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# Review of the Supreme Court's 1989-90 Term and Preview of the 1990-91 Term for the Transnational Practitioner

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**Review of the Supreme Court's 1989-90 Term and Preview of the 1990-91 Term for the Transnational Practitioner**

J. Clark Kelso\*

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In the previous article in this series, I had predicted that the Supreme Court would (1) reverse in *Alcan Aluminium Ltd. v. Franchise Tax Board of California*,<sup>1</sup> a Tax Injunction Act case;<sup>2</sup> (2) affirm in *Kirkpatrick, Inc. v. Environmental Tectonics*,<sup>3</sup> a foreign corrupt practices case raising issues under the Act of State Doctrine;<sup>4</sup> and (3) reverse in *Verdugo-Urquidez v. United States*,<sup>5</sup> a search and seizure case raising issues under the fourth amendment.<sup>6</sup> The Supreme Court did not disappoint, and at least for this year, my predictions came true.

In addition to these three cases, the Court decided several other

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1. 860 F.2d 688 (7th Cir. 1988).  
 2. Kelso, *Review of the Supreme Court's 1988-89 Term and Preview of the 1989-90 Term for the Transnational Practitioner*, 2 TRANSNAT'L LAW. 353, 369 (1989).  
 3. 847 F.2d 1052 (3d Cir. 1988).  
 4. Kelso, *supra* note 2, at 372-73.  
 5. 856 F.2d 1214 (9th Cir. 1988).  
 6. Kelso, *supra* note 2, at 375-77.

cases last term of interest to the transnational practitioner, including the Court's first case involving the Eurodollar market and an important personal jurisdiction case.

Of equally great significance is the resignation of Justice William J. Brennan, Jr., from the Court after 34 years of service.<sup>7</sup> As will be discussed more fully below, his replacement, Judge David Souter, is essentially an unknown quantity here in the United States, and it is thus unclear how Souter will affect the Court's decisions.

## I. EXECUTIVE SUMMARY

### A. *Personal Jurisdiction*

In *Burnham v. Superior Court of California*,<sup>8</sup> the Court unanimously held in a divorce action that personal service of a summons and complaint upon the defendant who was voluntarily within the state on business and to visit his children was sufficient to confer personal jurisdiction over that defendant even though the defendant had no other ties or connections with the state, and the cause of action did not arise out of the defendant's contacts with the state.

Justice Scalia, joined by three justices, reached this result by applying a bright-line rule that personal jurisdiction could always be obtained by personal service upon a natural person voluntarily within the state. Justice Brennan, joined by three justices, reached the same result applying the standards from *International Shoe Co. v. Washington*.<sup>9</sup> Justice Stevens, who concurred separately, agreed that there was jurisdiction, but he was unwilling to join either Justice Scalia or Justice Brennan in their approaches to the case.

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7. Justice Brennan was appointed by President Eisenhower in 1956.

8. 110 S. Ct. 2105 (1990).

9. 326 U.S. 310 (1945).

*B. Searches and Seizures Overseas and the Fourth Amendment*

In *United States v. Verdugo-Urquidez*,<sup>10</sup> the Court held that the fourth amendment did not apply to the search of an alien's home outside of the United States when the alien had no substantial ties with this country. The decision is of special importance to foreign citizens and corporations in light of recent efforts by the United States to give extraterritorial effect to some of its criminal laws. Do not expect your privacy to be protected by the United States Constitution.

*C. Collection of Eurodollar Deposits*

In *Citibank, N.A. v. Wells Fargo Asia Limited*,<sup>11</sup> the Court held that an agreement with respect to the place of repayment of a Eurodollar deposit (i.e., New York) did not constitute an agreement with respect to the place of collection of that deposit (i.e., the New York parent bank) when the foreign branch bank had been forbidden by the act of a foreign sovereign from repaying the deposit out of its own assets. Having found that the parties did not agree upon a place of collection, the Court remanded for a determination of whether the New York parent bank is required as a matter of the applicable law to satisfy the obligation of its foreign branch bank. The case preserves the distinction made in the banking industry between the place of repayment and place of collection, an important concept to the international banking community in light of the risk of nonpayment of foreign deposits.

*D. The Tax Injunction Act*

In *Franchise Tax Board of California v. Alcan Aluminum, Ltd.*,<sup>12</sup> the Court held that the Tax Injunction Act barred a federal suit by a foreign parent challenging California's unitary taxing scheme

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10. 110 S. Ct. 1056 (1990).

11. 110 S. Ct. 2034 (1990).

12. 110 S. Ct. 661 (1990).

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when the wholly-owned United States subsidiary could raise the parent's legal claims in a suit that had already been filed in state court. The case is another reminder to practitioners that state court remedies should be given serious consideration before filing suit in federal court.

### E. *The Act of State Doctrine*

The Court unanimously held in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*<sup>13</sup> that the act of state doctrine did not apply unless a United States court would be required to declare invalid (or otherwise ignore) the official act of a foreign sovereign. The case involved commercial bribery of a foreign official, and the most important practical effect of the Court's holding is to permit most litigation under the Foreign Corrupt Practices Act to proceed free from the shackles of the act of state doctrine.

## II. REVIEW OF THE 1989-90 TERM

### A. *Burnham v. Superior Court of California — Personal Jurisdiction Over A Natural Person Based Upon Personal Service Within The State*

#### 1. *The Jurisprudence of Jurisdiction*

The Supreme Court's jurisdiction jurisprudence has been widely criticized as lacking in predictive value.<sup>14</sup> The "minimum

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13. 110 S. Ct. 701 (1990).

14. The scholarly output on the topic of judicial jurisdiction is simply enormous. Recent critiques of the Supreme Court's jurisprudence are unanimously of the opinion that the state of the law is at present uncertain and confused. See, e.g., Murphy, *Personal Jurisdiction and the Stream of Commerce Theory: A Reappraisal and a Revised Approach*, 77 KY. L.J. 243 (1989); Morton, *Contacts, Fairness and State Interests: Personal Jurisdiction After Asahi Metal Industry Co. v. Superior Court of California*, 9 PACE L. REV. 451 (1989); VanDercreek, *Jurisdiction Over the Person — The Progeny of Pennoyer and the Future of Asahi*, 13 NOVA L. REV. 1287 (1989); Stravitz, *Sayonara to Minimum Contacts: Asahi Metal Industry Co. v. Superior Court*, 39 S.C.L. REV. 729 (1988); Paretzky, *A New Approach to Jurisdictional Questions in Transnational Litigation in U.S. Courts*, 10 U. PA. J. INT'L BUS. L. 663 (1988); Comment, *Asahi Metal Industry Co. v. Superior Court: Stream of Commerce or Swamp?*, 40 RUTGERS L. REV. 999 (1988); Note, *Personal*

contacts” and “traditional notions of fair play and substantial justice” tests, which, prior to the Court’s decision this term were by almost all accounts set in concrete in *International Shoe Co. v. Washington*,<sup>15</sup> appeal to the chancellor’s intellect in their beguiling simplicity. Unfortunately, the very characteristics that make the *International Shoe* tests attractive to the fair-minded also make them virtually useless to the legal practitioner and trial court judge faced with the very concrete question, “Does the court have jurisdiction over the defendant?” To offer as an answer to this question, “Yes, if it is fair,” is, in many cases, to give no answer at all.

Yet in case after case, the Court held that *International Shoe* was the starting point for analysis of jurisdiction questions.<sup>16</sup> When the *Restatement (Second) of Conflicts* was promulgated in 1970, it identified a single principle of judicial jurisdiction: “A state has power to exercise judicial jurisdiction over a person if the person’s relationship to the state is such as to make the exercise of such jurisdiction reasonable.”<sup>17</sup>

Despite the seeming all-inclusiveness of *International Shoe*, scholars were careful for a time not to throw out all pre-*International Shoe* bases for jurisdiction — even those that might not survive an *International Shoe* analysis. For example, the *Restatement (Second) of Conflicts* in Section 28 gave its blessing to jurisdiction based upon personal service over a natural person voluntarily present in the jurisdiction, even though the person’s presence was unrelated to the cause of action and was only

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*Jurisdiction and the Due Process Clause: An Evaluation of the Fairness Factors*, 19 PAC. L. J. 1459 (1988); Note, *Civil Procedure — Muddying the Stream of Commerce Theory — Asahi Metal Industry Co. v. Superior Court*, 36 U. KAN. L. REV. 191 (1987).

