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TOO MUCH PROCESS, NOT ENOUGH SERVICE:
INTERNATIONAL SERVICE OF PROCESS
UNDER THE HAGUE SERVICE CONVENTION

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Abstract

Service of process under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (“Hague Service Convention”) is too costly, time consuming, and unreliable. The Hague Service Convention’s defining feature – the Central Authority system – adds unwarranted expense and delay to the already expensive and protracted process of civil litigation. Worse, however, is the fact that the Central Authority completely fails to effect service on a foreign party in a significant percentage of cases. For decades, courts and commentators have argued over whether the Hague Service Convention actually permits litigants to sidestep the Central Authority and serve process simply, reliably, and directly – by mail. Regrettably, the divide among the circuit courts as to whether the Convention actually permits service by mail seems irreconcilable. This article does not attempt to resolve the service by mail controversy. Rather, this article proposes a different resolution: federal legislation establishing a domestic agent for service of process on foreign defendants that are subject to personal jurisdiction in the United States. While imperfect and most useful against foreign defendants likely to have domestically-available resources subject to enforcement of any resulting judgment, this legislation reduces the expense, burden, and uncertainty of service under the Convention, while remaining consistent with federalism, comity, due process of law, and the Hague Service Convention itself.
Introduction

Your client was rear-ended at low speed while stopped at a traffic light. Her seat collapsed backward, causing her head to strike the rear windshield, causing traumatic brain injuries. Your pre-suit investigation reveals that the seat components that failed were designed, tested, and manufactured by companies located in three countries: Canada, Japan, and the United States.
How do you serve all three companies in your lawsuit filed in the United States? You are apparently in luck. Both Canada and Japan are parties to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (“Hague Service Convention”).1 The Hague Service Convention is a multilateral treaty2 that provides permissible methods for accomplishing service of process on a defendant within a party nation’s borders. In fact, sixty-five countries have become parties to the Hague Service Convention to date.3 So how do you actually accomplish service under the Hague Service Convention? This question is not as simple as it may seem.4

The Hague Service Convention provides one, universal mechanism to accomplish service of process within a party’s territory. Each nation must establish a “Central Authority,”5 which both receives and executes requests for service of process.6 Although deceptively easy to describe in the abstract, in practice the Central Authority system does not accomplish the stated goals of the Hague Service Convention: to simplify and expedite the service of documents abroad.7 Indeed, service of process under the Hague Service Convention often adds six months or more to an already delay-ridden judicial process. Even worse, however, is that nearly 1 in 5 service requests takes longer than a year to complete and 1 in 10 requests is never honored at all – and these problems disproportionately affect service requests originating in the United States.

Service of process should be neither unduly time-consuming nor unreliable. Short of amending the Hague Service Convention to address these concerns, the current

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4 “Instructions for serving foreign judicial documents in the United States and for processing requests by litigants in this country for service of American judicial documents abroad.” D.J. Memo No. 386, Rev. 3, at p.13 (July 1979), (referring to the “short and clear” text of the Hague Service Convention).

5 Hague Service Convention, art. 2.

6 Hague Service Convention, arts. 3, 5.

7 Hague Service Convention, preamble; see also Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 698 (1988) (noting that the Hague Service Convention “was intended to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad.”).
language of the Convention allows domestic legislation that can improve the timeliness and certainty of serving process on foreign parties, all without running afoul of our treaty obligations under the Convention. Though not without limitations, federal legislation establishing a domestic agent for service of process on entities that are subject to personal jurisdiction in any state of the United States provides a quicker and easier method to accomplish service of process on foreign defendants. It also provides an interim solution that will benefit many litigants while the lengthy process of amending – and hopefully modernizing – the Hague Service Convention is concluded.

This article addresses the problems of service under the Hague Service Convention in five parts. Part I provides a brief overview of the concept of service of process and discusses the problems that led to the Hague Service Convention. Part II describes the mechanics of the Hague Service Convention, and Part III explains some of the practical problems with those mechanics. Part IV describes federal legislation designed to allow domestic litigants to serve foreign defendants through an agent for service of process, resulting in quicker, less expensive, and more certain service, while not running afoul of due process, federalism, comity, or the Hague Service Convention itself. Part IV acknowledges the limitations of such legislation – particularly enforcement of domestic judgments in foreign courts – and weighs them against the benefits to be gained, concluding that the potential limitations on enforcement abroad do not counsel against such legislation; thus, legislation as outlined here should be implemented.

I. A Brief History of Service and the Need for the Hague Service Convention.

Service of process, simply put, is the method by which a defendant is formally and officially notified that an action is pending against him and that he must respond. While filing the initial pleading typically commences a lawsuit, from a defendant's perspective, service of process marks the beginning of his compulsory involvement. Historically, service of process meant literal compulsion to answer because the

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8 See Schlunk, 486 U.S. at 698 (interpreting the Hague Service Convention).
9 Mississippi Pub'g Corp. v. Murphree, 326 U.S. 438, 444-445 (1946) (“[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served.”).
11 See Fed. R. Civ. P. 4(a)(1)(E); Tex. R. Civ. P. 99(c); see also Robert B. von Mehren, International Control of Civil Procedure: Who Benefits?, 57 S.M.U. LAW & CONTEMP. PROBS. 13, 14 (Summer 1994) (“As a general proposition, service is important in two respects. First, it may confer jurisdiction in some cases, and, second, it functions to give notice of the nature and venue of the case to the defendant.”).
defendant was physically seized pursuant to a writ of *capias ad respondendum.*\(^{12}\) 
Arresting the defendant accomplished not only notification, but also established a court's personal jurisdiction over a defendant.\(^{13}\) At least through the 19th century, *in personam* jurisdiction generally required personal service within the territorial boundaries of the forum.\(^{14}\) Under this view of personal jurisdiction as physical power over a defendant, jurisdiction and service were both subject to similar geographic limits, namely the territorial limits of the forum state.\(^{15}\) Although the concepts of service of process and personal jurisdiction are now distinct, even today, personal service on a defendant within the forum state exists as a reminder of the territorial view of personal jurisdiction. Such service is still a valid, independent basis for exercising personal jurisdiction in the United States.\(^{16}\)

By the middle of the 20th century, service of process and personal jurisdiction evolved from their more parochial origins to accommodate the rise of interstate commerce.\(^{17}\) As increased mobility and technological advances in communication gave rise to increased business transactions across state lines, the focus of personal jurisdiction shifted from physical presence in the territorial boundaries of the forum

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\(^{14}\) **Pennoyer v. Neff,** 95 U.S. 714, 733 (1878) (stating in dicta that when a suit “involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.”); *see also* Reber v. Wright, 68 Pa. 471, 476-477 (1871); Sturgis v. Fay, 16 Ind. 429, 431 (1861); Weil v. Lowenthal, 10 Iowa 575, 578 (1860).

\(^{15}\) **Pennoyer v. Neff,** 95 U.S. 714, 722 (“[N]o State can exercise direct jurisdiction and authority over persons or property without its territory. . . . [N]o tribunal established by [a State] can extend its process beyond that territory so as to subject either persons or property to its decisions.”); *see also* Int'l Shoe Co. v. State of Wash., *Office of Unemployment Comp. & Placement,* 326 U.S. 310, 316 (1945) (“Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of court was prerequisite to its rendition of a judgment personally binding him. But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'”) (internal citations omitted).


\(^{17}\) **Hanson v. Denckla,** 357 U.S. 235, 260 (1958) (Black, J., dissenting).
state to the concept of “contact” with the state.\footnote{International Shoe, 326 U.S. at 320 (1945).} With jurisdiction predicated on a nonresident’s contacts rather than personal service within the territory, service of process was no longer constrained to personal service, which was certain to give constitutionally adequate notice.\footnote{See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (“Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding”); see also Milliken v. Meyer, 311 U.S. 457, 463 (1940) (describing personal service even outside the jurisdiction as valid).} Instead, service methods evolved to permit more indirect methods, including “substituted” or “constructive” service on nonresidents.\footnote{Burnham v. Superior Court of California, 495 U.S. 604, 617-18 (1990).} Unlike personal service, these new service methods did not necessarily guarantee adequate notice. To satisfy due process, these alternatives to personal service were subject to a distinct test: any procedure must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”\footnote{Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).} While still marking or evidencing a court’s exercise of jurisdiction, service of process now functions primarily to provide timely notice to a defendant.\footnote{Henry H. Perritt, Jr., Jurisdiction in Cyberspace, 41 VILL. L. REV. 1, 31 (1996) (“[S]ervice of process performs two functions in Anglo-American civil procedure: it represents assertion of judicial power of the forum state over the person of the defendant, and it is the formal means of providing notice to the defendant so that he or she may defend the lawsuit.”).}

Personal service, however, is not the only constitutionally permissible method of service. Rather, the due process standard for service is a flexible one. Courts have held that many alternative methods of serving process are reasonably calculated to provide adequate and timely notice. One method of service available in nearly every state – service by certified or registered mail – provides reliable and timely notification and typically passes constitutional muster.\footnote{Cf. Jones v. Flowers, 547 U.S. 220, 230-31 (2006) (certified mail returned unclaimed should have been followed by attempts to serve via regular mail); see also Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 490 (1988) ("We have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice."); Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983) (stating notice by mail to a party whose name and address is reasonably ascertainable and which ensures actual notice is “a minimum constitutional precondition” in a legal proceeding); Hess v. Pawloski, 274 U.S. 352, 354 (1927) (stating service on a nonresident motorist is sufficient when a copy of the complaint is mailed to the defendant by registered mail and is also left with registrar).} Although not explicitly permitted by any rule of procedure, service of process by telex or fax has also been found reasonably calculated timely to inform the defendant of the pending action under certain, specific
factual scenarios.\textsuperscript{24} And at the extreme, service of process by publication in a newspaper or by posting a notice in public may comport with due process where it is the only available way to notify the defendant of the action.\textsuperscript{25}

Between service by mail and service by publication is an alternative method of service known as substituted service. One common example of substituted service provisions arose to fill the need to serve nonresident motorists who were accused of committing a tort in the forum state. The typical scenario involved an out-of-state motorist passing through a state and being involved in a traffic collision. A state statute would decree that some act by the motorist, such as his use of the roadways, equated to his consent to designate the secretary of state or some other local governmental official as his agent for receiving service of process.\textsuperscript{26} As a result, the plaintiff need not track down the passing motorist and physically serve him; instead, he could serve the secretary of state, who was then required to forward the process by mail to the motorist defendant. Provided that the statute made it “reasonably probable that notice of the service on the secretary will be communicated to the nonresident defendant who is sued,” substituted service provisions would satisfy constitutional due process limitations.\textsuperscript{27}

While the methods of serving process across state lines evolved in the United States, service of process on defendants in foreign States\textsuperscript{28} remained “a nightmare.”\textsuperscript{29} The post-war rise of international commerce in the latter half of the 20th century\textsuperscript{30}

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\textsuperscript{25} \textit{Greene v. Lindsey}, 456 U.S. 444, 452-53 (1982) (stating that posting may be allowed in some instances when personal service is not possible); \textit{Mullane v. Central Hanover Bank & Trust Co.}, 339 U.S. 306, 320 (1950) (stating service by publication is sufficient when it is the only method of notice available to plaintiff).
\textsuperscript{26} \textit{See, e.g., Wuchter v. Pizzutti}, 276 U.S. 13, 17-18 (1928) (describing New Jersey statute designating the secretary of state as the agent for service of process on a nonresident motorist); \textit{Hess v. Pawloski}, 274 U.S. 352 (1927) (describing Massachusetts statute designating the registrar as the agent for service of process on a nonresident motorist).
\textsuperscript{27} \textit{C.f. Wuchter v. Pizzutti}, 276 U.S. 13, 18 (1928) (invalidating New Jersey substituted service statute that did not require the secretary of state to attempt to actually notify the defendant about the pendency of the suit).
\textsuperscript{28} When discussing a foreign sovereign, this Article will refer to the sovereign as a “State,” which is capitalized. Where the concept of a state of the United States is discussed, the term “state” will appear, using a lower case “s.”
\textsuperscript{30} 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, \textit{FEDERAL PRACTICE AND PROCEDURE} § 1133 (3d ed. 2002) (“The phenomenal expansion of international trade, communication, and travel in recent decades has
called for reforms in international procedure that mirrored the evolution of personal jurisdiction and service of process in the United States. Americans attempting to serve defendants abroad had the unenviable task of serving a defendant according to the law of the foreign country in which the defendant was located, while still assuring the procedure satisfied domestic procedural requirements and constitutional due process limitations. American litigants had no desirable options. Service through United States consular officers was practically impossible and retaining local counsel to ensure compliance with local laws was prohibitively expensive. And who is a proper person to effect service differs greatly between the United States and civil law countries. In the United States, service is typically accomplished through private individuals, either by attorneys or private process servers rather than court officials. Many civil law countries, however, consider service of process a sovereign act, not properly performed by a private citizen and require service through judicial officials or other governmental agents.

made it increasingly common for a potential defendant to be physically in a foreign country at the time suit is commenced or to be a citizen of or an entity created by another nation and located outside the United States.

