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## Treaties: The Interpretation of Due Process in Foreign Treaties

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**TREATIES: THE INTERPRETATION OF DUE PROCESS IN FOREIGN TREATIES.** *DeTenorio v. McGowan*, 510 F.2d 92 (5th Cir. 1975).

### I. THE PRESENT CASE

Maria McGowan was the wife of E.J. McGowan, a United States national who owned 37 acres of land in Mississippi. McGowan died intestate in Panama on October 31, 1957.

His brother, H.E. McGowan, a Mississippi resident, was notified of the death by a United States consular report which indicated that Maria was the decedent's widow and listed her address. The widow was unaware of the land and of her inheritance rights under a Treaty of Friendship, Commerce and Consular Rights between the United States and Honduras. As a citizen of Honduras, Maria could inherit land in the United States under the treaty, provided that she had the land conveyed to herself within three years of the decedent's death. The treaty provided that if circumstances so required, the three-year period could be extended. When Maria died twelve years after her husband's death, she was still unaware of her right to the Mississippi acreage.

In 1968, eleven years after his brother's death, H.E. McGowan brought suit in a Mississippi Chancery Court to quiet title to the land. Possible claimants in the United States were notified by personal service, and constructive service by publication was provided by a newspaper circulating in the area where the land was located. No attempt was made to give notice to or serve process on Maria, then residing in Honduras. H.E. McGowan was awarded a default judgment.

When Maria died intestate one year later, her sister, Dorotea De Tenorio, became her heir. Dorotea learned about the land in Mississippi and filed a claim to confirm title and interest to the 37 acres in the United States District Court, Southern District of Mississippi.<sup>1</sup> Also a citizen of Honduras, Dorotea claimed the land as an heir under the Honduran treaty. Meanwhile, the acreage's attraction had increased with the discovery of oil, and both H.E. and Dorotea sold drilling rights to the property. The district court held that Maria's interest in the land could not be divested from her without due process of law and just compensation. Under the treaty Dorotea was entitled to the same protection, since she was an heir of Maria.

The Court of Appeals for the Fifth Circuit reversed and held

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1. 510 F.2d 92 (5th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3062 (U.S. July 29, 1975)(No. 74-1586).

that since the widow failed to sell the property within three years after her husband's death, as was required by the treaty, she was deprived of any interest in the property. The court ruled that the due process guarantees of the treaty applied only to acts of the signatory countries and were inapplicable to litigation between private parties concerning title to real property.

## II. NOTICE AS A FUNDAMENTAL OF DUE PROCESS

Due process tolerates variances in the type of notice required when appropriate to the nature of the case.<sup>2</sup> Nevertheless, the Supreme Court recognized certain fundamental requirements for due process. An elementary requirement of a final proceeding is notice reasonably calculated under the circumstances to inform interested parties of the pendency of the action and to afford them an opportunity to present their arguments.<sup>3</sup> Failure to give such notice is a violation of due process.<sup>4</sup> When a benefit is to be administratively terminated, beneficiaries must be given notice which includes detailed reasons for the proposed termination and affords the parties an opportunity to prepare for the hearing.<sup>5</sup>

Neither Maria McGowan nor her heir Dorotea were United States nationals, or aliens within the territorial jurisdictions of the United States. Therefore, guarantees of due process in the fourteenth amendment of the Federal Constitution—which addresses itself to citizens and residents—did not apply to them. Hence, any deficiency in service of process by the Mississippi Chancery Court to Maria McGowan could not be challenged on the basis of the fourteenth amendment.<sup>6</sup>

The Treaty of Friendship, Commerce and Consular Rights with Honduras contains a guarantee of due process for nationals of both countries and enables them to inherit land in either country. Article I reads:

The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well as for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.

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2. *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950).

3. *In re Ruffalo*, 390 U.S. 544 (1968).

4. *Schroeder v. New York City*, 371 U.S. 208 (1962); *Armstrong v. Manzo*, 380 U.S. 545 at 550 (1960); *Nelson v. New York City*, 352 U.S. 103 (1956); *Walker v. City of Hutchinson*, 352 U.S. 112 (1956); *New York City v. New York, N.H. & H. Ry.*, 344 U.S. 293 (1953); *McDonald v. Mabee*, 243 U.S. 90 (1917).

5. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970).

6. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948); *Truax v. Raich*, 239 U.S. 33 (1915).

The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. *Their property shall not be taken without due process of law* and without payment of just compensation . . . .<sup>7</sup> (emphasis added)

The treaty did not define due process; hence the meaning was ambiguous.