15. 326 U.S. 310, 316 (1945).

16. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Hanson v. Denckla*, 357 U.S. 235 (1958); *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220 (1957); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *Travelers Health Ass’n v. Virginia*, 339 U.S. 643 (1950); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

17. RESTATEMENT (SECOND) OF CONFLICTS § 24 (1971).

transitory.<sup>18</sup> Although giving its blessing to what is often called "tag" jurisdiction, the Reporter for the *Restatement (Second) of Conflicts* recognized that the rule might not be entirely consistent with *International Shoe*,<sup>19</sup> thus suggesting that *International Shoe* might not be the last word on jurisdiction after all.

But the all-inclusiveness of *International Shoe* was, in the opinion of most commentators, finally confirmed in *Shaffer v. Heitner*,<sup>20</sup> where the Court wrote that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."<sup>21</sup> In the comments to Section 5 of the *Restatement (Second) of Judgments*, the Reporter suggested that the *Restatement (Second) of Conflict's* prior approval of "tag" jurisdiction was doubtful in light of *Shaffer*.<sup>22</sup>

Most of the Court's jurisdiction cases have arisen in a domestic context with citizens of one state suing citizens from another state. In only two recent cases has the Court faced jurisdictional disputes with transnational implications. In *Helicopteros Nacionales de Colombia v. Hall*<sup>23</sup> and *Asahi Metal Industry Co. v. Superior Court of California*,<sup>24</sup> the Court considered jurisdiction over foreign corporations. Neither case, however, cleared the muddied waters. *Helicopteros* indicated that the transnational nature of a case might make a difference in the *International Shoe* balance, but that holding, while undoubtedly welcomed by transnationalists, only exacerbated the confusion. In *Asahi*, the Court was unable to

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18. *Id.* at § 28. comment a (1971) explained as follows:

Physical presence in the state was the traditional basis of judicial jurisdiction at common law. It is immaterial that the individual is only temporarily in the state. His presence in the state, even for an instant, gives the state judicial jurisdiction over him.

....

The rule that physical presence is a basis of judicial jurisdiction may result at times in a defendant being compelled to stand suit in a state to which he has no relationship other than the fact that he was served with process while passing through that state's territory.

19. "It can also be contended that the rule is inconsistent with the basic principle of reasonableness which underlies the field of judicial jurisdiction." *Id.* at comment a (1971).

20. 433 U.S. 186 (1977).

21. *Id.* at 212 (emphasis added).

22. RESTATEMENT (SECOND) OF JUDGMENTS § 5 comment a (1982).

23. 466 U.S. 408 (1984).

24. 480 U.S. 102 (1987).



form a majority on a critical jurisdiction issue that routinely faces transnational corporations: whether jurisdiction could be based upon the mere act of putting into the stream of commerce a product which injures a plaintiff in a foreseeable jurisdiction. In particular, the Court could not agree whether "purposeful availment" of the forum was necessary.<sup>25</sup>

## 2. *Burnham v. Superior Court*

The decision in *Burnham v. Superior Court of California*,<sup>26</sup> may signal a clarifying change in the law, at least with respect to one traditional basis of jurisdiction: service of process upon a natural person who is voluntarily within the jurisdiction.<sup>27</sup>

The defendant's wife, who resided in California with their children, filed a suit for divorce against the defendant in a California court. While visiting California from New Jersey on business and to see his children, the defendant was served with a California summons and a copy of the petition for divorce.

The defendant entered what amounts to a special appearance in the California suit to challenge jurisdiction.<sup>28</sup> This challenge was

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25. Justice O'Connor's plurality opinion (joined by Rehnquist, Powell, and Scalia) expressed the view that "minimum contacts" could be satisfied only if there had been a "purposeful availment" of the forum. *Asahi*, 107 S. Ct. at 1033 (O'Connor, J.). Justice Brennan's opinion (joined by White, Marshall, and Blackmun) rejected the "purposeful availment" test in favor of the stream of commerce approach. *Id.* 107 S. Ct. at 1035 (Brennan, J.).

The retirement of Justice Brennan will provide the Court with an opportunity to revisit (and hopefully decide) this important issue.

26. 110 S. Ct. 2105 (1990).

27. Although it should be obvious from the way in which the issue has been stated in the text, it bears emphasis that *Burnham* may not be relevant to resolving issues of jurisdiction over non-natural persons, such as corporations. See, e.g., Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 293 n.27 (1956).

28. Ordinarily, by entering an "appearance" in ongoing litigation, a person submits him or herself to the judicial jurisdiction of the state. RESTATEMENT (SECOND) OF CONFLICTS § 33. A "special appearance" (as opposed to a "general appearance") occurs when a person appears solely for the purpose of challenging the court's assertion of jurisdiction. The *Restatement (Second) of Conflicts* § 81 states the general rule followed by all states: "A state will not exercise judicial jurisdiction over an individual who appears in the action for the sole purpose of objecting that there is no jurisdiction over him."

In California, a challenge on personal jurisdiction grounds is made by filing a motion to quash. CAL. CIV. PROC. CODE § 418.10(a)(1) (West Supp. 1990).

rejected by the California state courts. The Supreme Court granted a writ of certiorari and unanimously affirmed the judgments of the California courts that jurisdiction existed.<sup>29</sup>

The unanimous affirmance by the Supreme Court indicates that this was in some respects an easy case. What makes the case interesting is not so much the result as the vastly different approach to jurisdictional questions taken by Justice Scalia (joined by Chief Justice Rehnquist, and Justices White and Kennedy) and Justice Brennan (joined by Justices Marshall, Blackman, and O'Connor). The Court was denied a majority because Justice Stevens concurred separately without any apparent rationale,<sup>30</sup> leaving the rest of us guessing as to the Court's ultimate rationale.<sup>31</sup>

Justice Scalia's approach can be fairly accurately summarized as follows: if it was good enough for his grand-father, it is good enough for him. More precisely, so long as a particular method of securing jurisdiction has been generally and widely approved and used by state courts, that "pedigree" is sufficient to establish the constitutionality of the assertion of jurisdiction, and it is not necessary to analyze the assertion of jurisdiction further under *International Shoe*. Since, as Justice Scalia demonstrates in his thorough opinion, courts and commentators of the past (although not the *recent* past)<sup>32</sup> have been essentially unanimous in their

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29. *Burnham v. Superior Court of California*, 110 S. Ct. 2105 (1990).

30. Much of the current unsettled state of the law can be attributed to Justice Stevens' unwillingness to come down on one side of the fence or the other. He concurred separately in *Shaffer v. Heitner*, 433 U.S. 186, 217 (Stevens, J., concurring), *Asahi Metal Indus. v. Superior Court of California*, 480 U.S. 102, 121 (1987) (Stevens, J., concurring in part), and now in *Burnham*.

31. The resignation of Justice Brennan and confirmation of Judge Souter will give the Court another opportunity to forge a majority in this area. Judge Souter's views on jurisdiction are unknown. Although he served on the New Hampshire Supreme Court for some seven years, that court did not cite *International Shoe* even once during his tenure. Press reports suggest that Souter models himself on Justice Oliver Wendell Holmes. To the extent that Souter has an affinity for the 19th century legal mind, this would suggest that he would join Scalia, whose opinion in *Burnham* relies heavily on 19th century style and precedent.