31 Gary A. Magnarini, *Service of Process Abroad Under the Hague Convention*, 71 MARQ. L. REV. 649, 653 n.22 (1988) (“The need to reform international judicial procedures was recognized even before World War II. In the late 1930’s the Harvard Research Committee in International Law drafted a proposed multilateral agreement which would offer litigants a variety of service methods. The Harvard Draft was farsighted indeed; its provisions were the basis for Federal Rule 4(i) and ultimately for the Hague Service Convention itself.”).


34 See, e.g., FED. R. CIV. P. 4(c)(2); TEX. R. CIV. P. 103; cf. FED. R. CIV. P. 4(c)(3) (authorizing service by a federal marshal on request).

35 Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 513 (2003) (“Some nations consider serving process and collecting evidence to be ‘official’ acts, and thus deem it a violation of their sovereignty for such acts to be conducted within their borders without their permission. . . .”); Mary Kay Kane, *The Exercise of Jurisdiction over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 836 (1988) (“in some countries service of process is viewed as a sovereign act so that any attempt to do so may be deemed a violation of that state’s sovereignty and subject to sanction.”); Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031, 1040 (1961) (“The opposition of foreign countries to the making of service within their borders ordinarily stems from the notion that the making of service is the official act of a foreign sovereign and should not be countenanced in the absence of treaty.”); see also Prewitt Enters., Inc. v. Org. of Petroleum Exporting Countries, 353 F.3d 916, 925 (11th Cir. 2003) (explaining Austria’s laws involving service); Beightler v. Produkte Fur Die Medizin AG, 3:07-
Foreign litigants attempting to serve defendants in the United States fared no better. Without a codified procedure, a foreign plaintiff would likely resort to a letter rogatory (also known as a letter of request) in order to effect service in the United States. A letter rogatory would take the form of a letter from a governmental official of the foreign State, requesting assistance from a governmental official of the United States to serve process. Our federal system, however, does not provide a federal governmental office to act on such requests as courts are generally administered at the state level. Moreover, a foreign plaintiff would likely be stymied by the lack of any uniform state office to act on such requests as well as the different service rules for each state and federal courts.

In an attempt to overcome the myriad problems of serving process in the United States, some European countries permitted service on foreign defendants via an involuntary agent procedure known as *notification au parquet*. Service could be accomplished by leaving the process with a local official, who, unlike the secretary of state described above, need only nominally attempt to forward the process to the defendant. Naturally, this method of service did not provide reasonable assurance, consistent with due process, that the defendant would receive timely notice of the suit. This led to default judgments against American defendants who never had any realistic opportunity to defend the suit, let alone know that it was pending. Against this
background of international service difficulties, the Hague Conference on Private International Law (“Hague Conference”) adopted the Hague Service Convention.\(^{40}\)

The Hague Conference is an organization comprised of sovereign States, which first convened in 1893.\(^{41}\) The Hague Conference has held sessions regularly over the last century and has drafted more than 40 conventions, many of which have been ratified around the world.\(^{42}\) These conventions address issues of private international law, ranging from procedural issues such as service of process and the taking of evidence abroad, to family law matters such as divorce recognition, inter-country adoption, and international child abduction. During its tenth session in 1965, the Hague Conference adopted the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.\(^{43}\) This Convention is intended to simplify, standardize, and expedite service of process in member nations, while incorporating features consistent with due process.\(^{44}\)


The Hague Service Convention applies only in certain specific circumstances. Litigants serving process on a party in a Hague Service Convention State must adhere to the procedures in the Convention when: (1) a document must be transmitted for service abroad; (2) the document is a judicial or extrajudicial document; (3) the case is a civil or commercial matter; and (4) the address of the recipient is known.\(^{45}\) For all practical purposes, the first factor – whether a document must be transmitted for service abroad – essentially determines whether the Hague Service Convention applies.\(^{46}\) Somewhat

\(^{40}\) Robert B. von Mehren, *International Control of Civil Procedure: Who Benefits?*, 57 S.M.U. LAW & CONTEMP. PROBS. 13, 16 (Summer 1994) (“The concurring justices concluded that the desire of the Tenth Hague Conference to eliminate 'notification au parquet' required that the Convention be interpreted to limit the 'forum's ability to deem service 'domestic,' thereby avoiding the Convention terms.'”)


\(^{44}\) Hague Service Convention, preamble.

\(^{45}\) Hague Service Convention, art. 1.

\(^{46}\) What constitutes a “civil or commercial matter” has occasionally been subject to dispute. For example, Germany has refused to cooperate with requests for service of pleadings seeking punitive damages on the basis that such damages are penal rather than civil in nature; thus, they are outside the scope of the Hague Service Convention. See Kenneth B. Reisenfeld, *Service of United States Process Abroad: A Practical Guide to Service Under the Hague Service Convention and the Federal Rules of Civil Procedure*,
surprisingly, the local law of the jurisdiction where the case is pending, rather than the law of the country where the defendant resides or some other law created or specified in the Hague Service Convention itself, determines whether a document must be transmitted abroad for service.\(^{47}\)

When a document must be transmitted for service abroad in a Hague Service Convention State, the Convention’s procedures are mandatory.\(^{48}\) The litigant serving process abroad must utilize one of the methods of service provided for in the Convention. The Convention provides one universal method, and other potential methods, for serving process abroad. The method available in all Hague Service Convention States is also the defining feature of the Hague Service Convention: the Central Authority.\(^{49}\)

Each State is required to establish an office known as the Central Authority.\(^{50}\) In some States, the Central Authority is administered through the court system. In others, there is a freestanding bureaucracy that performs its functions. Regardless of the structure of the Central Authority, it performs the same basic functions. The Central Authority both receives and executes requests for service from requesting parties.

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24 Int’l Law 55, 67-68 (1990). Generally, however, signatories to the Hague Service Convention agree that the phrase includes most matters other than criminal matters. Emily Fishbein Johnson, *Privatizing the Duties of the Central Authority: Should International Service of Process Be Up for Bid?*, 37 Geo. Wash. Int’l L. Rev. 769, 777 (2005) (“Most common law countries, including the United States, interpret the phrase to include service of all matters that are not criminal. In civil law countries, however, which make more complex distinctions between public and private law, ‘it is customary to exclude criminal, tax and administrative law from civil or commercial matters.’ In current practice, judges and Central Authorities are more likely to ‘make an autonomous, or at least liberal’ interpretation of the phrase . . . . ”); see also Preliminary Document No 14 of January 2009 for the attention of the Special Commission of February 2009 on the practical operation of the Hague Apostille, Service, Evidence and Access to Justice Conventions, at p. 10, No. 18, available at [http://www.hcch.net/upload/wop/2008pd14e.pdf](http://www.hcch.net/upload/wop/2008pd14e.pdf) (“The majority of States have not experienced any major difficulty with the interpretation of the phrase “civil or commercial”). As for what constitutes a “judicial or extrajudicial document,” the concept of extrajudicial documents is beyond the scope of this Article. There is no dispute, however, that the signatories to the Hague Service Convention agree that the phrase encompasses at least initial service of process.


\(^{48}\) Schlunk, 486 U.S. at 705.


\(^{50}\) Hague Service Convention, art. 2.
Requests for service must be made by a person authorized to forward service requests under the laws of the State of origin.\textsuperscript{51} Although private attorneys in the United States are often authorized to serve process under state law, and thus are proper requesting parties under the Hague Service Convention,\textsuperscript{52} some Central Authorities refuse to accept service requests forwarded by American attorneys.\textsuperscript{53} As a result, private attorneys are specifically advised to note in their request for service that they are authorized under domestic law to send such requests.\textsuperscript{54}

The Hague Service Convention also prescribes the form of the request to the Central Authority. The requesting party must provide the Central Authority a summary of the document to be served,\textsuperscript{55} the actual documents to be served,\textsuperscript{56} and a standardized service request form.\textsuperscript{57} The summary and request form must be provided in duplicate. Central Authorities may require that the service documents be “written in, or translated into, the official language or one of the official languages of the State addressed.”\textsuperscript{58} The Central Authority can refuse a service request that is defective in any way.\textsuperscript{59} For requests that do comply with the Hague Service Convention, the Central Authority is required to comply, although litigants have no recourse when a Central Authority fails or improperly refuses to effect service. Requesting parties may either ask the Central Authority to serve the documents using a specific method (provided that method is consistent with the internal law of the State where service is made), or via a method the Central Authority chooses.

In addition to the Central Authority system, the Hague Service Convention also permits service of process through other alternatives, provided the receiving State has not objected. In the absence of a specific objection, the Hague Service Convention allows service through diplomatic or consular agents, judicial officers, or any method permissible under the internal law of the country where process is to be served.\textsuperscript{60} These

\textsuperscript{51} Hague Service Convention, art. 3.
\textsuperscript{53} “The United Kingdom and Israel “have refused to accept service requests forwarded by private attorneys in the United States.” Emily Fishbein Johnson, \textit{Privatizing the Duties of the Central Authority: Should International Service of Process Be Up for Bid?}, 37 GEO. WASH. INT’L L. REV. 769, 792 (2005).
\textsuperscript{55} Hague Service Convention, art. 5.
\textsuperscript{56} Hague Service Convention, art. 3.
\textsuperscript{57} Hague Service Convention, art. 3.
\textsuperscript{58} Hague Service Convention, art. 5.
\textsuperscript{59} Hague Service Convention, art. 4.
\textsuperscript{60} Hague Service Convention, arts. 8-10, 19, & 21.
methods are rarely used; indeed, they basically recite the permissible practices that existed before the Hague Service Convention was adopted. Additionally, the Hague Service Convention arguably provides one more method for serving process – via “postal channels” directly to the party to be served. As discussed in the next section, service directly via mail or through the Central Authority carries unacceptable risks, either in terms of protracted litigation over the method chosen or the risk that the attempt at service will fail.