When a dispute arises between individuals concerning a treaty which affects domestic law, the power to interpret treaties rests with the judicial branch of government.<sup>8</sup> A fundamental principle of justice inherent in the meaning of due process is notice to parties who are identifiable and who may have an interest in the dispute. The Supreme Court has said that notice is a condition almost universally prescribed in legal systems.<sup>9</sup>

In the instant case, when H.E. McGowan filed a claim to quiet title to the 37 acres, the Mississippi Chancery Court required only constructive notice. The court's jurisdiction was in rem because the subject matter of the dispute was real property located in Mississippi, so that in personam jurisdiction over Maria McGowan was not necessary. Constructive service in this case was by publication for three consecutive weeks in the Clarke County Tribune, a newspaper published in the town of Quitman, Clarke County, Mississippi.<sup>10</sup> As a nonresident alien residing in Panama and then in Honduras, Maria McGowan had no opportunity to receive actual notice.

Although due process requires, at a minimum, that interested parties be given notice and opportunity for a hearing,<sup>11</sup> the Supreme Court has declined to state a comprehensive definition of due process, preferring that its full meaning be gradually ascertained on a case-by-case basis.<sup>12</sup> Since the Supreme Court has the power to

7. Treaty with Honduras on Friendship, Commerce, and Consular Rights, Dec. 7, 1927, art. I, paras. 3, 4, 45 Stat. 2618, T.S. No. 761 (effective June 7, 1928); [hereinafter cited as *Honduran Treaty*].

8. *Wilson v. Wall*, 73 U.S. (6 Wall.) 83 (1867); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1803); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 150 (1965).

9. *Twining v. New Jersey*, 211 U.S. 78 at 110 (1908) [hereinafter cited as *Twining*]; *Ochoa v. Hernandez y Morales*, 230 U.S. 139 (1913).

10. The publication was addressed to: "the unknown heirs, devisees and executors, if any, of E.J. McGowan, deceased, whose whereabouts, places of residence, and post office addresses are unknown."

11. *Londoner v. Denver*, 210 U.S. 373 (1908), *Roller v. Holley*, 176 U.S. 398 (1900); *Hovey v. Elliot*, 167 U.S. 409 (1897).

12. *Twining* at 110. *Mapp v. Ohio*, 367 U.S. 643 (1961), *rehearing denied*, 368 U.S. 871

interpret the treaty with Honduras, and since the meaning of due process has not been given a static, comprehensive definition, the Court, in this case, could consider the adequacy of the constructive notice given by publication in the local newspaper. The question then becomes: Was the constructive service fundamentally fair to Maria considering her rights under the due process provision of the treaty?

Before H.E. McGowan filed suit to quiet title to the 37 acres, he had received notice of his brother's death. Simultaneously, he had learned Maria's address and the fact that she was E.J.'s widow.<sup>13</sup> With such information in H.E.'s possession, constructive notice by publication in the local newspaper was an unreasonable procedure. It could be argued that under the circumstances a requirement of actual notice to Maria existed, based on the due process provision of the treaty.

If the Supreme Court decides to grant certiorari in the *De Tenorio* case, a holding grounded in treaty interpretation is one possibility. That is, the Supreme Court, in this situation, might consider equating the notice requirements of due process extrapolated from suits interpreting the fourteenth amendment with the due process provision of the treaty. The Court has the power to interpret the meaning of due process since it was left undefined in the Honduran treaty.<sup>14</sup>

Case law has established various notice requirements for actions based on in rem jurisdiction. Courts require that in each case a method for service of process be used that is most reasonably calculated to give the party notice of the proceedings and an opportunity to be heard. This notice must reasonably convey the required information about a pending action, and must afford a reasonable time for answer, given the circumstances of the case.<sup>15</sup> The Supreme Court has traditionally insisted that whatever its form, opportunity for a hearing must be provided before the deprivation of property at issue takes effect. That a hearing is subject to waiver, or is not fixed in form does not affect this basic requirement except in extraordinary circumstances.<sup>16</sup>

If a party's whereabouts are unknown, constructive service by

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(1961); *Local 473, Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961); *Territory v. Craig Enterprises, Inc.*, 355 P.2d 397 (Alas. 1960).

13. The report named Obdulia McGowan (Maria) as the widow of E.J. McGowan and his heir. It gave her address—Calle 5, Casa 6226, Juan Diaz, Panama.

14. U.S. CONST. art. VI, § 2.

15. *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950).