32. Recent cases and commentary by scholars have questioned whether "tag" jurisdiction is constitutional under *International Shoe*. See, e.g., *Nehemiah v. Athletics Congress of U.S.A.*, 765 F.2d 42, 46-47 (3d Cir. 1985); *Harold M. Pitman Co. v. Typecraft Software Ltd.*, 626 F. Supp. 305, 310-14 (9 N.D. Ill. 1986); *Bershaw v. Sarbacher*, 40 Wash. App. 653, 657, 700 P.2d 347 (1985). See, e.g., *Bernstine, Shaffer v. Heitner: A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 VILL. L. REV. 38, 47-68 (1979-80); *Brilmayer, A General Look at General Jurisdiction*, 66 TEX. L. REV. 723, 748-55 (1988); *Von Mehren, Adjudicatory Jurisdiction: General*

opinion that personal service upon a natural person voluntarily within the jurisdiction suffices to confer jurisdiction on the courts of that state, the due process limitations from *International Shoe* are necessarily satisfied. This is so even as to causes of action totally unrelated to the defendant's presence within the state and even though the defendant may have been present within the jurisdiction for only fifteen minutes. The only apparent exceptions to Scalia's rule involve cases in which the defendant is not voluntarily within the state.<sup>33</sup>

Justice Brennan's opinion, which fully embraces *International Shoe*, is premised largely upon a rejection of hard and fast rules that admit of no exceptions and that apparently would admit of no further development in the law. According to Justice Brennan, "[t]he critical insight of *Shaffer* is that all rules of jurisdiction, even ancient ones, must satisfy contemporary notions of due process."<sup>34</sup> Brennan criticizes Scalia for falling into the Blackstonian fallacy of asserting that the law has reached perfection and is in no further need of development.<sup>35</sup> Scalia undoubtedly recognizes that change and development is possible. For Scalia, however, that change and development must be initiated

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*Theories Compared and Evaluated*, 63 B.U.L. REV. 279, 300-07 (1983). Justice Scalia rejects these cases and articles as reflecting a misunderstanding of *International Shoe* and as being incorrectly inspired by a misplaced reliance on dicta in *Shaffer*. *Burnham*, 110 S. Ct. at 2113 & 2115-16.

33. Justice Scalia does not in his opinion explicitly hold that presence must be voluntary for his rule to apply. Instead, he carefully refers only to "personal service upon a physically present defendant" (as opposed to a "voluntarily present defendant"). *Burnham*, 110 S. Ct. at 2111. It is thus possible that Justice Scalia would find no due process violation even if a state were to assert jurisdiction over a person who was brought into a state by force.

On the other hand, Justice Scalia takes note in his opinion that "most states" did not permit jurisdiction to be asserted over "individuals who were brought into the forum by force or fraud . . . or who were there as a party or witness in unrelated judicial proceedings." *Id.* at 2112. Since an assertion of jurisdiction in these cases would not be blessed with a long "pedigree," the Court would presumably analyze such cases under the *International Shoe* guidelines.

34. *Burnham*, 110 S. Ct. at 2120 (Brennan, J., concurring) (emphasis added).

35. "Even Justice Scalia's opinion concedes that *sometimes* courts may discard 'traditional' rules when they no longer comport with contemporary notions of due process. For example, although, beginning with the Romans, judicial tribunals for over a millennium permitted jurisdiction to be acquired by force . . . by the 19th century, as Justice Scalia acknowledges, this method had largely disappeared. . . . I do not see why Justice Scalia's opinion assumes that there is no further progress to be made and that the evolution of our legal system, and the society in which it operates, ended 100 years ago." *Id.* at 2121 n.3.

by the states themselves as each state judges the fairness of such jurisdiction.<sup>36</sup> Brennan, by contrast, would reserve to the Court the power to judge the fairness of each exercise of jurisdiction.

This does not mean that the results which Brennan and Scalia would reach in particular cases is necessarily different, far from it. The bulk of Brennan's concurring opinion explains why, as a *general* rule, jurisdiction based upon personal service of a natural person voluntarily within the state does not violate due process. But to reach this result, Brennan, unlike Scalia, balances the benefits and burdens of presence jurisdiction. In the end, Brennan must leave open the possibility that in a particular case, jurisdiction based upon presence would be fundamentally unfair.

The main difference, then, between Scalia's and Brennan's approach, is the difference between a rule-based system in which the existence of certain material facts triggers application of the rule and a factor-based system in which factual circumstances are balanced against each other in light of an overall legal principle. Practitioners would probably prefer Scalia's approach because it appears to provide hard and fast answers to a critical and early question in the course of all litigation.

Of course the apparent clarity and simplicity of Scalia's rule-based approach may ultimately break down. As already noted, Scalia may himself recognize an exception when a person is involuntarily within a state.<sup>37</sup> And one wonders whether the case involving an airline passenger being served while the plane travels over the state will pass Justice Scalia's test. Mechanically applying the common law, it could be argued that being present over a state

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36. Scalia does not in his opinion clearly set forth a standard for judging the moment when changes in state law might trigger a new due process standard. If a minority of states rejected tag jurisdiction, that would not seem to be a rejection of the "tradition" that Scalia identifies. Suppose 26 states (one more than half) rejected tag jurisdiction? Scalia could still reasonably argue that the "tradition" remains good law in a substantial number of states. Suppose 45 states reject "tag" jurisdiction? This might be enough to trigger a new due process rule that would reject tag jurisdiction.

The closest that Scalia comes to formulating a test is when he notes in dictum near the end of his opinion that "nothing prevents an *overwhelming majority* of [states] from [rejecting "tag" jurisdiction], with the consequence that the 'traditional notions of fairness' that this Court applies may change." *Burnham*, 110 S. Ct. at 2119 (emphasis added).

37. See *supra* note 32.

is the same thing as being present in the state, and that service should therefore be sufficient to confer jurisdiction.<sup>38</sup>

On the other hand, the nineteenth century cases on which Scalia most heavily relied obviously did not consider the question of service on airplanes, and it is thus arguable that service in this type of case does not have a sufficiently developed "pedigree". If service in an airplane is considered to be a novel or, in Scalia's words, "non-traditional" form of service, then *International Shoe* would apply.<sup>39</sup>

As this discussion should illustrate, although Scalia's rule may be clear when it applies, it may remain unclear to which cases the rule will apply. There is little that Scalia can do about this type of uncertainty, which is inherent in the common law process of applying general rules to specific (and new) fact situations. Brennan's approach has a different, and perhaps more serious, problem. Although it is clear according to Brennan's approach when *International Shoe* applies (i.e., it applies to all cases), the results under *International Shoe* in specific fact situations may not be clear.<sup>40</sup>

There are several reasons why this case should be of interest to transnational practitioners. First, Justice Scalia's opinion represents an explicit attempt to clarify the law of jurisdiction in the United States. *Burnham* deals only with personal service upon natural persons, and does not deal with assertions of jurisdiction over corporations or other legal entities. We can hope, however, that Scalia's search for clear rules in this area will carry over into the next jurisdiction case involving transnational corporations.<sup>41</sup>

Second, to the extent that Justice Scalia's approach admits of no exceptions, the case should be of concern to international travellers. There are a limited number of ports of call for the international air

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38. That was the court's analysis and conclusion in *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959).

39. *Burnham*, 110 S. Ct. at 2119. As already noted above, it may be that assertions of jurisdiction over foreign corporations will fall outside of Scalia's rule and will continue to be analyzed under *International Shoe* and its progeny.

40. See *supra* note 13.

41. Of course clarity can be achieved only if the Court issues a majority opinion.

traveller. If Scalia's approach is applied mechanically — and that, after all, is supposed to be one benefit of clear rules — then a person flying from London to Kansas by way of New York City, may, upon clearing customs, be served with a New York summons.

It is possible, of course, that the Court would not follow the analysis in *Burnham* in cases involving foreign defendants. In *Asahi* and *Helicopteros*, the Court indicated some sensitivity to the problem of extending American notions of jurisdiction to cover foreign nationals. It is thus conceivable that the Court could treat cases involving foreign nationals differently from cases involving United States residents. When the case involves U.S. residents, the Court could apply the *Burnham* rule; when the case involves foreign nationals, the Court could revert to *International Shoe*.<sup>42</sup> But until the Court speaks to this issue, the next person who tries to hand you something in an American airport or in a plane flying over the United States may be a process server. Travellers beware!

**B. Verdugo-Urquidez v. United States — *The Fourth Amendment Does Not Protect A Non-Resident Alien Against A Search of His Home in a Foreign Country***

This case involved the joint search by U.S. Drug Enforcement Agency (DEA) agents and Mexican law enforcement officials of two homes in Mexico, both owned by Verdugo-Urquidez, a Mexican national. The district court held that the fourth amendment had been violated by the search and that the evidence obtained in the search should be suppressed. The Ninth Circuit Court of Appeals affirmed, concluding that DEA officers were required to obtain a search warrant from a United States magistrate before conducting as a joint venture with foreign law enforcement

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42. The Court could justify distinguishing the cases by noting that assertions of jurisdiction over foreign nationals is a relatively recent phenomenon that does not have a sufficiently developed "pedigree" to make it constitutional in all circumstances. In the absence of such a "pedigree," the fall-back analysis would be *International Shoe*.

officers the search of a foreign citizen's home.<sup>43</sup> In reaching its conclusion, the Ninth Circuit made three critical holdings. First, it held that the defendant could raise a fourth amendment challenge even though the defendant was a Mexican national.<sup>44</sup> Second, it held that the search was a "joint venture" between the United States and Mexican officials, and was thus subject to fourth amendment scrutiny.<sup>45</sup> Third, it held the DEA agents were not entitled to rely upon the statements by Mexican officials that the search had been properly authorized, and the DEA agents were instead required to obtain a search warrant from a United States court.<sup>46</sup>

As predicted, the Supreme Court has reversed, 6-3, with the majority opinion written by Chief Justice Rehnquist, separate concurring opinions by Justice Kennedy and Justice Stevens, and dissenting opinions by Justice Brennan and Justice Blackmun.<sup>47</sup> Although the result, a reversal, was not a surprise, the Court's rationale may come as quite a shock to many people, and especially the transnational practitioner.