III. The Problems with the Hague Service Convention.

A. Service via mail is risky.

For more than twenty years, there has been no clear answer to whether the Hague Service Convention actually permits service via mail. Ambiguous language in Article 10(a) of the Convention, permitting parties to “send judicial documents, by postal channels, directly to persons abroad” has led many to believe that service of process is permissible via mail. Others have credibly argued that, although admittedly cumbersome, the Central Authority is both a novel and defining feature of the Hague Service Convention; thus, permitting litigants to sidestep the Central Authority by serving process by mail cannot be the drafters’ intention. The purpose of this Article is not to resolve the Article 10(a) controversy. However, a brief examination of the circuit split regarding Article 10(a) reveals why parties prudently limit their service efforts to the Central Authority system, even though that system fails to provide efficient and reliable service.

61 See McClendon v. Nissan Motor Corp. in U.S.A., 726 F. Supp. 822, 826 (N.D. Fla. 1989) (“The question of service by mail is not addressed by the Convention; it merely discusses the right to send subsequent judicial documents by mail. Any other process would be a rather illogical result, as the Convention sets up a rather cumbersome and involved procedure for service of process; and if this particular provision allowed one to circumvent the procedure by simply sending something through the mail, the vast bulk of the Convention would be useless.”) (quoting E. Routh, “Litigation Between Japanese and American Parties,” Current Legal Aspects of Doing Business in Japan and East Asia, J. Haley, ed. (A.B.A. 1978) 190-191); see also Bankston v. Toyota Motor Corp., 123 F.R.D. 595, 599 (W.D. Ark. 1989), aff’d and remanded, 889 F.2d 172 (8th Cir. 1989) (same); see also Gary A. Magnarini, Service of Process Abroad Under the Hague Convention, 71 MARQ. L. REV. 649, 658 (1988) (describing the Central Authority as “an innovation constituting the heart and soul of this multilateral treaty”).
The genesis of the Article 10(a) controversy is the ambiguous term “send.” Other portions of the Hague Service Convention use the more specific terms “serve(d)”\textsuperscript{62} or “service”\textsuperscript{63} rather than “send.” Relying on the canon of construction \textit{expressio unius est exclusio alterius}, both the Eight Circuit Court of Appeals in Bankston v. Toyota Motor Corp.,\textsuperscript{64} and the Fifth Circuit Court of Appeals in \textit{Nuovo Pignone SpA v. Storman Asia M/V},\textsuperscript{65} were persuaded by this textual difference and concluded that “send” in Article 10(a) does not mean “serve.” Moreover, the Fifth Circuit Court of Appeals expressed serious reservations that the drafters of the Hague Service Convention would have provided for more “reliable” methods of service, such as the Central Authority system and service through diplomatic channels, “while simultaneously permitting the uncertainties of service by mail.”\textsuperscript{66}

Article 1 of the Hague Service Convention confirms, however, that the Hague Service Convention applies only to formal service of documents.\textsuperscript{67} Indeed, the drafters originally considered and rejected language in Article 1 that would have broadened the Convention to apply in situations other than formal service.\textsuperscript{68} Thus, as the Second Circuit Court of Appeals concluded in \textit{Ackermann v. Levine}, if Article 10(a) does not address service, its very inclusion in the Hague Service Convention – along with nearby Articles 10(b) and 10(c) and 30 other Articles admittedly concerning formal service – would be anomalous.\textsuperscript{69} And while the drafters did use the terms “serve” or “service” more consistently throughout the Hague Service Convention, they are not the only terms in the Convention that necessarily concern service of process.\textsuperscript{70} Many signatories

\textsuperscript{62} Hague Service Convention, preamble & arts. 1, 3, 5, 6, 8, & 15.
\textsuperscript{63} Hague Service Convention, title & arts. 1, 2, 5, 6, 8-17, & 19.
\textsuperscript{64} 889 F.2d 172, 173 (8th Cir. 1989).
\textsuperscript{65} 310 F.3d 374, 384 (5th Cir. 2004).
\textsuperscript{66} 310 F.3d 374, 384-85 (5th Cir. 2004).
\textsuperscript{67} \textit{Volkswagenwerk A.G. v. Schlunk}, 486 U.S. 694, 698 (1988); \textit{see also} Hague Service Convention, art. 1.
\textsuperscript{68} In \textit{Volkswagenwerk A.G. v. Schlunk}, the Supreme Court explained the scope of applicability of the Hague Service Convention: “The preliminary draft of Article 1 said that the present Convention shall apply in all cases in which there are grounds to transmit or to give formal notice of a judicial or extrajudicial document in a civil or commercial matter to a person staying abroad.” But the delegates “criticized the language of the preliminary draft because it suggested that the Convention could apply to transmissions abroad that do not culminate in service. The final text of Article 1, supra, eliminates this possibility and applies only to documents transmitted for service abroad.” 486 U.S. 694, 700-01 (1988).
\textsuperscript{69} 788 F.2d 830, 839 (2d Cir. 1986) (“The reference to the freedom to send judicial documents by postal channels directly to persons abroad would be superfluous unless it was related to the sending of such documents for the purposes of service.”); \textit{see also Brockmeyer v. May}, 383 F.3d 798, 803 n.1 (9th Cir. 2004) (declining to follow Bankston); \textit{Research Sys. Corp. v. IPSOS Publicite}, 276 F.3d 914, 926 (7th Cir. 2002) (same).
\textsuperscript{70} Article 21 refers to Articles 8 and 10 as involving “methods of transmission,” even though Article 8 expressly uses the phrase “forward documents, for the purpose of service,” while Article 10(a) uses the
to the Hague Service Convention necessarily interpreted Article 10(a) as permitting service of process by mail because they objected to service by mail under Article 10(a) or made statements evincing their interpretation that mail service was permissible under the Convention. Experts charged with interpreting the Hague Service Convention have come to the same conclusion. They attribute the textual difference, term “send.” “Methods of transmission” necessarily refers to both “service” in Article 8 and “send” in Article 10; thus, all three terms must be interchangeable.

71 The following countries objected to service via mail under Article 10(a): Argentina, Bulgaria, Peoples’ Republic of China, Czechoslovakia, Egypt, Germany, Greece, Republic of South Korea, Latvia, Luxembourg, Norway, Poland, Slovak Republic, Switzerland, Turkey, and Venezuela. See Memorandum of the Administrative Office of the U.S. Courts (Nov. 7, 2000), available at http://www.laed.uscourts.gov/process_abroad.pdf (last visited May 9, 2012); see also EOI Corp. v. Medical Marketing, Ltd., 172 F.R.D. 133, 138 (D.N.J. 1997) (describing objections of Czechoslovakia and Turkey).

72 Canada, Japan, Pakistan, and the United States similarly made statements indicating that they understood Article 10(a) permitted service by mail and that they did not object to such service. Canada stated that it “does not object to service by postal channels,” and Pakistan stated that it “has no objection to such service by postal channels directly to the persons concerned [Article 10(a)] . . . .” Paradigm Ent., Inc. v. Video Sys. Co. Ltd., No. 3:99-CV-2004, 2000 WL 251731 *6 (N.D. Tex. Mar. 3, 2000). Japan: “At a Special Commission of the Hague Convention held in April, 1989, the Japanese delegation announced that Japan does not consider the sending of foreign judicial documents by postal channels to be an infringement of its sovereign power.” Knapp v. Yamaha Motor Corp. U.S.A., 60 F. Supp. 2d 566, 569 n. 3 (S.D. W. Va. 1999) (quoting Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 134 (2d ed. 1992)). The United States: In 1967, “the United States delegate to the Hague Convention reported to Congress that Article 10(a) permitted service by mail.” Brockmeyer v. May, 383 F.3d 798, 803 (9th Cir. 2004).

73 See Letter from Alan J. Kreczko, U.S. Dep’t of State Deputy Legal Advisor to the Admin. Office of the U.S. Courts (March 14, 1991) quoted in U.S. Dep’t of State Op. Regarding the Bankston Case, 30 I.L.M. 260 (1991) (“We . . . believe that the decision of the Court of Appeals in Bankston is incorrect to the extent that it suggests that the Hague Convention does not permit as a method of service of process the sending of a copy of a summons and complaint by registered mail to a defendant in a foreign country.”). “[T]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.” United States v. Stuart, 489 U.S. 353, 369 (1989); Sumitomo Shoji America, Inc. v. Avaglano, 457 U.S. 176, 184-185 (1982) (same). See also Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 42-45 (2d. ed. 1992) (in this guidebook to practicing law under the Hague Service Convention, the authors, an international commission of experts from signatory countries to the convention, criticized the Bankston line of cases and reasoned that “signatory States would not have been given the opportunity to object to Article 10(a) on the grounds that such use of postal channels would infringe upon their sovereignty unless such use constituted service of process.”); Permanent Bureau Report on the Second Special Commission, 28 I.L.M. 1556, 1561 (1989) (a special international commission formed after the Bankston opinion stated: “the postal channel for service constitutes a method which is quite separate from service via the Central Authorities or between judicial officers. Article 10(a), in effect, offered a reservation to Contracting States to consider that service by mail was an infringement of their sovereignty. Thus, theoretical doubts about the legal nature of the procedure were unjustified. Nonetheless, certain courts in the United States of America . . . had concluded that service of process abroad by mail was not permitted under the Convention.”). Such authorities reveal
somewhat un-satisfyingly, to “careless drafting.”\textsuperscript{74} This debate has proceeded for more than twenty years and no resolution to the Article 10(a) dispute appears on the horizon. As a result, litigants have no prudent choice but to rely on the problematic Central Authority system to serve process abroad, even though it is time-consuming and unreliable.

\textbf{B. Service via the Central Authority is cumbersome and unreliable.}

Service via the Central Authority is unappealing for many reasons. First, service is relatively expensive; it often costs in excess of $1,000.00.\textsuperscript{75} Although under Article 12 “[t]he service of judicial documents coming from a contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed,” an applicant may be required to reimburse the Central Authority for costs incurred by “the employment of a judicial officer or of a person competent under the law of the State of destination” or “the use of a particular method of service.”\textsuperscript{76} This only adds further expense to the $1000.00 cost estimate. Second, some countries not only require translation of documents to be served, they micromanage document translations, refusing to serve documents they consider mistranslated.\textsuperscript{77} This can lead to multiple attempts to translate documents to the Central Authority’s satisfaction. Third, Central Authorities often refuse to fulfill service requests from American attorneys because they incorrectly conclude that such persons are not permitted to make service requests through the Central Authority.\textsuperscript{78} Finally, Central Authorities often refuse to complete requests originating in the United States where the service documents were created electronically, such as when using e-filing services in federal courts, because the documents lack an original signature or seal.\textsuperscript{79} These difficulties in translation, who is a

\begin{itemize}
  \item “the practical construction adopted by the parties” and are important aids to interpretation of treaties like the Hague Service Convention. See \textit{Air France v. Saks}, 470 U.S. 392, 396 (1985).
  \item \textsuperscript{74} \textit{Ackermann v. Levine}, 788 F.2d 830, 839 (2d Cir.1986).
  \item \textsuperscript{75} \textit{Bankston v. Toyota Motor Corp.}, 889 F.2d 172, 174 (8th Cir. 1989) (Gibson, J., concurring) (describing service under the Central Authority system as costing “$800 to $900” more than 20 years ago). The author’s personal experience reveals that this estimate is no longer accurate; indeed, complying with Article 5 is much more costly today than it was in 1989.
  \item \textsuperscript{76} Hague Convention, art. 12.
  \item \textsuperscript{77} “[B]oth Japan and Germany read the documents received before serving them domestically and have been known to send documents back because of inaccurate translations.” Emily Fishbein Johnson, \textit{Privatizing the Duties of the Central Authority: Should International Service of Process Be Up for Bid?}, 37 Geo. Wash. Int’l L. Rev. 769, 785 (2005).
  \item \textsuperscript{78} The United Kingdom and Israel “have refused to accept service requests forwarded by private attorneys in the United States.” Emily Fishbein Johnson, \textit{Privatizing the Duties of the Central Authority: Should International Service of Process Be Up for Bid?}, 37 Geo. Wash. Int’l L. Rev. 769, 792 (2005).
  \item \textsuperscript{79} Preliminary Document No 14 of January 2009 for the attention of the Special Commission of February 2009 on the practical operation of the Hague Apostille, Service, Evidence and Access to Justice Conventions, at p. 21, No. 73 available at \url{http://www.hcch.net/upload/wop/2008pd14e.pdf} (“They also noted
proper requesting party, and concerns about authenticating documents often make it advisable to hire a process serving company specializing in service under the Convention, such as APS.80

