 215 F.2d 547, 553 (2d Cir. 1954).
288. *Matimak*, 118 F.3d at 89 (Altimari, J., dissenting).
289. *See id.* at 90. Judge Altimari was troubled by Chinese laws that, after June 30, 1997, will differentiate between ethnic and non-ethnic Chinese residents of Hong Kong and do not grant Chinese citizenship to Hong Kong corporations. *See id.*
290. *See id.* at 90-91.
291. Windert Watch Co. v. Remex Elecs. Ltd., 468 F. Supp. 1242 (S.D.N.Y. 1979).
292. Iran Handicraft and Carpet Export Ctr. v. Marjan Int'l Corp., 655 F. Supp. 1275 (S.D.N.Y. 1987).
293. *See Matimak*, 118 F.3d at 91.
294. *See id.*

court to recognize Hong Kong as a subject of the United Kingdom, and the majority should have deferred to this decision.[295] The United States' strong interest in Hong Kong, combined with the explicit request to permit Matimak to litigate in the federal courts, led Judge Altimari to dissent from the majority opinion.[296]

D. Analyzing the Matimak *Decision*

The decision of the Second Circuit in *Matimak* has the potential to cause irreparable damage to U.S. trade relations. Corporations located in foreign locales that have not been recognized by the United States have cause to be wary of conducting business with parties from the United States, and vice versa. If any disputes arise during the business relationship, the wronged party may be unable to bring an action in the federal courts of the United States. The foreign corporation could still bring an action in a state court, however this would risk appearing in a court where the American business would have home-court advantage. In a perfect world, the state courts would be free of prejudice against non-local parties; state courts would be as impartial as federal courts. However, the world is far from perfect.

> [L]ocal bias is not dead. To be sure, increased transportation, communication, travel and interstate business have homogenized the country greatly. But, it is Pollyannish to conclude that regional bias no longer exists. Indeed, well-publicized cases clearly suggest local bias. Even if such bias ha[s] abated, there is still a widespread *apprehension* of local bias.[297]

One reason federal judges tend to be less biased than state judges is because they do not have to accede to public opinion to be reelected. Another reason may be that they have more legal experience than state judges and more exposure to foreign litigants. Although the federal courts may also be biased in favor of American parties, on the whole, federal judges are better qualified than state judges to hear disputes involving foreign litigants.[298] Federal judges also have a better support staff than most state court judges.[299] Finally, the federal court jury is drawn from a wider geographical area, which should tend to lessen the potential for local bias.[300]

The implications of the *Matimak* decision weigh most heavily on

---

295. *See id.*
296. *See id.* at 92.
297. MOORE, *supra* note 4, § 102 app. 03(2).
298. *See id.*
299. *See id.* Federal judges are often assisted by law clerks, magistrates and other personnel not available in state courts. *See id.*
300. *See id.*

Hong Kong corporations; however, the decision could lead to similar decisions that keep corporations from other Crown Colonies out of the federal courts. Hong Kong has not been a British Crown Colony since June 30, 1997.[301] It is now a Special Administrative Region of the People's Republic of China.[302] However, Hong Kong corporations remain citizens of Hong Kong, and Chinese law does not recognize Hong Kong corporations as Chinese citizens or subjects.[303] Accordingly, Hong Kong corporations are still not recognized by the United States as foreign citizens or subjects under the reasoning established in *Matimak*.[304] Corporations from the remaining British Crown Colonies possess essentially the same relationship with the United States as Hong Kong did when *Matimak* was initiated. If any difference exists, it is that these colonies have no plans for changing fealty in the near future. These colonies have similar governments, similar sovereignty, and similar non-governmental contacts with the United States. Accordingly, the *Matimak* decision suggests that corporations from these colonies should be restricted from using alienage jurisdiction to enter the federal courts. American courts had given access to these corporations, however, the *Matimak* decision expressly disapproved of the rationale behind those decisions.[305] Since *Matimak* was decided, its reasoning has already been used to deny subject matter jurisdiction when alienage jurisdiction is based on the presence of a Bermuda corporation.[306]

Prohibiting access to the federal courts for corporations from Hong Kong and the remaining Crown Colonies is no small matter. Hong Kong is the United States' twelfth largest trading partner.[307] In 1996, the United States' total exports to Hong Kong were valued at $15.5 billion, and total imports from Hong Kong were valued at $6.9 billion.[308]

---

301. *See* 22 U.S.C.A. § 5701(1)(B) (West Supp. 1998).

302. *See* H.K.S.A.R. CONST. (BASIC LAW) preamble, 29 I.L.M. 1511 (adopted April 4, 1990).

303. *See* Matimak Trading Co. v. Khalily, 118 F.3d 76, 90 (2nd Cir. 1997).