The fourth amendment provides as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."<sup>48</sup>

The proscription against unreasonable searches and seizures and the companion exclusionary rule have been a powerful weapon which criminal defendants have used to force the exclusion of often

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43. 856 F.2d 1214 (9th Cir. 1988). On the Ninth Circuit's opinion, see generally, Note, *The Extraterritorial Applicability of the Fourth Amendment*, 102 HARV. L. REV. 1672 (1989); Note, *The International Silver Platter and the "Shocks the Conscience" Test: U.S. Law Enforcement Overseas*, 67 WASH. U. L.Q. 489, 501-05 (1989).

44. 856 F.2d at 1218-24.

45. *Id.* at 1224-28.

46. *Id.* at 1228-30.

47. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056 (1990) (Rehnquist, C.J.); 110 S. Ct. at 1066 (Kennedy, J., concurring); 110 S. Ct. at 1068 (Stevens, J., concurring in judgment); 110 S. Ct. at 1068 (Brennan, J., dissenting); 110 S. Ct. at 1077 (Blackmun, J., dissenting). Chief Justice Rehnquist was joined in his opinion by Justices White, O'Connor, Scalia, and Kennedy. Justice Brennan was joined in his dissenting opinion by Justice Marshall.

48. U.S. CONST. amend. IV.

very incriminating evidence.<sup>49</sup> Reacting in part to criticism of some of the excesses of the exclusionary rule, the Supreme Court has, in recent years, rewritten its fourth amendment jurisprudence. For example, the Court has imposed a "standing" requirement that effectively prevents a criminal defendant from invoking the fourth amendment in certain circumstances (such as when the government has unreasonably searched a third party).<sup>50</sup> The Court now permits in some circumstances the introduction of evidence obtained in violation of the fourth amendment when police officers acted in good faith.<sup>51</sup> The Court has also modified its definition of what constitutes a "reasonable" search so as to permit certain warrantless searches that, under prior law, might have violated the fourth amendment.<sup>52</sup> The Court has expanded the independent source doctrine, which gives the police a chance to do it right the second time around.<sup>53</sup> And the Court has narrowed the definition of what constitutes a search.<sup>54</sup>

In *Verdugo*, the Court did not need to call upon any of these

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49. There is a healthy literature on the fourth amendment and the exclusionary rule, including several books dedicated entirely to the topic. See, e.g., J. HIRSCHL, *FOURTH AMENDMENT RIGHTS* (1979); R. DAVIS, *FEDERAL SEARCHES AND SEIZURES* (1964). A recent review of the exclusionary rule contains ample citations to the available secondary literature. See Note, *Resurrecting the Wolf: An Analysis of the Fourth Amendment Exclusionary Rule*, 60 ST. JOHN'S L. REV. 716 (1986).

50. *United States v. Payner*, 447 U.S. 727 (1980). See generally Comment, *Parties Entitled to Invoke the Exclusionary Rule: Fourth Amendment Standing in Transition*, 51 MISS. L.J. 771 (1981).

51. See, e.g., *Illinois v. Krull*, 480 U.S. 340 (1987) (applying good faith exception to reasonable reliance upon a statute which authorized warrantless administrative searches); *United States v. Leon*, 468 U.S. 897 (1984) (applying good faith exception to reasonable reliance upon a search warrant issued by a neutral magistrate); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984) (applying good faith exception to reasonable reliance upon a magistrate's assurances that necessary changes would be made to the form of a warrant). See, e.g., Uchida, Bynum, Rogan & Murasky, *Acting in Good Faith: The Effects of United States v. Leon On the Police and Courts*, 30 ARIZ. L. REV. 467 (1988); Note, *Criminal Procedure — Expansion of the Good Faith Exception to the Exclusionary Rule — United States v. Owens*, 848 F.2d 462 (4th Cir. 1988), 62 TEMP. L. REV. 1351 (1989).

52. *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990) (permitting warrantless search of home when officers reasonably believe the person who has consented to search possesses common authority over the premises with the owner); *California v. Greenwood*, 486 U.S. 35 (1988) (permitting warrantless search of garbage bags left on curb); *California v. Ciraolo*, 476 U.S. 207 (1986) (permitting warrantless surveillance of fenced backyard from a plane flying at 1,000 feet).

53. *Murray v. United States*, 108 S. Ct. 2529 (1988). See generally Note, *Fourth Amendment — An Acceptable Erosion of the Exclusionary Rule*, 79 J. CRIM. L. & CRIMINOLOGY 647 (1988).

54. See *United States v. Place*, 462 U.S. 696 (1983) (exposure of luggage to a dog trained to locate drugs does not constitute a search).



exceptions. Instead, in an opinion that emphasized a territorial view of sovereign obligations, a majority held that the fourth amendment did not even apply. In reaching this conclusion, the Court emphasized the facts that (1) Verdugo was an alien who lacked substantial connections with the United States and (2) the search was conducted on foreign soil.

With respect to Verdugo's constitutional status, the Court concluded that the phrase "the people" in the fourth amendment is "a term of art" that did not include "aliens outside of the United States territory."<sup>55</sup> Under this construction, an alien located outside of the United States may not claim the protections of the fourth amendment. But even if the alien is temporarily within the United States at the time the foreign search occurs, physical presence is not enough to bring that alien within the class of "the people." Instead, the protections of the fourth amendment are triggered only if an alien within this country also has "developed sufficient connection with this country to be considered part of that community."<sup>56</sup>

This additional qualification was critical for decision of the case because Verdugo was actually present in the United States at the time of the search of his home in Mexico, having been lawfully brought into the United States against his will by Mexican police and held in the United States by police authorities. The majority discounted this presence as "not of the sort to indicate any substantial connection with our country."<sup>57</sup>

The Court's analysis did not end, however, with the observation that Verdugo (an alien with no substantial connections with the United States) could not claim the protections of the fourth amendment. The Court also took pains to note that there was no

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55. 110 S. Ct. at 1061.

56. *Id.* The Court does not indicate precisely what connections would be enough to be judged "substantial." There are suggestions in the opinion that a voluntary presence in the United States along with the acceptance of "some societal obligations," might be enough. 110 S. Ct. at 1065. This would indicate that an alien who is voluntarily present in the country and who has accepted "some societal obligations" could claim the protections of the fourth, fifth, and sixth amendments. Cf. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (assuming, but not deciding, that aliens present in the United States are protected by the fourth amendment).

57. 110 S. Ct. at 1064.

indication that the fourth amendment was intended to apply to anything other than "domestic matters."<sup>58</sup> Conceivably, then, the fourth amendment would not apply to the search of any home in a foreign country even if that home were owned by a United States citizen.<sup>59</sup> Such a holding would be supported by one of the themes struck at the end of the Court's opinion: that applying the fourth amendment to restrict government searches and seizures overseas might conflict with overriding national interest, especially in the context of armed intervention abroad.<sup>60</sup> The Court thus has left open the possibility that the fourth amendment simply is inapplicable to anything other than searches within the United States.<sup>61</sup>

The decision in *Verdugo* is of great importance to transnational practitioners. The extra-territorial application of United States law always raises controversy.<sup>62</sup> With *Verdugo*, United States officials may now attempt to enforce those laws using techniques of search and seizure without being limited by the fourth amendment. As a result of *Verdugo*, United States officials no longer must satisfy fourth amendment requirements of reasonableness before conducting such a search; the only limitation would seem to come

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58. *Verdugo-Urquidez*, 110 S. Ct. at 1061.