Commentators often characterize the difficulty of complying with the Hague Service Convention as minimal.81 If the only impediments to service were the expense and administrative headaches just described, those commentators would be justified. Although these difficulties are not insignificant, the more serious obstacles to international service of process are the serious delays in and the lack of reliability of the Central Authority. This problem arises, at least in part, because there is neither stick nor carrot available to litigants to enforce a State's treaty obligations. There is no deadline imposed on the Central Authority to act on service requests.82 Indeed, a signatory country can categorically ignore the Hague Service Convention.83 Even where the Central Authority acknowledges its responsibilities, requests for service are often not acted upon for months.84 Worse still, proof of service from the Central Authority may take years or never come at all.85

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80 See http://www.civilactiongroup.com/index.php?pr=International (“APS is recognized by member nations as an authority to transmit requests for service abroad.”).
84 “Not infrequently, a request for service is acted upon only several months after it has been sent. There are even instances in which the certificate of execution has been returned to the requesting authority several years after the request was sent.” Catherine Kessedjian, Preliminary Document No. 7 on Electronic Data Interchange, Internet and Electronic Commerce, at 28 available at http://www.hcch.net/upload/wop/gen_pd7e.pdf (April 2000) (last visited May 4, 2012).
85 “Not infrequently, a request for service is acted upon only several months after it has been sent. There are even instances in which the certificate of execution has been returned to the requesting authority several years after the request was sent.” Catherine Kessedjian, Preliminary Document No. 7 on Electronic Data Interchange, Internet and Electronic Commerce, at 28, available at http://www.hcch.net/upload/wop/gen_pd7e.pdf (April 2000) (last visited May 4, 2012).
As a default rule litigants can expect service through the Central Authority – even when it is successful – to take at least six months.\(^8^6\) This delay can have outcome-determinative consequences. For example, in *Paracelsus Healthcare Corp. v. Philips Med. Sys., Nederland, B.V.*, the plaintiff served the request for service on the Central Authority for the Netherlands one month before limitations expired.\(^8^7\) Not surprisingly, the Central Authority did not complete service within the month; as a result, the court held the suit was properly dismissed, and admonished the plaintiff: “Paracelsus should have recognized the difficulties involved in serving a foreign corporation and immediately used every method available to accomplish service within the limitations period.”\(^8^8\) Curiously, the court criticized the plaintiff for failing to use alternative service methods – including mail service – because the Netherlands had not objected to them,\(^8^9\) apparently failing to recognize that the alternative methods are either at least as time-consuming as the Central Authority or, in the case of mail service under Article 10(a), a method found impermissible by the very same Court of Appeals fifteen years earlier.\(^9^0\) Unfortunately, this result is not an isolated event\(^9^1\) and can also occur where a plaintiff fails “diligently” to complete service after filing – even where the statute of limitations is not at issue.\(^9^2\)

More troubling is the apparently systemic problem of significant delays in, or complete failure of, the Central Authority system. In a significant percentage of cases, proof of service is delayed by a year or more. Even more disturbing is the fact that, especially considering requests for service originating in the United States, ten percent of requests are never fulfilled at all. In July 2008, the Permanent Bureau, the secretariat

\(^8^6\) E. Charles Routh & Garvey Schubert Barer, Going International: Fundamentals of International Business Transactions 491 (2004) (“No time period is specified for service, and it can be a very time-consuming process. . . . Although it varies by country and generally is getting better, anticipate six months from the start of the process for statute of limitations checking.”).

\(^8^7\) 384 F.3d 492, 497 (8th Cir. 2004).

\(^8^8\) 384 F.3d 492, 497 (8th Cir. 2004).

\(^8^9\) 384 F.3d 492, 497 (8th Cir. 2004).

\(^9^0\) Bankston v. Toyota Motor Corp., 889 F.2d 172, 173 (8th Cir. 1989).

\(^9^1\) See, e.g., Thach v. Tiger Corp., 609 F.3d 955, 960 (8th Cir. 2010) (dismissing pursuant to limitations despite plaintiff’s attempt to serve via Japan’s Central Authority a little more than a month before limitations expired); Damron v. Sadler, 01-A-01-9511-CV00502, 1996 WL 355070, at *6 (Tenn. Ct. App. June 28, 1996) (stating, in dicta, that due to failure to effect service within the limitations period, on remand “the suit is subject to dismissal upon proper presentation of the affirmative defense of statute of limitations.”).

\(^9^2\) See *Conservatorship of Prom v. Sumitomo Rubber Indus., Ltd.*, 224 Wis. 2d 743, 762, 592 N.W.2d 657, 666 (Ct. App. 1999) (dismissing suit for failure to comply with Wisconsin’s 60-day diligent service requirement). While the 120 day limit for diligently securing service in Federal Rule of Civil Procedure 4(m) does not apply in the context of foreign service of process, plaintiffs must still diligently effect service or risk dismissal. See, e.g., *Nylok Corp. v. Fastener World Inc.*, 396 F.3d 805, 807 (7th Cir. 2005) (“[T]he amount of time allowed for foreign service is not unlimited.”).
of the Hague Conference, distributed a questionnaire to Hague Service Convention States to evaluate how the Convention was functioning and to identify concerns. In January 2009, the Permanent Bureau published the results of the questionnaire and compiled statistics regarding the timeliness of responses to requests for service through the Central Authority. Although two thirds of service requests were completed within two months, the Permanent Bureau uncovered an alarming trend:

Of greater concern are the 18.3% of requests which took 12 months or more to be issued with a certificate, which justifies the comments of States as regards delays. Significant delays undermine the effectiveness of the Convention, and the Permanent Bureau considers that solutions to prevent delays of this length should be considered as part of the discussion at the Special Commission.

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Finally, 10.3% were of requests were returned unexecuted, the vast majority of these coming from the United States of America.

Viewed in the aggregate, nearly thirty percent of requests were either never acted upon or took more than a year to complete. Any private process server with this batting average would be out of business. Delays and uncertainty of this magnitude are simply unacceptable, especially when added to a civil litigation system that is already too time-consuming and unpredictable. On average, nearly three years elapses from the time a plaintiff files a complaint to the eventual verdict or judgment and another year or more elapses before an appeal is resolved. Often, these delays are further compounded by long, expensive preliminary battles over procedure, including the method of service

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95 See Civil Trial Cases and Verdicts in Large Counties, 2001, at p. 8 available at http://bjs.ojp.usdoj.gov/content/pub/pdf/ctcvlc01.pdf (last visited April 27, 2012) (“non-asbestos product liability trials had one of the longest case processing times, averaging 35.1 months from filing to verdict or judgment.”).

96 See Appeals of Civil Trials Concluded, 2005, at p. 4 available at http://bjs.ojp.usdoj.gov/content/pub/pdf/actc05.pdf (last visited April 27, 2012) (“Among appeals decided on the merits, 38% were disposed within 12 months of the filing date, and 82% were disposed within 18 months of the filing date.”).
of process. Federal legislation establishing a domestic agent for service of process for foreign entities subject to personal jurisdiction here can reduce delay and make service more reliable.

IV. Federal Substituted Service Legislation.

Federal legislation inspired by the United States Supreme Court's decision in Volkswagen, AG v. Schlunk would alleviate the burden, expense, and uncertainty of serving process through the Central Authority while remaining consistent with the Constitution and the Hague Service Convention itself. In Schlunk, the Supreme Court held that the Hague Service Convention did not apply because the foreign defendant was validly served through an involuntary domestic agent under state law. Because state law did not require that a document be sent abroad as a necessary part of service, the Convention did not apply of its own terms.

The details of Schlunk reveal the key features of the proposed legislation and why the legislation will not run afoul of either the Hague Service Convention or the Constitution. When Herwig Schlunk's parents were killed in an automobile crash, he brought a wrongful death suit claiming the Volkswagen in which they were killed was defective. Initially he sued Volkswagen of America (“VWoA”), the domestic entity that sold the car. VWoA, however, denied it designed or manufactured the car. Mr. Schlunk then amended his complaint to add Volkswagen Aktiengesellschaft (“VWAG”), the German parent company that designed and manufactured the Volkswagen and that

97 Shelton, Comment, Defective Products in a Defective System: Legislation Designed to Level the Playing Field in International Trade, 16 ROGER WILLIAMS U. L. REV. 171, 172 (2011) (“the current system of holding foreign manufacturers of defective products accountable is itself defective: when faulty products enter the U.S. from abroad and subsequently injure American consumers, lengthy and unfair battles over procedure characterize any litigation that ensues.”).
98 A bill sponsored by Senator Sheldon Whitehouse (D- RI) in the 111th Congress and again in the 112th Congress would have performed a somewhat similar function to the legislation proposed here. See Foreign Manufacturers Legal Accountability Act of 2010, S. 1946, 112th Cong. (2011); Foreign Manufacturers Legal Accountability Act of 2010, S. 1606, 111th Cong. (2009) (“FMLAA”). The FMLAA would require a foreign manufacturer to designate an agent for service of process in a single state and deemed such designation consent to personal jurisdiction in that state. S. 1946, 112th §§ 5(a)(1) – (2), (c). The FMLAA has a number of shortcomings, the most relevant of which is that a covered manufacturer need only designate an agent in one state. The wide latitude afforded manufacturers as to where to designate an agent promotes a race to the bottom avoided by my proposed legislation. Additionally, the FMLAA is concerned primarily with personal jurisdiction. For reasons explained more fully in my forthcoming work on the Hague Judgment Enforcement Convention, the FMLAA is a noble but flawed effort to resolve the thorny issue of establishing personal jurisdiction over foreign nationals.
99 Schlunk, 486 U.S. at 696.
100 Schlunk, 486 U.S. at 696.
wholly owned the domestic sales entity, VWoA.\textsuperscript{101} Rather than serve VWAG via the Hague Service Convention,\textsuperscript{102} Mr. Schlunk served VWoA as VWAG’s agent for service of process. Under Illinois state law, VWoA was VWAG’s involuntary agent for receiving process.\textsuperscript{103} And under Illinois law, service was complete upon VWAG when Mr. Schlunck served VWoA.\textsuperscript{104}

The key to the Supreme Court’s holding was that the local law of the jurisdiction where the case is pending determines whether the Hague Service Convention is implicated. Article 1 of the Convention provides: “The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.”\textsuperscript{105} The Court interpreted this language to mean that the Convention applies only when “a transmittal abroad [ ] is required as a necessary part of service.”\textsuperscript{106} The Convention, however, does not specify when a document must be transmitted “for service abroad.” Without any guidance from the Convention itself, the Court essentially saw no other alternative but to consult local law to determine whether a document must be transmitted abroad as a necessary part of service. Because under Illinois law service was complete when the domestic subsidiary was served, the Court explained that “[w]here service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends and the [Hague Service] Convention has no further implications.”\textsuperscript{107} Thus, the Hague Service Convention was not even implicated, let alone violated.\textsuperscript{108}

Although they agreed that substituted service that was complete under state law did not violate the Convention, the concurring justices acknowledged the difficulties the Court’s holding might produce. Such a restricted view of when the Convention applies might resurrect notification au parquet, one of the service methods the Hague Service Convention was designed to eliminate. As briefly described above, notification au parquet resembles, at least in passing, substituted service provisions available under state law. Notification au parquet allows a litigant to deposit the service documents with a designated local governmental official who is only arguably required to forward the documents to the defendant. The defendant’s duty to answer the lawsuit is triggered when the official receives the documents – not when the defendant is actually notified.