16. *Fuentes v. Shevin*, 407 U.S. 67 (1972).

publication can be sufficient since under the circumstances it is the method most reasonably calculated to give notice. If a person's address is known, even though he is a nonresident living outside the state where the property is located, due process requires more than constructive service by publication. In these situations, substitute service by mail is the method "most reasonably calculated" to give actual notice.<sup>17</sup> If H.E. McGowan had not known Maria, due process presumably would have been satisfied by personal service upon all known claimants and constructive notice in the local newspaper.<sup>18</sup> However, H.E. McGowan knew of the widow and her location, notice to her was necessary before he sought to quiet title to the 37 acres. If Maria had been a resident alien, *i.e.*, within the territorial jurisdiction of the United States, it is clear that the requirements of notice from the rule of *Mullane* would not have been met, since substitute service by mail was possible. However, the requirements that procedural due process conform to "traditional standards of fair play and substantial justice" do not apply absent the protection of the fourteenth amendment.<sup>19</sup> And, as previously stated, the non-resident alien status of both Maria and Dorótea excluded them from fourteenth amendment coverage.

Since the Court has the power to interpret the meaning of due process in the treaty, what criteria should it use? Despite the inapplicability of fourteenth amendment criteria, the Supreme Court's equating of those criteria with the due process provision of the treaty is not totally foreclosed. When interpreting a treaty, the rules of construction of treaties require that provisions be construed liberally and given full force and effect, *anything in the Constitution or laws of any state to the contrary notwithstanding*.<sup>20</sup> (Emphasis added.) When two constructions are possible, one restrictive of rights and the other favorable to them, the latter is to be preferred.<sup>21</sup> If these notice requirements are established for the treaty, then the chancery court's notice procedure would not have conformed to due process. Nonresident aliens are able to inherit real property in the United States, as long as a treaty exists between the country of their citizenship and the United States, and the treaty provides inheri-

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17. *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950).

18. *Hamilton v. Brown*, 161 U.S. 256, 275 (1896).

19. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

20. U.S. CONST. art. VI, § 2; *Todok v. Union State Bank*, 281 U.S. 449, 452 (1930); *Jordan v. Tashiro*, 278 U.S. 123 (1928).

21. *Clark v. Allen*, 331 U.S. 503 (1947); *Nielson v. Johnson*, 279 U.S. 47, 52 (1929); *Hauenstein v. Lynham*, 100 U.S. 483, 487 (1880) [hereinafter cited as *Hausenstein*].

tance rights.<sup>22</sup> The Honduran treaty at issue provides inheritance rights. Article IV reads:

Where, on the death of any person holding real . . . property or interests therein within the territories of one [signatory country], such property or interests therein would, by the laws of the country . . . descend . . . to a national of the other [signatory country], whether resident or nonresident, were he not disqualified by the laws of the country where such property . . . therein is . . . situated, such national shall be allowed a term of 3 years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary . . . without restraint or interference, and exempt from any succession probate, or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country . . . .<sup>23</sup>

Thus Maria had inheritance rights under the treaty as the widow of E.J. McGowan; and Dorotea, the heir of Maria. According to the supremacy clause of the Federal Constitution, a treaty which guarantees inheritance rights and attaches due process obligations to those rights supersedes conflicting state procedural law governing the giving of notice in an in rem proceeding if the effect of the state's notice procedure violates the guaranty of the treaty. A liberal reading of the treaty's due process provision, coupled with the effect of the supremacy clause, would thus result in effective, albeit not technical, incorporation of the fourteenth amendment procedural due process guarantees into the *De Tenorio* situation.

### III. JUDICIAL REVIEW WHEN FEDERAL POLITICAL BRANCHES HAVE NOT ACTED TO SETTLE A NONRESIDENT ALIEN'S CLAIM

Political departments of the federal government did not exercise their powers to settle Dorotea's claim to the property as Maria's heir. A similar situation existed in *Zschernig v. Miller*.<sup>25</sup> Pursuant to a state statute, Oregon courts denied an inheritance to a nonresident alien who was a resident of East Germany because he could not convince the court that his country would reciprocate by allowing U.S. nationals to inherit estates in that country. In an amicus curiae brief before the Supreme Court, the United States Department of Justice argued that the Oregon escheat statute did not unduly interfere with the conduct of United States foreign relations and, there-

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22. *Nielson v. Johnson*, 279 U.S. 47 (1929); *Jordan v. Tashiro*, 278 U.S. 123 (1928); *Hauenstein* at 487 (1880).