59. Justice Kennedy in particular noted the practical and conceptual difficulties with applying a warrant requirement to an overseas search. 110 S. Ct. at 1067-68 (Kennedy, J., concurring). The Court has granted a writ of certiorari to consider this issue in *Powell v. Parsons*, No. 89-1672, 59 U.S.L.W. 3029.

60. 110 S. Ct. at 1065-66. Justice Kennedy also noted in his separate concurrence that "[t]he absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the fourth amendment's warrant requirement should not apply in Mexico as it does in this country." 110 S. Ct. at 1068. This analysis would suggest that Justice Kennedy would not apply the fourth amendment to any foreign search, although Justice Kennedy explicitly notes that "[t]he rights of a citizen, as to whom the United States has continuing obligations, are not presented by this case." *Id.*

61. In *Reid v. Covert*, 354 U.S. 1 (1957), the Court held that the fifth and sixth amendments protected a United States citizen stationed abroad. Because the fifth and sixth amendments are drafted slightly differently from the fourth amendment (a difference noted by the Court in *Verdugo-Urquidez*), it remains open whether the fourth amendment also protects United States citizens abroad.

Several lower courts have extended fourth amendment protections to United States citizens in the context of searches abroad. *United States v. Conroy*, 589 F.2d 1258, 1264 (5th Cir. 1979), *cert. denied*, 444 U.S. 831 (1979); *United States v. Rose*, 570 F.2d 1358, 1362 (9th Cir. 1978).

62. See Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 INT'L LAW 257 (1980).

from the foreign governments' willingness to cooperate with United States officials<sup>63</sup> and other possible constitutional limitations, such as the fifth amendment's due process clause.<sup>64</sup> The fifth amendment's due process clause is, however, notably more generous to the Government than is the fourth amendment's more specific limitations.

C. *Citibank, N.A. v. Wells Fargo Asia Limited – Repayment of Eurodollar Debts Out Of Parent Banks' General Funds*

Given the uncertainty of world affairs and the difficulty in predicting the acts of sovereign nations, one might think that sophisticated businesspersons operating in the transnational arena would be careful to include in multi-million dollar contracts a clause which specifies what is to happen when performance of the contract is made impossible by the acts of a foreign sovereign — that is, a clause which allocates what is often referred to as the "sovereign risk." At least in the banking industry, this apparently was not the case, however, as *Citibank, N.A. v. Wells Fargo Asia*

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63. For example, Switzerland agreed early in 1990 to turnover to the U.S. what otherwise would have been secret information concerning Swiss bank accounts allegedly used by Manuel Noriega. See *Swiss to Hand Bank Secrets to U.S.*, *The Financial Times*, Jan. 18, 1990, at 2, § 1.

64. The Court's analysis strongly suggests that an alien outside of the United States cannot claim the protections of the fifth or sixth amendments. 110 S. Ct. at 1062-63. But once an alien is subjected to United States judicial jurisdiction (e.g., when placed on trial in the United States), then the fifth and sixth amendments would be applicable. As the Court noted, violations of the fifth and sixth amendments take place at trial, while a violation of the fourth amendment is complete at the time of the unreasonable search. 110 S. Ct. at 1060. With respect to the fifth amendment right against self-incrimination, the Court noted that "conduct by law enforcement officials *prior to trial* may ultimately impair that right." *Id.* Thus, even if the fourth amendment is not applicable to a foreign search, it remains open to argue that the circumstances of the foreign search were so outrageous as to "shock the conscience" in violation of the fifth amendment. See *United States v. Salerno*, 481 U.S. 739, 746 (1987).

Although the Court does not discuss the fourteenth amendment in its opinion, it seems highly likely that if a person would not be protected under the fourth, fifth, and sixth amendments, that person would also not be protected under the fourteenth amendment. The Due Process Clause of the fourteenth amendment tracks the language of the fifth amendment. The Equal Protection Clause of the fourteenth amendment is, if anything, even narrower in its application, since as drafted, it provides that a State may not deprive "any person *within its jurisdiction* the equal protection of its laws." U.S. CONST. amend. XIV, § 1 (emphasis added). The emphasized language does not appear in the Due Process Clause.

*Ltd.* makes clear.<sup>65</sup>

This case involves deposits, repayment and collection in the Eurodollar market. In 1983, Wells Fargo Asia Limited (“WFAL”) (a Singapore-chartered bank wholly owned by Wells Fargo Bank, N.A., a United States-chartered bank) agreed to make two, \$1 million time deposits in Citibank/Manila, a branch office of Citibank, N.A. (a United States-chartered bank). In the wonderful world of modern banking, no money actually changes hands in these transactions, and the situs of the accounts is nowhere near the Philippines. Instead, the “deposit” is accomplished by means of an electronic wire transfer from WFAL’s account with a New York correspondent bank to Citibank/Manila’s account with another New York correspondent bank. At the end of the time deposit, the “money” plus interest will be transferred back to WFAL’s account with its New York correspondent bank. The details of this transaction were confirmed in an exchange of telexes.<sup>66</sup>

Before the time for repayment arrived, the Philippine government restricted repayments of principal on all foreign obligations due to foreign banks, requiring government approval of all such payments.<sup>67</sup> Because of this restriction, Citibank/Manila refused to repay WFAL when the time deposit matured, claiming that the new Philippine law made performance impossible. WFAL filed suit in the federal court for the Southern District of New York claiming that Citibank New York was liable for the repayment of

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65. 110 S. Ct. 2034 (1990).

66. WFAL’s telex to Citibank/Manila read: “We shall instruct Wells Fargo Bk Int’l New York our correspondent please pay to our a/c with Wells Fargo Bk Int’l New York to pay to Citibank NA customer’s correspondent USD 1,000,000.” 110 S. Ct. at 2037. Citibank/Manila’s telexes to WFAL read: “Please remit US Dlr 1,000,000 to our account with Citibank New York. At maturity we remit US Dlr 1,049,444.44 to your account with Wells Fargo Bank Intl Corp NY through Citibank New York.” *Id.*

67. This new rule was contained in an Oct. 15, 1983, Memorandum to Authorized Agent Banks (MAAB 47): “Any remittance of foreign exchange for repayment of principal on all foreign obligations due to foreign banks and/or financial institutions, irrespective of maturity, shall be submitted to the Central Bank [of the Philippines] through the Management of External Debt and Investment Accounts Department (MEDIAD) for prior approval.” *Id.* at 2038. This Memorandum was issued during the period of political and economic turmoil that existed in the Philippines shortly after the murder of Senator Benigno Aquino in August 1983.

WFAL's funds.<sup>68</sup>

Evidence presented to the trial court established that there was a distinction in the banking community between "place of repayment," which refers to the physical location where wire transfers take place, and "place of collection," which refers to the place or places where the depositor may look for satisfaction. The parties had agreed only upon a place of repayment in their contract, and had said nothing about collection. Accordingly, the contract was silent on the issue of whether WFAL could look to Citibank N.A. for its funds.<sup>69</sup>

Because the parties had not in their agreement explicitly indicated what would happen in the event that the Philippine government did something which made repayment by Citibank/Manila impossible, it was left up to the courts to decide how the situation should be handled based upon an implied term in the contract.<sup>70</sup> A term may be implied in a contract either by the conduct of the parties and the surrounding circumstances, a course of conduct or custom in the industry, or as a matter of law.<sup>71</sup>

There was no evidence with respect to the parties conduct and surrounding circumstances, and the evidence was in conflict concerning industry practice and understanding.<sup>72</sup> The trial court held that the facts did not support an implied term obligating Citibank N.A. to satisfy Citibank/Manila's obligation.<sup>73</sup> The Second Circuit came to a different conclusion, focusing on the

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68. *Id.* at 2038. While litigation was pending, Citibank/Manila secured the approval of the Central Bank of the Philippines to pay interest to WFAL and to pay principal to the extent that it could make such payments out of non-Philippine assets held by Citibank/Manila. Citibank/Manila paid WFAL \$934,000, and the remainder, \$1,066,000, remained in dispute. *Id.*

69. The Second Circuit Court of Appeals indicated in its opinion that the place of collection included, as a matter of law, the place of repayment unless there was an agreement to the contrary. *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 852 F.2d 657, 660-61 (2d Cir. 1988). The Supreme Court disagreed with the Second Circuit's analysis and preserved for the banking industry the important distinction between the place of repayment and the place of collection. *Wells Fargo Asia Ltd.*, 110 S. Ct. at 2040. Correcting this error was probably the most important aspect of the Supreme Court's decision.