\textsuperscript{101} Schlunk, 486 U.S. at 696.
\textsuperscript{102} Germany is a party to the Hague Service Convention.
\textsuperscript{103} Schlunk, 486 U.S. at 706.
\textsuperscript{104} Schlunk, 486 U.S. at 707.
\textsuperscript{105} Hague Service Convention, art. 1.
\textsuperscript{106} Schlunk, 486 U.S. at 707.
\textsuperscript{107} Schlunk, 486 U.S. at 707.
\textsuperscript{108} Schlunk, 486 U.S. at 707.
Yet, there is no remedy available if the official fails to notify the defendant.\textsuperscript{109} Several countries that are now parties to the Hague Service Convention, including France, Italy, Belgium, Greece, and the Netherlands, permitted service via \textit{notification au parquet} at the time the Convention was drafted.\textsuperscript{110}

The concurring Justices were concerned not only with \textit{notification au parquet}, they were concerned that states would adopt other service methods even less likely timely to notify the foreign defendant. They saw the Court’s holding as giving a state virtually unfettered discretion to designate any service – no matter how suspect – as “domestic,” thereby avoiding application of the Convention altogether. A state could, for example, create a mailbox rule for service of process, such that when the process is deposited in the mail, service is deemed complete on the foreign national irrespective of whether it was ever delivered.\textsuperscript{111} Worse still, a state could deems anyone a domestic agent for service of process on a foreign defendant and deem service complete upon receipt by the deemed agent, “even though there is little likelihood that service would ever reach the defendant.”\textsuperscript{112} The negotiating history and contemporaneous statements made during ratification of the Hague Service Convention confirmed that the Convention was intended to make international service of process more likely to actually notify the defendant of the pendency of the lawsuit – in other words, more consistent with due process.

The Court, however, was not concerned by these implications and interpreted the language as they found it. They agreed that “the [Hague] Conference wanted to eliminate \textit{notification au parquet},”\textsuperscript{113} particularly because its procedures failed to comport with due process.\textsuperscript{114} The Court simply held that the language of Article 1, making the Hague Service Convention applicable only to transmissions of documents abroad as a necessary part of service, prevailed – especially where there was “no comparable evidence in the negotiating history that the Convention was meant to apply to substituted service on a subsidiary like VWoA, which clearly does not require service abroad under the forum’s internal law.”\textsuperscript{115} Indeed, if the drafters of the Hague Service Convention had intended the Convention to govern any service on a foreign national, it could have drafted the Convention to that effect. And as the concurrence grudgingly acknowledged, due process remains an important limitation on service – both for domestic or foreign entities. In cases brought in domestic courts, service of process on

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\textsuperscript{109} Schlunk, 486 U.S. at 703.  \\
\textsuperscript{110} Schlunk, 486 U.S. at 703.  \\
\textsuperscript{111} Schlunk, 486 U.S. at 710.  \\
\textsuperscript{112} Schlunk, 486 U.S. at 711.  \\
\textsuperscript{113} Schlunk, 486 U.S. at 703.  \\
\textsuperscript{114} Schlunk, 486 U.S. at 710.  \\
\textsuperscript{115} Schlunk, 486 U.S. at 704.
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any party, regardless of citizenship, is limited by due process. Similarly, if a foreign or domestic defendant is served abroad, suffers an adverse judgment, and the plaintiff attempts to enforce the judgment in this country, the defendant can resist enforcement on due process grounds. Any method of service, such as those posited by the concurrence, that attempts to deem service complete without a meaningful attempt to notify the defendant would be invalid under the Due Process Clause, irrespective of whether it comports with the Hague Service Convention.

In light of the holding in Schlunck, substituted service legislation can be drafted to increase the efficiency and reliability of international service, all without running afoul of the Constitution or the Hague Service Convention itself. The essential elements of the legislation include the following:\textsuperscript{116}

1. a duty for foreign persons or entities that are subject to personal jurisdiction in any state of the United States to register an agent for service of process with the United States Secretary of State;\textsuperscript{117}

2. as a consequence of failing to register an agent for service when required, or despite having registered an agent, where the agent cannot be served after at

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\textsuperscript{116} In addition to the features of the Illinois statute described in Schlunck, this legislation is inspired by the Texas long arm and substituted service statutes. See Tex. Civ. Prac. & Rem. Code §§ 17.044, 17.045.

\textsuperscript{117} The intent of this section is to create an obligation to register an agent for service of process, such that the obligation is coextensive with the due process limits on personal jurisdiction. See, e.g., CSR, Ltd. v. Link, 925 S.W.2d 591, 594-95 (Tex. 1996) (interpreting broad statutory language in Texas' long arm statute involving "doing business" in the state as reaching to the limits of federal due process). Similar concepts already exist in other states and territories. See Melia v. Les Grands Chais de France, 135 F.R.D. 28, 32 (D.R.I. 1991) (quoting Rhode Island's substituted service provision allowing substituted service on the secretary of state as agent for any corporation that does business in Rhode Island); Kawasaki Heavy Indus., Ltd. v. Superior Court of Guam, CIV. 90-00024, 1990 WL 320758 at *3 (D. Guam App. Div. Oct. 24, 1990) (quoting Guam's substituted service provision allowing substituted service on any unregistered corporation that is subject to personal jurisdiction); Hammond v. Honda Motor Co., Ltd., 128 F.R.D. 638, 642 (D.S.C. 1989) ("An unauthorized foreign corporation which is doing business in South Carolina is deemed to have designated the Secretary of State as its agent 'upon whom process against it may be served . . .'.") Of course, the question of whether the particular court in which the claim is brought can actually exercise personal jurisdiction over the defendant remains a separate question, subject to a separate due process analysis. It is certainly conceivable that a defendant would have an obligation to register an agent for service of process with the Secretary of State (because he has sufficient contacts with at least one state to be subject to personal jurisdiction there), yet not have sufficient contacts with the particular state in which the claim is brought to justify the exercise of personal jurisdiction. While this feature of the legislation may result in litigation of the predicate facts establishing a duty to register, such challenges seem most likely from defendants who would also challenge personal jurisdiction. Thus, by definition, the plaintiff could prove the defendant had sufficient contacts with the forum state to rebut the challenges to both service of process and personal jurisdiction. As a result, the breadth of issues to litigate "pre-answer" would not necessarily increase.
least two attempts on two different business days, the United States Secretary of State is deemed the involuntary agent for service of process;

3. when the Secretary of State is served with process in accordance with this legislation and via a method permitted by the rules of the court in which the case is pending, service is complete upon receipt by the Secretary of State;¹¹⁸

4. the Secretary of State must forward all process received to the current home or home office address of the person or entity served, addressed to the individual person or a corporate officer, director, or managing agent of the business entity, all as provided by the serving party, by registered or certified mail, return receipt requested;

5. the deadline of the served party to answer, object, or otherwise respond to the suit is the latter of 60 days after the date of receipt of the process by the Secretary of State or the deadline imposed by the law of the court where the case is pending;

6. the plaintiff must file documents evincing proof of service, including documents proving the Secretary of State was served, that the Secretary of State forwarded service, and the return receipt showing the defendant received service;

7. no default judgment shall be entered unless the plaintiff proves strict compliance with the foregoing provisions; and

8. the time for appealing or directly or collaterally attacking a default judgment on the grounds that the judgment was rendered despite a lack of compliance with this legislation or, despite compliance, the defendant did not receive actual notice of the lawsuit before the deadline to answer, object, or otherwise respond to the suit, is extended to the longer of 1 year or the deadline provided under the law of the court where the judgment was rendered.

These features result in either a designated agent or an involuntary agent upon whom process may be served. In either event, this process neither implicates nor violates the Hague Service Convention because service is complete when the agent is served and the subsequent forwarding of the served documents is thus not a necessary part of service. Moreover, this procedure meets the federal due process test of notice, reasonably calculated under all the circumstances, timely to apprise a defendant of the pendency of the action and the duty to respond because the use of certified or registered mail to

¹¹⁸ Many substituted service statutes have this feature; it is a matter of drafting the language appropriately. See, e.g., Barrie-Peter Pan Sch., Inc. v. Cudmore, 261 Md. 408, 414, 276 A.2d 74, 77 (1971) (“The secretary of state acts for and on behalf of the corporation, as effectually as if he were designated in the charter as the officer on whom process was to be served; or, as if he had received from the president and directors a power of attorney to that effect.”) (internal quotations omitted).
notify a defendant is constitutionally valid. This legislation is also a valid exercise of federal power, premised upon the Interstate Commerce Clause of the United States Constitution or the federal government’s power over foreign relations. It also does not violate the doctrine of international comity. Finally, its benefits in streamlining litigation outweigh any difficulty that may arise in enforcing the resulting judgment in a foreign court.

A. The proposed legislation neither implicates nor violates the Hague Service Convention.

Service of process under this proposal occurs domestically; thus, the Hague Service Convention is not implicated of its own terms. As with the Illinois substituted service statute in Schlunk, the agent, whether designated or involuntary, is the agent for receiving service of process. The agent is not the plaintiff’s process server. As a result, service is complete when the designated agent or the Secretary of State receives the process from the serving party. Unlike the Illinois statute, however, the proposed legislation explicitly requires the agent to forward the process to the defendant. This difference is without significance though, because the Hague Service Convention applies only when a document must be transmitted abroad “as a necessary part of service.” Conversely, “[w]here service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends and the [Hague Service] Convention has no further implications.” Because the Hague Service Convention is not even implicated when a domestic agent is served as proposed, there is no conflict between the treaty and the proposed legislation; thus, the treaty would have no preemptive effect, either by its own terms or via the Supremacy Clause.

This proposal also differs in important ways from notification au parquet. The proposal requires that the defendant have sufficient connection to the litigation and the United States such that the court could validly exercise personal jurisdiction over the defendant. It also explicitly requires the agent to forward the process to him. Perhaps more importantly, there are consequences if the agent fails to forward the process to the defendant or if the defendant can prove that he never received notice of the suit. If the plaintiff cannot prove strict compliance with all provisions – including specifically that the agent forwarded the process, and that the completed return receipt was filed as required – the court may not enter a default judgment. The proposal also provides a fairly generous deadline to respond to the suit and generous timelines for overturning a

119 Schlunk, 486 U.S. at 703.
120 Schlunk, 486 U.S. at 707 (emphasis added).
121 Schlunk, 486 U.S. at 707.
122 See n. 117, supra.
default judgment in the event the defendant does not receive actual notice or the plaintiff fails to show strict compliance with these procedures.\textsuperscript{123} These features also provide the defendant with due process; consequently, it would meet even the standard advanced by the concurrence in \textit{Schlunk} – that the Hague Service Convention forbids service of process that does not comport with due process.