23. Honduran Treaty, art IV., para. 1.

24. U.S. CONST. art. VI, § 2 (supremacy clause).

25. 389 U.S. 429 (1968).

fore, did not intrude upon the preemptive power of the federal government. The Supreme Court reversed the state court, finding that Oregon had intruded into the field of foreign affairs; an area which the Constitution entrusts to the President and the Congress. Reversal was ordered in *Zschernig* even though in that case neither the legislative nor executive branches had exercised powers, and the justice department had actually argued against its use. In the instant case, there is similar governmental inaction on the federal level. Based on *Zschernig*, the Supreme Court retains the power to strike down the chancery court's decision finding title in H.E. McGowan, even though other federal branches have not acted. The act was by an instrumentality of the state of Mississippi, and therefore, it could be viewed as an intrusion by a state into the field of foreign affairs. According to *Zschernig*, the Court's power to overturn the state court's decision would rest on the federal function of judicial review of state actions which overstep a constitutional power inherent in the federal government. The power is to conduct United States foreign relations. The Supreme Court has considered it to be an inherent power in the Constitution, and not an explicit one.<sup>26</sup>

#### IV. EFFECT OF MISSISSIPPI'S SPECIAL PUBLIC INTEREST IN RESTRICTING ALIENS FROM EXPLOITING OIL LOCATED IN THE STATE

Mississippi law holds that nonresident aliens are barred from owning real property within its jurisdiction. The statute provides:

Resident aliens may acquire and hold land, and may dispose of it and transmit it by descent, as citizens of the state may; but nonresident aliens shall not hereafter acquire or hold land . . . .<sup>27</sup>

Clearly the statute discriminates against a class of aliens—those who are nonresidents. Based on the equal protection clause of the fourteenth amendment, state statutes which discriminate against a class of aliens admitted into the United States have been held inherently suspect.<sup>28</sup> However, there are earlier decisions which have upheld state laws that bar aliens from exploiting natural resources of a state on the reasoning that the state has a special public interest in favoring its own citizens over aliens in the distri-

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26. This doctrine is relatively new and is not clearly accepted by the Court; perhaps the Court will expand on it if *De Tenorio* is reviewed. An analysis of the doctrine is given in L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION*, 238-41 (1975).

27. MISS. CODE ANN. § 89-1-23 (1972).

28. *Graham v. Richardson*, 403 U.S. 365 (1971).



bution of its limited resources.<sup>29</sup> Since oil was found beneath the McGowan land, it could be argued that because of the current oil shortage, Mississippi has a special public interest in excluding aliens from exploiting oil resources located within its borders. However, in light of recent decisions, it is unlikely that this argument would be successful against Dorotea's claim.

In *Heim v. McCall*,<sup>30</sup> the Court upheld the constitutionality of state statutes which limited the right of noncitizens to exploit the state's natural resources or restricted the devolution of real property to aliens under the special public interest doctrine. However, *Heim* is easily distinguishable because of the absence of an overriding treaty in that case. In *Graham v. Richardson*,<sup>31</sup> the Court was doubtful that a special public interest would justify prohibiting aliens from fishing in certain waters, while allowing others to do so. After discussing *Takahashi v. Fish & Game Comm'n*,<sup>32</sup> the Court said:

Whatever may be the contemporary vitality of the special public interest doctrine in other contexts after *Takahashi*, we conclude that a state's desire to preserve limited welfare benefits for its own citizens is inadequate to justify Pennsylvania's making noncitizens ineligible for public assistance, and Arizona's restricting benefits to citizens and longtime resident aliens. First the special public interest doctrine was heavily grounded on the notion that [w]hatever is a privilege rather than a right, may be made dependent upon citizenship. [Citation omitted.] But this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a right or as a privilege.<sup>33</sup>

Therefore, in *De Tenorio* the argument that Mississippi has a special public interest in prohibiting aliens from exploiting oil within its jurisdiction seems contrary both to the Court's ruling in *Graham* and to the current trend which has given decreasing weight to the public interest doctrine.

## V. CONCLUSION

If the Court equates the notice requirements of due process, under the fourteenth amendment, with the Treaty's due process provision, the question arises as to the limits of equating further constitutional guarantees with guarantees in United States treaties.

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29. *Crane v. New York*, 239 U.S. 195 (1915), *Patsone v. Pennsylvania*, 232 U.S. 138 (1914).

30. 239 U.S. 175 (1915).

31. 403 U.S. 365 (1971).

32. 334 U.S. 410 (1948).

33. 403 U.S. 365, 374 (1971).

The Court need go no further than establish the due process requirement for this treaty in order to settle the present dispute. But the embodiment of other constitutional requirements to aid in foreign treaty interpretations, in line with the Court's treatment of "due process," will have to be considered on a case-by-case basis.

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