70. Citibank apparently modified its confirmation slips in response to this litigation. *See Wells Fargo Asia Ltd. v. Citibank*, 660 F. Supp. 946, 951 (S.D.N.Y. 1987).

71. 110 S. Ct. at 2039.

72. 660 F. Supp. at 950; 695 F. Supp. at 1452-53.

73. *Id.*

terms of the contract providing for repayment in New York.<sup>74</sup>

Over six years after the deposit had matured, the Supreme Court issued its opinion. It held, citing the "clearly erroneous" standard which limits appellate review of trial court factual findings, that the Second Circuit had erred in essentially overturning the trial court's factual finding that there was no implied agreement putting Citibank N.A. on the hook.<sup>75</sup> Since there was no term implied by the facts, the only issue remaining in the case was whether such a term would be implied by law. The Supreme Court remanded the case to the Second Circuit for a determination of what law applies and whether that law would impose upon Citibank N.A. an obligation to pay WFAL.<sup>76</sup>

The Supreme Court's holding here is, as Justice Stevens noted in his short dissent, "narrow."<sup>77</sup> Indeed, the decision is so narrow, that Chief Justice Rehnquist complained in a short concurring opinion that the Court had even granted certiorari in the case.<sup>78</sup> The importance of the case is certainly not its holding. Rather, the lesson to be learned is that leaving obvious issues open in a multi-million dollar agreement is going to be costly, because litigation to resolve the open issue will drag on for years, and the ultimate judicial resolution is far from clear. In a world where sovereigns come and go and laws respecting foreign investment and trade are subject to constant and dramatic revision, transnational practitioners are well advised in transnational contracts to allocate explicitly the risk of loss in the event of change of foreign law.

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74. 852 F.2d at 660.

75. 110 S. Ct. at 2040-41.

76. *Id.* at 2042. The district court had earlier found that New York law applied, and that under New York law, Citibank N.A. was obligated to pay the debt of its Philippine branch. 695 F. Supp. 1450, 1453-56 (S.D.N.Y. 1988). The Second Circuit on remand now will consider the correctness of these findings.

77. 110 S. Ct. at 2043 (Stevens, J., dissenting).

78. *Id.* at 2042 (Rehnquist, C.J., concurring).

D. Franchise Tax Board of California v. Alcan Aluminium Ltd.  
— Tax Injunction Act Bars Suit In Federal Court By Foreign  
Parent When Subsidiary May Raise Claims In State Court

One of the more serious commercial and trade disputes between the United States and foreign nations concerns the tax laws of several states which utilize a “unitary” tax approach in computing corporate tax.<sup>79</sup> A unitary tax approach generally involves ignoring formal corporate structure in determining corporate earnings in favor of an analysis based upon the “unitary business” which a corporation engages in, whether by itself or through affiliated companies.

A unitary taxing scheme risks overstating the income attributable to operations within the taxing state. Since a systematic overstatement of domestic income imposes a burden on interstate commerce (by imposing a special burden on out-of-state affiliated companies), unitary taxing schemes would be subject to constitutional scrutiny under the commerce clause and foreign commerce clause. The Supreme Court held in *Container Corp. v. Franchise Tax Board*,<sup>80</sup> and *Mobil Oil Co. v. Commissioner of Taxes*,<sup>81</sup> that a unitary taxing scheme does not impose an unreasonable burden on interstate or foreign commerce, but the Court reserved the question whether the application of a unitary taxing scheme to a domestic subsidiary of a foreign parent violates the foreign commerce clause’s proscription against multiple taxation and impairment of federal uniformity.<sup>82</sup>

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79. England, for example, has authorized its treasury department to retaliate by denying a United Kingdom tax credit to United States companies with substantial operations in unitary tax states. United Kingdom Finance Act of 1987, New Clause 27. An amicus brief filed on behalf of the Member States of the European Communities and the Governments of Australia, Japan, and Switzerland characterizes the resolution of the issue as one of “vital importance to the fifteen countries and to their future economic and commercial relations with the U.S.” See *Alcan Aluminium Ltd. v. Franchise Tax Board State of California*, 860 F.2d 688 n.11 (7th Cir. 1989), *rev’d*, 110 S. Ct. 661 (1990).

80. 463 U.S. 159, 184 (1983).

81. 445 U.S. 425, 438 (1980).

82. See *Container Corp.*, 463 U.S. at 189 n.26 & 195 n.32. See also *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979).

In *Franchise Tax Board of California v. Alcan Aluminium, Ltd.*,<sup>83</sup> the domestic subsidiary raised the constitutional challenge to the unitary taxing scheme in a California state court, and the foreign parent raised a parallel challenge in federal court.<sup>84</sup> The United States Court of Appeals for the Seventh Circuit permitted the federal action to go forward, holding that the foreign parent had standing to raise the constitutional claim and that there was no basis for abstaining.<sup>85</sup> The Supreme Court reversed.<sup>86</sup>

The Court first held that the foreign parent had standing under Article III of the United States Constitution.<sup>87</sup> In order to satisfy the requirements of Article III standing, a litigant must show (1) that "he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant"<sup>88</sup> and (2) that "the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'"<sup>89</sup> The foreign parents easily met these tests. The increased tax burden on the foreign parents was certainly an injury-in-fact, and the injury was fairly traceable to the defendant's administration of an allegedly unconstitutional unitary taxing scheme.<sup>90</sup>

Article III standing is only one part of the standing inquiry in federal court, however. Federal courts have created various "prudential requirements" that, in an appropriate case, may be used to dismiss a federal suit.<sup>91</sup> One such requirement is that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."<sup>92</sup> Arguably, a foreign parent could not satisfy this

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83. 110 S. Ct. 661 (1990).

84. *Alcan Aluminium Ltd. v. Franchise Tax Board of California*, 860 F.2d 688, 691 (7th Cir. 1988), *rev'd*, 110 S. Ct. 661 (1990).

85. 860 F.2d at 699-700.

86. 110 S. Ct. 661 (1990).

87. *Id.* at 664-65.

88. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). See *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982).

89. *Valley Forge Christian College*, 454 U.S. at 472 (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)).

90. *Alcan Aluminium*, 110 S. Ct. at 665.

91. See generally C. WRIGHT, *LAW OF FEDERAL COURTS*, § 13 (4th ed. 1983).

92. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).



test since it is the domestic subsidiary rather than the foreign parent which is being taxed. Following this line of reasoning, the Ninth Circuit Court of Appeals had previously denied standing to a foreign parent to challenge California's unitary taxing scheme.<sup>93</sup> The Seventh Circuit had come to a different conclusion in *Alcan Aluminium*.<sup>94</sup>

The Supreme Court could not avoid deciding the Article III standing issue, since Article III standing is a constitutional prerequisite to the exercise of federal court jurisdiction.<sup>95</sup> The Court did not have a constitutional obligation to address the prudential standing issue, however, and the Court chose not to resolve the issue in this case.<sup>96</sup> Instead, the Court simply assumed that there was standing, and then held that the suit must be dismissed in any event as barred by the Tax Injunction Act.<sup>97</sup>

The Tax Injunction Act provides as follows:

“[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.”<sup>98</sup>

The Seventh Circuit had held that the foreign parent's action was not barred by the Tax Injunction Act because it was clear that the foreign parent has *no* remedy under state law; the California procedures may be utilized only by the taxpayer.<sup>99</sup>

The Supreme Court took a different view of the Tax Injunction Act. Although the Act requires that there be a “plain, speedy and efficient remedy” in state court, the Act does not by its terms require that that remedy be pursuable by the federal plaintiff. Noting that the federal plaintiffs here, as sole shareholders and corporate parents, exercised complete control over the domestic subsidiaries, the Court held that the Tax Injunction Act barred a

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93. *Shell Petroleum, N.V. v. Graves*, 709 F.2d 593, 595 (9th Cir.), *cert. denied*, 464 U.S. 1012 (1983).

94. *Alcan Aluminium*, 860 F.2d at 700.

95. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 260 (1977).

96. See C. WRIGHT, *LAW OF FEDERAL COURTS*, § 13.

97. *Alcan Aluminium*, 110 S. Ct. at 666.

98. 28 U.S.C. § 1341 (1988).