\textbf{B. The proposed legislation meets due process standards.}

A foreign national may be required, consistent with due process, to designate a local agent upon whom process may be served, particularly when, as here, the obligation to designate an agent is coextensive with the due process limits on personal jurisdiction.\textsuperscript{124} The ultimate test of due process remains whether the service method is “reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”\textsuperscript{125} The proposed legislation relies primarily on mail services to ensure that the Secretary of State, once served with process, actually notifies the defendant that the suit is pending against him. For nearly a century, the postal system has been considered sufficiently reliable to meet the requirements of due process.\textsuperscript{126} In fact, under the Hague Service Convention, Central Authorities often execute service requests through the postal system.\textsuperscript{127} In addition, the more generous response deadlines and default judgment restrictions, as well as the appellate and collateral attack provisions further help ensure that no person is deprived of property without due process of law. Thus, this proposal is consistent with due process.


\textsuperscript{124} See \textit{Perkins v. Benguet Consol. Min. Co.}, 342 U.S. 437, 445 (1952) (discussing state statutes that require a foreign corporation to secure a license and appoint a statutory agent as useful for determining whether the foreign corporation has sufficient minimum contacts for personal jurisdiction purposes).

\textsuperscript{125} \textit{Mullane v. Central Hanover Trust Co.}, 339 U.S. 306, 314 (1950).

\textsuperscript{126} See \textit{Tulsa Professional Collection Services, Inc. v. Pope}, 485 U.S. 478, 490 (1988) (“We have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice”); \textit{Mennonite Bd. of Missions v. Adams}, 462 U.S. 791, 800 (1983) (stating notice by mail to party whose name and address is reasonably ascertainable and which ensures actual notice is “a minimum constitutional precondition” in a legal proceeding); \textit{Hess v. Pawloski}, 274 U.S. 352, 354 (1927) (stating service on a nonresident motorist is sufficient when a copy of the complaint is mailed to the defendant by registered mail and is also left with registrar); \textit{cf. Jones v. Flowers}, 547 U.S. 220, 230-31 (2006) (certified mail returned unclaimed should have been followed by attempts to serve via regular mail).

C. The Legislation is a valid exercise of federal power.

Congress may validly enact legislation governing service on foreign nationals pursuant to either its Foreign Commerce Clause power or the federal government's inherent power over foreign relations. There is no question that Congress may regulate procedure in federal courts pursuant to the Constitution's grant of authority under Article III, as supplemented by the Necessary and Proper Clause. This grant of authority over procedure specifically includes rules for service of process. It is generally understood, however, that Congress has no such plenary power over state court procedures; indeed, our federal system typically reserves to the states the ability to regulate the procedures by which state law claims are resolved. Despite Congress' lack of plenary authority over state procedures, the federal government can regulate state procedural rules when it otherwise acts pursuant to its limited powers. For example, in *Stewart v. Kahn*, the central issue was Congress' power to enact a limitations tolling statute that applied in both federal and state courts. The plaintiff sued on a promissory note that came due during the Civil War, but did not file suit until after the war had ended, which was also after the limitations period had expired. In 1864, however, Congress passed a tolling provision that deducted from any limitations period

128 See, e.g., *Burlington N. R.R. v. Woods*, 480 U.S. 1, 5 n.3 (1987) (“Article III of the Constitution, augmented by the Necessary and Proper Clause of Article I, § 8, cl. 18, empowers Congress to establish a system of federal district and appellate courts and, impliedly, to establish procedural Rules governing litigation in these courts.”); *Hanna v. Plumer*, 380 U.S. 460, 472, 85 S. Ct. 1136, 1144, 14 L. Ed. 2d 8 (1965) (“For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.”); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 2 (1825) (“Congress has power to regulate the process in all cases, in the Courts of the Union.”).

129 *Hanna v. Plumer*, 380 U.S. 460, 464 (1965) (“Prescribing the manner in which a defendant is to be notified that a suit has been instituted against him, it relates to the ‘practice and procedure of the district courts.’”).

130 Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 951 & n.14 (2001) (discussing scholars who address whether the federal government may regulate state court procedures). When federal substantive claims are enforced in state courts, however, federal procedural rules that are an integral part of the federal claim laws may displace a state procedural rule that would impermissibly interfere with resolution of the federal claim. See, e.g., *Bailey v. Cent. Vt. Ry.*, 319 U.S. 350, 354 (1943) (requiring the state court to submit all factual issues to a jury in a FELA case in lieu of the state procedure permitting the judge to find certain facts related to fraud); *Cent. Vt. Ry. v. White*, 238 U.S. 507, 512 (1915) (requiring the state court to use the federal procedure placing the burden of proving contributory negligence on the defendant in FELA cases in lieu of the state procedure requiring the plaintiff to disprove contributory negligence).

the time during which it was not possible to serve the defendant due to the rebellion.\textsuperscript{132} The defendant claimed that if the tolling provision were construed to apply in state courts, it would be unconstitutional.\textsuperscript{133} The Supreme Court disagreed, holding that Congress' and the President's war powers, the power to suppress insurrection, and the power to make laws necessary and proper to these granted powers authorized Congress to "remedy the evils which have arisen from [the Civil War's] rise and progress."\textsuperscript{134} Thus, Congress can validly enact laws, arguably procedural in nature,\textsuperscript{135} that apply in state courts when it acts pursuant to valid federal authority.\textsuperscript{136}

Congress could validly enact legislation providing for service of process on foreign persons or entities under the Foreign Commerce Clause of the Constitution. Under Article I, Section 8, clause 3 of the Constitution, Congress has the power "[t]o regulate Commerce with foreign Nations." Although this clause has received far less scrutiny than the adjacent Interstate Commerce Clause,\textsuperscript{137} the definition of "commerce" is likely at least as expansive in the foreign commerce realm.\textsuperscript{138} The question is thus whether the proposed legislation is a regulation of "commerce" as that term is understood in Supreme Court precedent. Because service of process involving foreign entities, I argue, involves regulation of economic activity with foreign nations, or at least is regulation of activity that, in the aggregate, substantially affects commerce with foreign nations, the proposed legislation is a valid exercise of foreign commerce clause authority.

At first blush, a rule of procedure applicable to service of process in both federal and state courts may not appear to regulate commercial or economic activity.\textsuperscript{139} The Supreme Court's commerce clause jurisprudence has, especially of late, inquired whether the legislation directly regulates commercial or economic activity. For

\begin{footnotes}
\item[132] Id. at 503-04.
\item[133] Id. at 506.
\item[134] Id. at 507.
\item[135] Compare Oil Co. v. Wortman, 486 U.S. 717, 725 (1988) (statute of limitations was procedural for purposes of the Full Faith and Credit Clause) with Guaranty Trust Co. v. York, 326 U.S. 99 (1945) (statute of limitations was substantive for Erie choice of law purposes).
\item[136] See Pierce County, Wash. v. Guillen, 537 U.S. 129, 147 (2003) (holding that an evidentiary privilege from disclosure, applicable in both state and federal courts, was a valid exercise of Congressional power under the Commerce Clause as part of a larger regulatory scheme for the interstate highway system).
\item[137] Anthony J. Colangelo, The Foreign Commerce Clause, 96 Va. L. Rev. 949, 950 (2010) ("Yet unlike its Article I, Section 8 sibling, the Interstate Commerce Clause, which has been scrutinized by generations of lawyers, scholars, and judges, the Foreign Commerce Clause has received little sustained analytical attention.").
\item[138] Id.
\item[139] See Anthony J. Bellia Jr., Federal Regulation of State Court Procedures, 110 Yale L.J. 947, 964 (2001) (calling litigation "in the abstract, a noneconomic activity").
\end{footnotes}
example, in United States v. Lopez, the Court invalidated the Gun Free School Zones Act as exceeding Congress’ power under the Commerce Clause because “neither the actors nor their conduct has a commercial character.”140 Similarly, the Supreme Court struck down the Violence Against Women Act in United States v. Morrison because “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”141 Though not necessarily outcome determinative, the character of the activity being regulated is important to the Court’s Commerce Clause analysis.142

Unlike laws prohibiting gun possession in a school zone or prohibiting violence against women, service of process more directly involves economic or commercial features. Often, state rules regarding service of process specify that only non-parties may serve process.143 This virtually guarantees that someone must be hired to send or physically deliver process to the recipient, who, under the proposed legislation, is either the designated or involuntary agent of a foreign national. The proposal also requires that the foreign person or entity be served through the use of postal channels, which necessitates a purchase of postage and return receipt services for mail sent to the foreign national. The Secretary of State would naturally be permitted to charge a fee for its services. And the intent of the legislation – one of its stated goals – is to reduce the high cost of international service. Even if these economic aspects of the proposed legislation seemed insignificant, litigation – of which service of process is a necessary part – is itself a significant economic activity. The reality is that the vast majority of American companies are, on average, a party to at least one lawsuit every year. More specifically, litigation between American and foreign companies is generally thought to be on the rise.145 And all of this litigation is expensive: the median amount American companies spent on litigation in 2011 was $1.4 Million.146

142 See United States v. Morrison, 529 U.S. 598, 613 (2000) (“While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”).
143 See, e.g., CAL. CODE CIV. P. 414.10; N.Y. C.P.L.R. § 2103(a); TEX. R. CIV. P. 103.
144 See 2011 Fulbright Litigation Trends Survey available at http://www.fulbright.com/litigationtrends02 (in 2010, 87% of U.S. companies surveyed were defendants in at least one lawsuit and 60% were plaintiffs in at least one lawsuit – numbers which are generally consistent year to year).
145 Although comprehensive statistics are not available, practitioners and commentators alike have noted the rise of international commerce and a concomitant rise in international litigation, especially in this country. See, e.g., Dan Harris, Why More U.S. Firms Are Suing Chinese Companies, Forbes Online, July 28, 2010 available at http://www.forbes.com/sites/china/2010/07/28/why-more-u-s-firms-are-suing-chinese-companies/ (“There has in the last year or so, been an uptick in the number of lawsuits in the United States against Chinese companies.”); Roger J. Johns & Anne Keaty, The New and Improved Section 1782: Supercharging Federal District Court Discovery Assistance to Foreign and International Tribunals, 29 AM. J. TRIAL ADVOC. 649, 683 (2006) (“As the pace of globalization increases, the quantum of international
Legislation aimed at streamlining litigation between American and foreign nationals and reducing the costs inherent in beginning such litigation is legislation that substantially affects commerce with foreign nations. Although the Court has limited what qualifies as regulation of commerce since the 1990s, Congress may still regulate activity even where it “may not be regarded as commerce . . . if it exerts a substantial economic effect on interstate commerce.”\textsuperscript{147} And though the Court has more recently reigned in the formerly expansive reach of the Commerce Clause, it has consistently reaffirmed the aggregation test of \textit{Wickard v. Filburn}: “Congress’s power, moreover, is not limited to regulation of an activity that by itself substantially affects interstate commerce, but also extends to activities that do so only when aggregated with similar activities of others.”\textsuperscript{148} It is also worth remembering that “[i]n assessing the scope of Congress’ Commerce Clause authority, the Court need not determine whether [the challenged] activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”\textsuperscript{149} As a result, even if the proposed service rule is itself not an economic or commercial regulation, and even if the economic effects of less cumbersome and less expensive service rules are significant only when viewed in the aggregate, Congress may regulate service of process on foreign nationals because, on the whole, it substantially affects commerce with foreign nations.\textsuperscript{150}

\textsuperscript{146} See 2011 Fulbright Litigation Trends Survey \textit{available at} http://www.fulbright.com/litigationtrends02 (“However, spending has risen this year, with U.S. companies reporting a median spend of $1.4 million and U.K. companies a median of $881,000.”).