304. *See id.*

305. *See id.* at 85 (rejecting *Netherlands Shipmortgage Corp. v. Madias*, 717 F.2d 731 (2d Cir. 1983) and *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239 (7th Cir. 1989)).

306. *See* Koehler v. Bank of Bermuda (N.Y.) Ltd., No. 96-Civ-7885 (JFK), 1998 WL 557595 (S.D.N.Y. Sept. 2, 1998).

307. *See Matimak*, 118 F.3d at 81.

308. *See* Appellate Brief Submitted Amicus Curae by the Government of the Hong Kong Special Administrative Region in Support of Plaintiff-Appellant at 4, Matimak Trading Co. v. Khalily, 936 F. Supp. 151 (S.D.N.Y. 1996) (No. 96-9117) (on file with author). In addition to these totals, there is substantial investment between the two

Matimak could affect over 480,000 corporations that are registered under Hong Kong's Companies Registry.[309] The United States' trade with the remaining Crown Colonies is not nearly as substantial as with Hong Kong, however it is still far from insignificant. In 1997, the United States' exports to the Cayman Islands totaled $270.4 billion, exports to the British Virgin Islands totaled $64.7 million, and exports to Bermuda totaled $338.1 million.[310] Imports from the Cayman Islands amounted to $19.6 million; imports from the British Virgin Islands totaled $16.9 million; and imports from Bermuda totaled $29.8 million.[311] More businesses are incorporated under the laws of these Crown Colonies every year due to the economic advantages offered by these states. At this time, Bermuda has over 10,000 registered corporations and the Cayman Islands has almost 40,000.[312] These statistics reveal that the *Matimak* decision could have a terribly large impact on United States' trade. The potential consequences of denying these stateless corporations access to federal courts reveals the importance in carefully examining the appropriateness of the *Matimak* decision, in particular, and alienage jurisdiction in general.

The Framers of the Constitution saw the wisdom in providing a neutral forum for foreign parties to enforce their rights against citizens of the United States. The majority in *Matimak* recognized the Framers' ultimate goal of creating a neutral forum, but like almost every court since *Blair Holdings*,[313] the majority mistook the reason the Framers found it necessary to set such a goal. In *Blair Holdings*, the court relied primarily on Hamilton's comments in *The Federalist Papers* to reach the conclusion that the Framers' primary concern was to avoid entanglements with other sovereigns.[314] The *Blair Holdings* court failed to examine comments by other Framers, or consider the circumstances in which these comments were made.[315] If it had done this, the *Blair Holdings* court would have realized that the Framers were at least equally concerned with encouraging foreign businesses to engage in trade with American businesses.[316] Like lemmings going over a cliff, the

---

countries. *See id.*

309. *See id.* at 5.

310. *See* U.S. Census Bureau, *Statistics* (visited March 28, 1998) <http://www.census.gov/foreign-trade/sitc1/1997.htm>.

311. *See id.*

312. *See* Appellate Brief Submitted Amicus Curae by the Government of the Hong Kong Special Administrative Region in Support of Plaintiff-Appellant at 5 n.1, Matimak Trading Co. v. Khalily, 936 F. Supp. 151 (S.D.N.Y. 1996) (No. 96-9117) (on file with author).

313. Blair Holdings Corp. v. Rubenstein, 133 F. Supp. 496 (S.D.N.Y. 1955).

314. *See id.* at 500.

315. *See id.*

316. *See supra* notes 128-31 and accompanying text.

courts following *Blair Holdings* faithfully accepted its findings without personally investigating the intentions of the Framers.[317]

Stateless parties are being denied access to the federal courts because any injustice they may suffer in the courts will not implicate retribution by a foreign sovereign. However, stateless corporations should be given access to a neutral federal judiciary because bias against them may affect their willingness to engage in commerce with American businesses. Considering the diplomatic and military strength of the United States as it enters the twenty-first century, the fear that a state court's bias against a foreign party would entangle the entire Union in a conflict with another sovereign is unfounded.[318] However, the fear that bias against foreign parties could chill foreign commerce should still affect the treatment of foreign parties in American courts. By providing foreigners a federal forum where their grievances may be heard without bias, the United States has grown into a world superpower. Chief Judge John Parker stated:

> No power exercised under the Constitution has, in my judgement, had greater influence in welding these United States into a single nation; nothing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into the various parts of the Union; and nothing has been so potent in sustaining the public credit and the sanctity of private contracts.[319]

The *Matimak* court failed to address this important justification for alienage jurisdiction, resulting in a decision that goes against the very

317. *See supra* notes 65-68 and accompanying text.

318. This fear was most likely justified in the late eighteenth century, when the United States was a weak country just getting its feet on the ground.

319. Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 A.B.A. J. 433, 437 (1932). In his comments on diversity jurisdiction in general, Chief Justice Taft said:

> I venture to think that there may be a strong dissent from the view that danger of local prejudice in state courts against non-resident is at an end.... The material question is not so much whether the justice administered is actually impartial and fair, as it is whether it is thought to be so by those who are considering the wisdom of investing their capital in states where capital is needed for the promotion of enterprises and industrial and commercial progress.... [N]o single element in our government system has done so much to secure capital for the legitimate development of enterprises throughout the West and South as the existence of federal courts there, with a jurisdiction to hear diverse citizenship cases.

Hon. William H. Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A.B.A. J. 601, 604 (1922).

reasons alienage jurisdiction was created in the first place.[320] Corporations from Hong Kong and the remaining Crown Colonies may hesitate before doing business with an American party because, if a dispute arises, the foreign corporation may not have the assurance of neutrality which the federal courts afford. They can still bring an action in the state courts, however the fear still exists today that state courts will not be as neutral.

The statutory grant of alienage jurisdiction, first codified by the Judiciary Act of 1789 and now found at 28 U.S.C. section 1332(a)(2), was intended by Congress to encompass all non-citizens of the United States. The *Matimak* decision failed to properly consider the full scope of these statutes.[321] Even if the stateless parties are not included in the plain language of the Act, Congress intended to extend alienage jurisdiction as far as the Constitution permits, which includes stateless parties.[322]

Matimak, in determining the standard for de facto recognition of a foreign state, primarily relied on *Murarka*,[323] the first case to use de facto recognition.[324] The majority decided that de facto jurisdiction must be limited to situations similar to those in *Murarka*: where official recognition of the foreign state was imminent.[325] The *Chang* court had extended the de facto standard to situations where commercial and cultural ties reflect recognition,[326] but the *Matimak* court failed to address this change in the de facto standard.[327] The *Chang* court is not in a jurisdiction which the Second Circuit reviews, but the district court for the Southern District of New York approved of the *Chang* rationale in *Tetra Finance*,[328] and the *Matimak* court should have considered *Chang* before it held that the *Tetra Finance* decision was unpersuasive.[329] The reasoning of the *Chang* court was more in accord with the intentions of the Framers than that of the *Murarka* court, in that it considered the commercial ties between the United States and the foreign state.[330] The *Matimak* court should have addressed this decision when it was determining whether de facto jurisdiction of Hong Kong exists.

---

320. *See* Matimak Trading Co. v. Khalily, 118 F.3d 76, 82-85 (2nd Cir. 1997).
321. *See id.* at 86-87.
322. *See id.* at 86; *see also supra* Part III.
323. Murarka v. Bachrack Bros., 215 F.2d 547, 552 (2d Cir. 1954).
324. *See Matimak*, 118 F.3d at 80-5.
325. *See id.* at 80.
326. *See* Chang v. Northwestern Mem'l Hosp., 506 F. Supp. 975, 977 (N.D. Ill. 1980).
327. *See Matimak*, 118, F.3d at 84-85.
328. Tetra Finance (HK) Ltd. v. Shaheen, 584 F. Supp. 847, 848 (1984).
329. *See Matimak*, 118, F.3d at 85.
330. *See Chang*, 506 F. Supp. at 977 n.2.

One commentator has concluded that the *Matimak* decision concerning whether Hong Kong has been de facto recognized was supported by legal precedent.[331] However, like the majority in *Matimak*, that commentator has failed to consider the standard for de facto recognition established in *Chang*[332] and approved in *Tetra Finance*[333] and *Wilson*.[334]

In *Murarka*, the court established de facto recognition in order that "form rather than substance" is not permitted to govern.[335] By limiting de facto recognition to the facts in *Murarka*, the Second Circuit has failed to achieve this ultimate goal of the *Murarka* court. De facto recognition must be flexible to accommodate the changing needs of the United States. It should be used to avoid the danger created when a foreign litigant is not given access to the federal courts, due to the fact that the United States has not formally recognized a foreign state as a sovereign and independent entity.

The *Matimak* decision has already resulted in the exclusion of more foreign corporations from federal courts. In *Koehler v. Bank of Bermuda*, the Southern District of New York applied the principles of *Matimak* to hold that a Bermuda corporation could not be sued in federal court under alienage jurisdiction.[336] Upon deciding that *Matimak* controls, the court held that the Bermuda corporations were not citizens of a foreign state for purposes of alienage jurisdiction.[337] Additionally, in *Inarco International Bank v. Lazard Freres & Co.*, the Southern District of New York suggested that corporations from Aruba also could not bring suit in federal court pursuant to section 1332(a)(2).[338] Aruba is

331. *See* Bradford Williams, *The Aftermath of Matimak Trading Co. v. Khalily: Is the American Legal System Ready for Global Interdependence?*, 23 N.C. J. OF INT'L L. & COM. REG. 201, 222-23 (1997).