99. 860 F.2d at 698.

federal action when the federal plaintiff controls an entity that can raise the constitutional claim in a state court action.<sup>100</sup>

Turning to the requirement that the state remedy be "plain, speedy and efficient," the Court first assumed that such a remedy existed and then put the burden of proving that there was no such remedy upon the foreign parent.<sup>101</sup> Although the foreign parents had a reasonable argument that a state court would not permit the domestic subsidiary to raise a challenge under the foreign commerce clause (since the injury is to the foreign parent), the foreign parents could not cite any California authority to demonstrate that a California court would refuse to hear such a claim, and there was one contrary decision from an intermediate California court.<sup>102</sup> The Court held that the foreign parents had not met the burden of proving that there was no adequate remedy in state court, and the Court unanimously dismissed the federal action.<sup>103</sup>

This case should serve as yet another reminder to corporate counsel and litigators that, given the Court's present position on federalism issues, state courts should be given serious initial consideration as to the choice of forum. A federal court should be sought only as a last resort and only when it is demonstrably clear that federal court jurisdiction exists (and in the context of a case that might involve abstention, such as where a state court action is already pending, this may involve making a clear showing that the state court has *no* power to adjudicate the claim).

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100. 110 S. Ct. at 666.

101. *Id.* See, e.g., *Pennzoil v. Texaco*, 107 S. Ct. 1519 (1987); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 435 (1982); *Moore v. Sims*, 442 U.S. 415, 432 (1979). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 3-30 (2d ed. 1988).

102. See *Mercedes-Benz of North America v. State Board of Equalization*, 127 Cal. App. 3d 871, 874, 179 Cal. Rptr. 758, 760 (1982).

103. *Alcan Aluminium*, 110 S. Ct. at 667.

E. *Kirkpatrick, Inc. v. Environmental Tectonics — The Act of State Doctrine and Foreign Corrupt Practices*

Commercial bribery is an unfortunate reality of certain transnational commercial transactions. In order to secure contracts with a foreign government, a hungry contractor may make payments or kickbacks to high government officials — often labelled “commissions” — in return for receiving the government’s business. In reaction to these practices, the Congress enacted and the President signed the Foreign Corrupt Practices Act, which prohibits such activity by United States companies.<sup>104</sup>

*Kirkpatrick, Inc. v. Environmental Tectonics* is a civil suit brought by the losing bidder against a contractor who was awarded a military contract by a foreign government as a result of bribes paid to foreign officials. After the successful bidder, W.S. Kirkpatrick & Co., was awarded a military contract by the government of Nigeria, the losing bidder, Environmental Tectonics Corporation (“ETC”), learned that its bid had been lower than Kirkpatrick’s, and ETC decided to investigate the circumstances under which the contract had been awarded. It discovered Kirkpatrick’s bribery scheme, and reported its findings to the United States Embassy in Lagos, Nigeria. Following an investigation by the United States Justice Department, Kirkpatrick and Carpenter, high company officials in Kirkpatrick & Co., were charged with violating the Foreign Corrupt Practices Act. They each pleaded guilty to one violation of the Act.<sup>105</sup>

Not satisfied with having exposed Kirkpatrick’s illegal practices, ETC shortly thereafter filed an action for damages against Kirkpatrick & Co. under the Racketeering Influenced Corrupt Organizations Acts,<sup>106</sup> the New Jersey Anti-Racketeering Act,<sup>107</sup> and the Robinson-Patman Act.<sup>108</sup> Among other pre-trial challenges to the lawsuit, Kirkpatrick & Co. asserted that the act

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104. 15 U.S.C. §§ 78dd-1, 78dd-2 (1988).

105. *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1055-57 (3d Cir. 1988).

106. 18 U.S.C. §§ 1961-68 (1988).

107. 2C N.J.C.S. §§ 41-1--41-6.2 (West 1982 & Supp. 1990).

108. 15 U.S.C. § 13(c) (1988).

of state doctrine barred consideration of the claims by the federal court. The district court agreed, and dismissed the action.<sup>109</sup> The court of appeals reversed.<sup>110</sup> The Supreme Court granted a writ of certiorari and unanimously affirmed the judgment of the court of appeals.<sup>111</sup>

The act of state doctrine is a judicially-created limitation on the exercise of federal court jurisdiction.<sup>112</sup> Early opinions by the Court emphasized somewhat international comity as the primary basis for the doctrine, but the Court has in modern times indicated that the doctrine is grounded more in separation of powers considerations.<sup>113</sup> The Court has not embraced any one statement of the doctrine, however, and in its recent cases, the Court had been unable to produce a majority opinion, suggesting that the doctrine has no agreed upon purpose or contours.<sup>114</sup>

In a recent and comprehensive overview of the many formulations of the act of state doctrine, Professor Dellapenna of Villanova University identified four purposes which the act of state doctrine could conceivably serve: (1) as a rule of judicial abstention; (2) as a way of avoiding political questions; (3) as a "super choice-of-law" rule; and (4) as a rule of repose.<sup>115</sup>

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109. 659 F. Supp. 1381.

110. 847 F.2d 1052 (3d Cir. 1988). The Third Circuit's opinion was noted in Note, *Environmental Tectonics Corp. v. W.S. Kirkpatrick, Inc.: The Act of State Doctrine and the Problem of Judicial Inconsistency*, 14 N.C.J. INT'L L. & COM. REG. 495 (1989).

111. *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 110 S. Ct. 701 (1990).

112. The literature on the act of state doctrine would fill a small library. Two recent contributions especially worth consulting are Dellapenna, *Deciphering the Act of State Doctrine*, 35 VILL. L. REV. 1, 30-53 (1990) and Leigh, *Sabbatino's Silver Anniversary and the Restatement: No Cause for Celebration*, 24 INT'L LAW. 1 (1990).

There have been a number of legislative attempts to codify or abolish the act of state doctrine, see Dellapenna, *supra*, at 126-30, but Congress has limited its legislative activity to disapproving a portion of the Court's decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (see Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301(d), 78 Stat. 1009, 1013 (codified at 22 U.S.C. § 2370(e)(2) (1988)) (commonly known as the Hickenlooper Amendment)), and to insuring that the enforcement of arbitral agreements will not be barred by the act of state doctrine (Pub. L. No. 100-669, § 1, 102 Stat. 3969 (1988) (codified at 9 U.S.C. § 15 (Supp. VI 1988))).

113. *Compare* *Underhill v. Hernandez*, 168 U.S. 250 (1897) *with* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

114. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972); *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682 (1976).

115. Dellapenna, *supra* note 109, at 30-53.

Although the Court does not explicitly rely upon any one set of principles or purposes in its decision, the rule which the Court adopts appears to be most consistent with what Professor Dellapenna identifies as the most likely purpose for the doctrine: a rule of repose that gives finality to sovereign acts.<sup>116</sup>

The Court's specific holding was that the act of state doctrine applied only to those situations in which a decision by a court in the United States necessarily would require a finding that a sovereign act was invalid or ineffective.<sup>117</sup> According to this rule, so long as there would be no judicial determination that an act of a foreign sovereign was invalid, the doctrine would be inapplicable no matter how embarrassed a foreign sovereign might be by the judicial proceedings, no matter how embarrassed the United States government might be, and no matter how great the interference with United State foreign policy.<sup>118</sup> This approach to the act of state doctrine is most consistent with a rule of repose which, in essence, grants full faith and credit to the acts of a foreign sovereign.

The Court's bright-line rule rejects a more flexible approach to the act of state doctrine — an approach advocated by the State Department — that would have permitted a court in some extreme circumstances to dismiss a suit that, although not requiring a finding as to the legal validity of a foreign sovereign's actions, would have nevertheless significantly impaired the conduct of U.S. foreign policy.<sup>119</sup> Although the Court's opinion suggests a bright-

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116. *Id.* at 45-53.

117. "In every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory." 110 S. Ct. at 704.

118. It may be, however, that independent separation of powers concerns would counsel judicial abstention in such a case. If so, then the Court's decision in *Kirkpatrick* can be viewed as a rather technical one in which the Court narrows the scope of the act of state doctrine itself but leaves open other independent bases for refusing to go forward. Even this technical adjustment in the law would be welcome, since it would at least clarify the limited reach of the act of state doctrine.