\textsuperscript{147} \textit{Wickard v. Filburn}, 317 U.S. 111, 125 (1942).


\textsuperscript{149} \textit{Gonzales v. Raich}, 545 U.S. 1, 2 (2005).

\textsuperscript{150} A determination that the proposed service rules are a regulation of, or substantially affect, commerce is not tantamount to a finding that Congress may simply foist the Federal Rules of Civil Procedure on state courts. The principles of federalism and the Tenth Amendment, neither of which are applicable where foreign interests are concerned, adequately circumscribe Congress’s power generally to enact rules of procedure applicable in state courts. \textit{See, e.g., Reno v. Condon}, 528 U.S. 141, 149 (2000) (“In \textit{New York} and \textit{Printz}, we held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment.”); see also Anthony J. Bellia Jr., \textit{Federal Regulation of State Court Procedures}, 110 YALE L.J. 947, 972 (2001) (“Congress has no authority to regulate state court procedures in state law cases because ‘procedural law’ derives exclusively from state authority.”).
Irrespective of whether the proposal regulates commerce, legislation governing service of process on foreign nationals implicates the federal government’s power over foreign affairs, which is an independent basis for congressional legislation. “As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations.”151 And unlike Congress’s enumerated powers, including the Commerce Clause, “the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution.”152 The federal government’s power, and more specifically, Congress’s legislative power over matters affecting foreign nationals, though not strictly defined,153 is expansive.154 Although scholars may debate whether and under what circumstances states have concurrent power over matters touching foreign relations, where an activity concerns foreign relations, the federal government certainly has the power to legislate.155

D. The Legislation is consistent with international comity.

153 Andrew W. Hayes, *The Boland Amendments and Foreign Affairs Deferece*, 88 COLUM. L. REV. 1534, 1574 (1988) (“That there is no clear line between the substantive authority of the executive and Congress in foreign affairs does not itself diminish Congress’s constitutional authority over foreign affairs.”).
154 See Hines v. Davidowitz, 312 U.S. 52, 62-63 (1941) (“When the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land.”); see also Am. Ins. Ass’n v. Garamendi, 539 U.S. 396, 413 (2003) (discussing the “concern for uniformity in this country’s dealings with foreign nations” that resulted in the framers’ “allocation of the foreign relations power to the National Government”).
155 Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1634-35 (1997) (“Such suits typically implicate issues that fall in the gray zone between substance and procedure: transnational choice of law, transnational forum non conveniens, the enforcement of transnational forum selection clauses, and the recognition of foreign judgments. These issues are not governed by enacted federal law. The question thus arises whether they are governed by state law or federal common law. The Supreme Court has not resolved this question. But some lower courts have ruled that these issues implicate federal foreign relations interests and should be governed by the federal common law of foreign relations. Commentators overwhelmingly agree with this conclusion.”). The question may arise as to whether congressional legislation in the area of foreign affairs violates the executive’s special prerogative. While there is no clear delineation between Congress’s power over foreign commerce and the President’s authority to make treaties or executive agreements, without any conflict between the proposed legislation and the existing treaty that may arguably apply, namely the Hague Service Convention, (see supra, Part ___), a violation of the separation of powers doctrine is unlikely. See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 291, 233, 235 (2001) (“[T]here is no adequate explanation of the foreign affairs powers of Congress. Most scholars assume that Congress has a general power to legislate in foreign affairs matters . . . . Notwithstanding the common understanding of executive power, the President cannot regulate international commerce . . . .”).
International comity, to the extent it is a rule of law at all, should pose no barrier to service of process that is otherwise valid under domestic law. International comity is, at best, a complex and elusive concept. Its contours are ill defined, both in terms of what circumstances implicate comity and when comity operates to actually limit some action in an American court. Hilton v. Guyot is often quoted as the source of the doctrine of international comity in the United States. In deciding whether to enforce a French money judgment, the Court described comity as “the extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation . . . .” In addition to comity’s application to recognition or enforcement of a foreign judgment or other order, comity is most consistently invoked as either a rule of statutory construction preventing a domestic law from reaching foreign conduct or as a quasi-abstention doctrine akin to forum non conveniens in which a court declines to exercise jurisdiction in favor of a foreign forum. However, the formulation is so broad that comity has been invoked in myriad circumstances where a foreign interest may be at issue, sometimes with contradictory results. The

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156 Joel R. Paul, *Comity in International Law*, 32 Harv. Int’l L.J. 1, 7 (1991) (“deference to foreign sovereigns in the name of comity is neither required by customary international law nor reciprocated in practice”); id. at 79 n.31 (1991) (“comity is an extravagant and gratuitous form of deference to foreign sovereigns”).


158 Id; see also Hilton v. Guyot, 159 U.S. 113, 163-164 (1895) (“Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.”).

159 Joel R. Paul, *Comity in International Law*, 32 Harv. Int’l L.J. 1, 8-9 (1991) (comity is “both traceable to, and well represented by, the Supreme Court’s opinion in Hilton v. Guyot, which is the most commonly cited statement of comity in U.S. law.”).


162 Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804) (A statute “ought never to be construed to violate the law of nations, if any other possible construction remains.”); see also Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817-18 (1993) (Scalia, J., dissenting) (discussing the concept of “prescriptive comity,” or “comity of nations,” which refers to “the respect sovereign nations afford each other by limiting the [territorial] reach of their laws”).

163 Hartford Fire Ins. Co., 509 U.S. at 817-18 n. 9 (Scalia, J., dissenting) (distinguishing “prescriptive comity” from “comity of courts,” and defining latter to refer to the principles “whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere”).

164 Compare Morgenthau v. Avion Res. Ltd., 11 N.Y.3d 383, 390, 898 N.E.2d 929, 934 (2008) (declining to apply comity as a limit on service of process and holding comity was “not an additional hurdle for a plaintiff to overcome in serving a party in a foreign country”) with Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634, 647 (5th Cir. 1994) (holding that the Hague Service Convention did not invalidate
lack of a clear explanation of the doctrine from the Supreme Court despite two centuries of reference to it only perpetuates this problem. In short, existing formulations of this incoherent doctrine are broad enough for a foreign litigant to state a colorable objection to service when service does not comply with the law local to the foreign national. The better reasoned approach, however, would not apply comity to invalidate otherwise valid domestic service procedures.

The Supreme Court’s resolution of another Hague Convention case is instructive on the limits of comity, were it invoked in an attempt to invalidate service of process that complied with domestic law. In Societe Nationale Industrielle Aerospatiale v. U.S. District Court for S. District of Iowa, the Supreme Court was confronted with whether the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (“Hague Evidence Convention”) was the exclusive means of securing discovery from a foreign national. Much as the Court held with respect to the Hague Service Convention in Schlunk, the Hague Evidence Convention is not exclusive; the treaty does not foreclose the use of discovery procedures under the Federal Rules, even where the documents and information are located in the territory of a signatory country. Unlike in Schlunk, the Aerospatiale Court addressed the defendant’s objections based on international comity, namely, whether comity concerns dictated that litigants use the service that complied with domestic procedures but remanding for the district court to determine whether such service violated international comity) and Lake Charles Cane LaCassine Mill, LLC v. SMAR Int’l Corp., 07-CV-667, 2007 WL 1695722 at *2 (W.D. La. June 8, 2007) (quashing service that was not in accordance with Brazilian law). Compare also Gebr. Eickhoff Maschinenfabrik Und Eisengieberei mbH v. Starcher, 174 W. Va. 618, 631, 328 S.E.2d 492, 506 (1985) (although recognizing that the Hague Evidence Convention was not exclusive, “the principle of international comity dictates first resort to [the Hague Evidence Convention] procedures until it appears that such attempt has proven fruitless and that further action is necessary to prevent an impasse.”) with In re Honda Am. Motor Co., Inc. Dealership Relations Litig., 168 F.R.D. 535, 538 (D. Md. 1996) (declining to apply comity to prevent deposition of Japanese national in the United States).

165 Compare Emory v. Grenough, 3 U.S. (3 Dall.) 369, 370 (1797) (describing a “courtesy of nations” as permitting extraterritorial effect of laws “so far as they do not occasion a prejudice to the rights of the other governments, or their citizens”) with Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 546 (1987) (“we have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation. American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state. We do not articulate specific rules to guide this delicate task of adjudication.”) (internal citations omitted).


167 Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 534 (1987) (“The text of the Evidence Convention itself does not modify the law of any contracting state, require any contracting state to use the Convention procedures, either in requesting evidence or in responding to such requests, or compel any contracting state to change its own evidence-gathering procedures.”).
procedures in the treaty as a rule of first resort. It is the Court’s resolution of the specific comity objections that illustrates why comity should not limit domestic service of process.

The foreign defendant, a French company, argued comity requires first resort to the treaty’s procedures because conducting discovery via American discovery rules would be an affront to France’s “judicial sovereignty.” More specifically, the French defendant argued that in civil law countries like France, government officials often conduct discovery in contrast to the American style of discovery. Because France had agreed to the Hague Evidence Convention, so the argument went, France had agreed to limit its sovereignty only to the extent necessary to comply with its treaty obligations. Thus, the Hague Evidence Convention should be the exclusive method of securing discovery. The Court rejected this argument as unsupported by the text of the Convention itself and declined to issue a blanket rule of first resort, instead leaving open the question of whether a litigant could make a more particularized argument in favor of comity on a case-by-case basis in the future.

After Aerospatiale, some commentators have suggested that, by analogy, courts should consider comity as a limit to substituted service procedures like those blessed in Schlunk. Despite twenty-five years of case law following Aerospatiale, no litigant has advanced a more persuasive rationale for applying comity to limit domestic discovery procedures. While on occasion a court has invoked comity to require a litigant first to resort to the Hague Evidence Convention, in each case, the litigant made the same abstract sovereignty argument rejected in Aerospatiale and the court simply entered its order without much analysis or even explanation. More often, courts have rejected

168 Id. at 543.
169 Id. at 543.
170 Id.
171 Id.
172 Id. at 543-44. The Court also rejected any argument that France’s blocking statute, which specifically prohibits discovery of information located in France for use abroad, required a rule of first resort to the Hague Evidence Convention. Id. at 544 n.29.
173 H.H. Koh, INTERNATIONAL BUSINESS TRANSACTIONS IN UNITED STATES COURTS at 185-86 (1996) (“It is still possible for the forum to alleviate the harsh result of Schlunk by applying comity on a case-by-case basis.”); G. Born, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS at 832 (1996) (“Although it was not argued in Schlunk, the same comity rationale [as advanced in Aerospatiale] would appear applicable to service under the Hague Service Convention, arguably requiring resort to the Convention in cases where foreign states object to substituted service.”). While the Supreme Court did not decide Schlunk on comity grounds, both sides briefed the issue of comity to the Court. See Volkswagenwerk AG v. Schlunk, Brief for Petitioner, 1987 WL 881152 at *48; Brief for Respondent, 1988 WL 1031820 at *30.
the simplistic “sovereignty” objection, much as the *Aerospatiale* Court did. The mere fact that a foreign country prefers its own procedural rules to that of a domestic court’s is insufficient reason to apply foreign procedural laws in a domestic court in the name of “comity.” Otherwise, the Court would have laid down the blanket rule requiring first resort to the Hague Evidence Convention. As a result, there appears to be no good argument in favor of applying comity to limit otherwise valid domestic service procedures.