332. *See Chang*, 506 F. Supp. at 977.

333. *See Tetra Finance*, 584 F. Supp. at 848.

334. *See* Wilson v. Humphreys (Cayman) Ltd., 916 F.2d 1239, 1243 (7th Cir. 1990).

335. Murarka v. Bachrack Bros., 215 F.2d 547, 552 (2d Cir. 1954).

336. *See* Koehler v. Bank of Bermuda; No. 96-Civ-7885 (JFK), 1998 WL 557595, at *7 (S.D.N.Y. Sept. 2, 1998).

337. *See id.* The U.S. Department of State notified the court that "the U.S. does not regard the Islands of Bermuda as an independent sovereign nation or foreign state." *Id. See also* Klein v. Marriott Int'l, Nos. 98-Civ-1591(WCC), 98-Civ-2356(WCC), 98-Civ-2357(WCC), 1999 WL 27201, at *2 (S.D.N.Y. Jan. 20, 1999) (citing *Koehler* and *Matimak* in holding that defendant Bermuda corporation was not a citizen or subject of a foreign state for purposes of section 1332(a)(3)).

338. *See* Inarco Int'l Bank v. Lazard Freres & Co., No. 97-Civ-0378 (DAB), 1998

a dependency of the Netherlands, and as such it is not recognized as an independent foreign state.[339] After suggesting in dicta that, pursuant to *Matimak*, alienage jurisdiction may be absent, the court dismissed the plaintiff's complaint on other grounds.[340]

The Supreme Court should address this issue before any more actions are dismissed for lack of alienage jurisdiction. The fact that jurisdictions have split in deciding whether corporations from semi-autonomous states may enter the federal courts, and the fact that *Matimak* could have a serious chilling effect on United States trade with these foreign states, makes the issue ripe for the Court's attention.

In the meantime, Congress should also take action to resolve this problem. Congress has never expressly defined "citizen or subject of a foreign state." This would be a wise decision because as time passes, new types of foreigners may appear which Congress cannot anticipate and this issue would return. The best way for Congress to resolve the issue would be to amend section 1332(a)(2). Congress could satisfy the intentions of the Framers and preserve flexibility for the future by changing section 1332(a)(2) to read "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interests and costs, and is between citizens of a State and foreign citizens or subjects." By phrasing the statutory grant of alienage jurisdiction in this manner, Congress will more closely follow the language of the Constitution. By removing "state" from the statute, all foreigners will have access to the federal courts regardless of where they are from.

VI. CONCLUSION

The majority in *Matimak* followed the path of prior courts in examining the intentions of the Framers concerning alienage jurisdiction, and ended up in the wrong place. As a result of *Matimak*, the standard for de facto recognition has been set back to a standard established in 1954.[341] At a time when the court should be thinking about how its decisions will implicate the United States in the coming millennium, the *Matimak* decision was disregarded by contemporary views about the nature of alienage jurisdiction. By examining the words of the Framers, and the context in which they spoke, it is clear that their primary reason for providing the federal courts with alienage jurisdiction

---

WL 427618 (S.D.N.Y. July 29, 1998).

339. *See id.* at *1.

340. *See id.* at *2.

341. The standard has been set back to that in *Murarka v. Bachrack Bros.*, 215 F.2d 547 (2d Cir. 1954).

was not solely to avoid foreign entanglements. The Framers wished to protect and encourage United States' foreign commerce. Avoiding entanglements with foreign sovereigns was clearly considered important by Hamilton, but by relying solely on his comments in *The Federalist Papers*, the court has not realized the full purpose of alienage jurisdiction. In establishing alienage jurisdiction, the Framers clearly meant to encompass all non-citizens of the United States within the phrase "foreign citizens or subjects." By relying on *Murarka* to determine the standards for de facto recognition, the court improperly disregarded four decades of change in the law. *Murarka* established de facto recognition; it did not set its limits. By recognizing commercial and cultural ties as sufficient contact to justify de facto recognition, the courts in *Chang* and *Tetra Finance* accomplished the goals of the Framers when they established alienage jurisdiction.

"Stateless corporations" should not be denied access to the federal judiciary under alienage jurisdiction. The Supreme Court should use the next available opportunity to overrule the decision of the Second Circuit in *Matimak Trading Co. v. Khalily*. Alternatively, Congress should amend section 1332(a)(2) to prevent further misinterpretations of alienage jurisdiction. These changes need to be made before the United States's foreign trade relations are irreparably harmed.

FRANK ERIC MARCHETTI


UNIVERSITY OF SAN DIEGO
A·D·1949