There are also important distinctions between discovery procedures and service of process that make a difference when issues of “sovereignty” are raised. The nature of

Civil Procedure should be used, the interests of protecting a foreign litigant in light of the jurisdictional problems are paramount”); *Knight v. Ford Motor Co.*, 260 N.J. Super. 110, 615 A.2d 297, 301 n. 11 (1992) (noting, in dicta, that “[i]f jurisdiction does not exist over a foreign party . . . the Convention may provide the only recourse for obtaining evidence”). Contrary to the Court’s discussion in *Aerospatiale*, courts occasionally give too much weight to general claims of “sovereignty.” See *In re Perrier Bottled Water Litig.*, 138 F.R.D. 348, 355 (D. Conn. 1991) (“The simple fact that, in joining the Convention, France has consented to its procedures is an expression of France’s sovereign interests and weighs heavily in favor of the use of those procedures.”); *Hudson v. Hermann Pfauter GmbH & Co.*, 117 F.R.D. 33, 37 (N.D.N.Y. 1987) (“When discovery is sought from citizens within the borders of a civil law country such as West Germany, the use of the discovery devices of the Federal Rules necessarily is more offensive to the sovereign interests of that country than would be the case if the same procedures were utilized in seeking discovery from a citizen of a common law country that is a signatory to the Convention, such as the United Kingdom.”).

the document served significantly affects the perceived sovereignty concerns. Service of a discovery subpoena or even a discovery request carries with it the threat of relatively immediate sanctions for failure to comply. In contrast, the informational nature of service of process renders it “relatively benign in terms of infringement on the foreign nation’s sovereignty.”

Similarly, the method of service affects the perceived sovereignty concerns. The proposed legislation results in completed service in this country and does not require in-person service on foreign soil, which is a greater potential affront to sovereignty than mail service. With no compelling argument in favor comity and because the proposed legislation is tailored to reduce potential sovereignty concerns, comity should not invalidate the substituted service proposed here.

E. The benefits of the Legislation outweigh the difficulty of enforcement abroad.

The principal limitation of service of process on a foreign national that does not utilize the procedures in the Hague Service Convention is the increased difficulty of enforcing the judgment where the defendant resides. It is generally true that to enforce a domestically obtained judgment in a foreign country, the defendant must have been served with process in accordance with the internal laws of country where enforcement is sought. As a practical matter, this difficulty may be more of a theoretical concern

177 F.T.C. v. Compagnie De Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1304, 1313 (D.C. Cir. 1980) (“When an American regulatory agency directly serves its compulsory process upon a citizen of a foreign country, the act of service itself constitutes an exercise of American sovereign power within the area of the foreign country's territorial sovereignty. . . . Given its informational nature, service of process from the United States into a foreign country by registered mail may thus be viewed as the least intrusive means of service i.e., the device which minimizes the imposition upon the local authorities caused by official U.S. government action within the boundaries of the local state.”); see also Smit, International Aspects of Federal Civil Procedure, 61 COLUM. L. REV. 1031, 1042 n.58 (1961) (“since service (of process) by mail requires activity only on the part of a foreign country's postal authorities, it is one of the forms of service least likely to be prohibited.”).
178 The secretariat of the Hague Conference has reported that decisions like Schlunk and similar conclusions that the Hague Service Convention is not mandatory have not caused an uproar among member States as some predicted. See Jan 2009 Summary at p. 26 (“the Permanent Bureau is very pleased to note that the 2003 Conclusion and Recommendation No 73, stating that the Service Convention is non-mandatory but exclusive, has not caused any problems amongst responding States.”).
179 See Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 706 (1988) (“In addition, parties that comply with the Convention ultimately may find it easier to enforce their judgments abroad.”); Yvonne A. Tamayo, Catch Me if You Can: Serving United States Process on an Elusive Defendant Abroad, 17 HARV. J. LAW & TECH. 211, 235-36 (2003) (“If a United States judgment requires enforcement in a foreign country, the service of process on which the judgment is based must have complied with the internal laws of the enforcing country.”); see also Joseph F. Weis, Jr., The Federal Rules and the Hague Conventions: Concerns
because foreign nationals who are subject to personal jurisdiction in the United States may be more likely to have domestically available assets against which enforcement may proceed. In any event, service procedures that foreign courts may find objectionable are perhaps the least of a litigant's concerns. Money judgments obtained in this country already suffer from a host of obstacles that make enforcement abroad unlikely. When weighed against the significant savings, both in terms of money and time, and the increased certainty of actually completing service, the fact that the judgment has but one more hurdle to enforcement is not significant.

Domestic money judgments are generally difficult to enforce abroad for a number of reasons. In 2001, the Committee on Foreign and Comparative Law of the Association of the Bar of the City of New York surveyed practitioners in Belgium, Canada, the People’s Republic of China, England, Wales, France, Hong Kong, Italy, Japan, Mexico, South Africa, Spain, and Switzerland about enforcing foreign judgments in their courts. The results of the survey paint a bleak picture for enforcing money judgments in the subject countries. Although the specific reasons were manifold, some of the most serious obstacles to recognition (let alone enforcement) of a domestic money judgment included: (1) differences in the concept of personal jurisdiction, (2) judgments that contravene the public policy of the foreign forum, and (3) practical obstacles, such as the delay and expense in utilizing foreign court procedures.

Many countries consider our concept of personal jurisdiction overly broad and will not enforce judgments unless the American court had personal jurisdiction in accordance with the law of the country where enforcement is sought. For example, Swiss law has a much narrower view of personal jurisdiction, basically requiring that the Swiss national be domiciled in the forum or have unquestionably submitted to the court’s jurisdiction. Similarly, French law in practice grants France “exclusive”

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*of Conformity and Comity*, 50 U. Pitt. L. Rev. 903, 906 (1989) (“[I]t is necessary to satisfy both domestic and foreign law on service if the judgment is to be enforced abroad.”); Gary B. Born & Andrew N. Vollmer, *The Effect of the Revised Federal Rules of Civil Procedure on Personal Jurisdiction, Service, and Discovery in International Cases*, 150 F.R.D. 221, 239 (1993) (noting that a country whose laws were violated by service of United States process might well not enforce a resulting United States judgment); accord *Hague Service Convention*, art. 15 (conditioning entry of a default judgment on compliance with the Hague Service Convention or other applicable law).

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181 Id. at 384, 389, 409.

182 Id. at 384 (“Most of the states surveyed have concepts of jurisdiction which are inconsistent or incompatible with U.S. concepts of long-arm jurisdiction and are not prepared to see such U.S. concepts expanded into their countries.”).

183 Id. at 385-86.
jurisdiction in almost all cases involving a French national\textsuperscript{184} and a French court will refuse to enforce a money judgment if it determines it has exclusive jurisdiction.\textsuperscript{185} England, Wales, South Africa, Italy, Spain, and Mexico also have similarly restrictive concepts of personal jurisdiction that may preclude enforcement.\textsuperscript{186} Commentators familiar with China have also concluded that Chinese concepts of personal jurisdiction are more restricted than the “exorbitant” reach of the American minimum contacts test.\textsuperscript{187}

The enforcing court’s public policy is also a likely objection to recognition and enforcement of American money judgments. Some countries give courts wide discretion in determining whether a judgment violates vague notions of justice, morality, liberty, or public order, making enforcement a shot in the dark.\textsuperscript{188} More specifically, every jurisdiction surveyed would likely refuse to enforce a judgment containing punitive, exemplary, or other multiple damages as contrary to their public policy.\textsuperscript{189} Finally, the time and expense involved in actually enforcing a judgment abroad is often a significant handicap. In many countries, including Canada, South Africa, Spain, Japan, Belgium, Italy, and Mexico, enforcement actions likely take two years and sometimes as long as nine years to complete.\textsuperscript{190} These are only some of the obstacles to enforcement that the survey found.

Weighed against the marginal increase in uncertainty of enforcement abroad, the benefits of the proposed legislation to domestic litigants are numerous. The overall expense will be reduced, thanks to the use of mail and relief from the need to hire specialized service providers to, among other things, translate the service documents. The six-month delay in securing service will be reduced due to simpler procedures. Cost and delay in litigation are also reduced as pretrial litigation over service is avoided, thanks in large part to on-point Supreme Court authority blessing substituted service like the proposed legislation.\textsuperscript{191} Service also becomes more reliable because the procedure bypasses the problematic Central Authority system. And the proposed legislation accomplishes all this without the need to amend the Hague Service Convention.

\textsuperscript{184} Id. at 386.
\textsuperscript{185} Id.
\textsuperscript{186} Id. at 385-88.
\textsuperscript{188} Survey, supra note 179 at 390-93.
\textsuperscript{190} Survey, supra note 179 at 409-10.
\textsuperscript{191} \textit{Volkswagenwerk Aktiengesellschaft v. Schlunk}, 486 U.S. 694, 708 (1988). Many states already provide for substituted service provisions like the one suggested in this article. And many of them have held that \textit{Schlunk} permits substituted service without violating the Hague Service Convention. \textit{See} Table A.
Convention, a process of negotiation involving the 65 parties to the treaty that would necessarily be time consuming and potentially contentious. ¹⁹²

**Conclusion**

Service of process under the Hague Service Convention is expensive and unreliable but it need not be so. A substituted service provision can cut through the red tape and uncertainty, all while providing valuable time and space for the parties to the Hague Service Convention to revise and update this nearly fifty year old treaty to keep pace with the rise of international litigation.

Table A:

<table>
<thead>
<tr>
<th>State</th>
<th>Does Local Law Permit Substituted Service Without Violating the Hague Service Convention?</th>
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<tbody>
<tr>
<td>Alaska</td>
<td>Unknown</td>
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<td>Arizona</td>
<td>Unknown</td>
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<tr>
<td>Arkansas</td>
<td>Unknown</td>
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<tr>
<td>Connecticut</td>
<td>Unknown</td>
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<td>D.C.</td>
<td>Unknown</td>
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<tr>
<td>Hawaii</td>
<td>Unknown</td>
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<tr>
<td>Idaho</td>
<td>Unknown</td>
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<tr>
<td>Indiana</td>
<td>Possibly. <em>Cf. Bays v. Mill Supplies, Inc.</em>, 1:10–CV–00432, 2011 WL 781464 (N.D. Ind. Feb. 28, 2011) (plaintiff was unable to show the agent was controlled by the defendant).</td>
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<tr>
<td>Iowa</td>
<td>Unknown</td>
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<tr>
<td>Kentucky</td>
<td>Unknown</td>
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<td>Maine</td>
<td>Unknown</td>
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<td>Michigan</td>
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<td>Montana</td>
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<td>Nebraska</td>
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<td>Washington</td>
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<tr>
<td>State</td>
<td>Case</td>
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<tr>
<td>Wyoming</td>
<td>Unknown.</td>
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<tr>
<td>N. Mariana Islands</td>
<td>Unknown.</td>
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<tr>
<td>Puerto Rico</td>
<td>Unknown.</td>
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</tbody>
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