119. "It is one thing to suggest, as we have, that the policies underlying the act of state doctrine should be considered in deciding whether, despite the doctrine's technical availability, it should nonetheless not be invoked; it is something quite different to suggest that those underlying policies are a doctrine unto themselves, justifying expansion of the act of state doctrine (or, as the United States puts it, unspecified 'related principles of abstention') into new and uncharted fields." *Id.* at 706-07.

line rule, the rule is technically dicta. The State Department had indicated in its letter to the district court that litigation of this case would not significantly impair the conduct of foreign policy. Accordingly, the Court did not need in its opinion to decide whether the act of state doctrine would be available in such a case.<sup>120</sup> There thus remains some small room for arguing that the act of state doctrine should apply even when the legal validity of a foreign sovereign's actions are not in issue.

### III. PREVIEW OF 1990-91 TERM

#### A. *Floyd v. Eastern Airlines*<sup>121</sup> — Liability under Section 17 of the Warsaw Convention for Purely Emotional Injury

In this case, the plaintiffs were passengers on an Eastern Airlines flight from Miami to Nassau, Bahamas. After take-off, all three engines failed, and the crew informed the passengers that they would be forced to ditch the plane in the Atlantic Ocean. A disaster was averted when the crew restarted the engines, and the plane landed safely back in Miami.

The plaintiffs filed suit against Eastern, asserting claims under both the Warsaw Convention and under state law. Emotional distress was the only damage claimed in the original complaint. The district court dismissed all claims. The Eleventh Circuit Court of Appeals reversed the district court's judgment. The Supreme Court has granted a writ of certiorari to consider only the following questions:

- (1) In view of presumed liability under Warsaw Convention for death, wounding, or any other bodily injury, is air carrier liable for fright, psychic injury, or emotional distress absent objective bodily injury or absent any physical manifestations of injury?
- (2) Does Montreal Agreement, which modifies Warsaw Convention and which eliminates air carrier's "due care" defense, make international air carriers insurers of their passengers against any fright, psychic injury, or emotional distress absent showing of objective

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120. This may explain why the Court was able to issue a unanimous opinion here while in *Dunhill*, the Court could not even forge a majority.

121. 872 F.2d 1462 (11th Cir. 1989) cert. granted 59 U.S.L.W. 3018 (July 17, 1990).

bodily injury or absent physical manifestations of injury?<sup>122</sup>

Although the court has granted certiorari on two questions, only the first question is significant. The second question concerns the Montreal Agreement, which has never come into force and did not modify the terms of the Warsaw Convention. Moreover, the court of appeals did not hold that the Montreal Agreement created liability where none existed under the Warsaw Convention. The second question is thus likely to be ignored by the Court.

The first question, however, is of vital interest, and it appears that the Eleventh Circuit will be reversed. In its most recent case under the Warsaw Convention, the Supreme Court, in an opinion by Justice Scalia, applied a "plain meaning" approach to interpretation of the Warsaw Convention. The Court explained as follows:

We must thus be governed by the text solemnly adopted by the governments of many separate nations whatever conclusions might be drawn from the intricate drafting history that petitioners and the Solicitor General have brought to our attention. The latter may of course be consulted to elucidate a text that is ambiguous, *see, e.g., Air France v. Saks*, 470 U.S. 392 (1985). But where the text is clear, as it is here, we have no power to insert an amendment.<sup>123</sup>

The text at issue in *Eastern Airlines* is found in Article 17 of the Warsaw Convention. French is the governing text for the Warsaw Convention,<sup>124</sup> and Article 17 provides as follows in the French version:

Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement.<sup>125</sup>

A roughly literal translation of the first portion of Article 17 is that "The carrier is responsible for damages sustained in case of death, of wounding or of all other bodily injuries suffered by a passenger."<sup>126</sup>

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122. *Eastern Airlines v. Floyd*, 59 U.S.L.W. 3018 (July 17, 1990).

123. *Chan v. Korean Air Lines*, 109 S. Ct. 1676, 1683-84 (1989).

124. *See Air France v. Saks*, 470 U.S. 392, 397 (1985).

125. *Floyd v. Eastern Airlines*, 872 F.2d at 1471.

126. *See id.* (citing the unofficial translation at 49 Stat 3014, reprinted at note following 49 U.S.C. § 1502 (1988)).

The plain meaning of Article 17 would seem to exclude recovery for purely emotional harm. Indeed, the court of appeals recognized in its opinion that a literal interpretation of the phrase "lesion corporelle" would exclude recovery for purely emotional harm.<sup>127</sup> This interpretation is further confirmed by the other two items in the list, "mort" (death) and "blesure" (wounding), both of which relate to physical, as opposed to emotional harm. The maxim of statutory construction *ejusdem generis* would appropriately be applied here.<sup>128</sup>

The court of appeals rejected this narrow construction of Article 17, but its arguments are ultimately not convincing. The most serious mistake which the court makes is to rely heavily upon French law in deciding that a recovery for mental distress is possible under Article 17. The mistake is made early in the court's analysis. The court cites *Air France v. Saks* for the proposition that "we are required to determine the French legal meaning of the Convention's terms."<sup>129</sup> This is a correct statement of law, since the official draft of the Convention is in French.

But when the court of appeals finds that the term "lesion corporelle" has no meaning in French law, the court then embarks on an exegesis of French law. In particular, the court notes that French law makes no distinction between physical injury and purely mental or emotional injury.<sup>130</sup> Instead, the court continues, French law distinguishes only between "dommage materiel" and "dommage moral."<sup>131</sup> The court then concludes its analysis with a non-sequitur, arguing that if the drafters had intended to exclude any particular type of damage, they would have used the terms

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127. 872 F.2d at 1471.

128. Professor Karl Llewellyn explained *ejusdem generis* as follows in his leading article on statutory construction: "It is a general rule of construction that where general words follow an enumeration they are to be held as applying only to persons and things of the same general kind or class specifically mentioned." Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed*, 3 VAND. L. REV. 395, 405 (1950).

129. 872 F.2d at 1470.

130. *Id.* at 1472.

131. *Id.* at 1472. The court explains as follows: "*Domage materiel* consists of pecuniary loss resulting from injury, such as compensation for expenses or financial loss resulting from injury or death, medical and funeral expenses, and loss of earning power or income. *Domage moral* refers to intangible losses such as pain and suffering, invasion of privacy, or disfiguration." *Id.* at n.16.



“dommage materiel” and “dommage moral.” Since they used the term “lesion corporelle,” which, according to the court “does not readily evoke a sharp distinction of French law,”<sup>132</sup> the drafters must have intended not to exclude any particular type of damage.

It seems much more likely, however, that if the drafters used a term that had no counterpart in French law, the drafters probably intended to reach a result that had no counterpart in French law. Namely, the drafters may have intended to restrict recovery under the Warsaw Convention to purely physical harm, and to exclude recovery for purely emotional harm. The court’s heavy reliance upon substantive French law – even when the Convention does not use words that “readily evoke” French law – leaves the opinion open to the criticism that its approach would leave us “forever chained to French law.”<sup>133</sup> We should expect the Supreme Court to reverse and hold that Article 17 does not create a cause of action for purely emotional harm.

*B. The New Justice: David H. Souter*

On the last day of the Court’s term, Justice William J. Brennan announced his resignation from the Court after 34 years of service. President Bush shortly thereafter announced his nomination to succeed Justice Brennan: Judge David Souter, who had been only recently appointed by President Bush to the United States Court of Appeals for the First Circuit. The Senate confirmed the nomination and Justice Souter joined the Court on October 9, 1990.

Foreigners may be surprised to learn that little is known about Judge Souter’s judicial philosophy. Foreigners may be even more surprised to learn that the lack of information about Judge Souter was considered by many to be the primary reason President Bush selected him. Unlike Judge Robert Bork, whose nomination by President Reagan was defeated largely because his well-known views on controversial issues of constitutional law, such as

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132. *Id.*

133. *Air France*, 470 U.S. at 399 (quoting *Rosman v. Trans World Airlines*, 34 N.Y.2d 385, 394, 358 N.Y.S.2d 97, 102, 314 N.E.2d 848, 853 (1974)).

abortion, made him a target for liberal interest groups, Justice Souter was a "teflon" nominee — someone whom no interest group can pin down.

Justice Souter was educated at Oxford as a Rhodes Scholar and then at Harvard Law School. He practiced law for only two years before joining the Office of Attorney General of the State of New Hampshire. Working his way up the ranks of that office, Judge Souter ultimately was appointed Attorney General of the state. Justice Souter served for many years on the New Hampshire Supreme Court and his opinions while serving on that court give the clearest picture of his judicial philosophy.<sup>134</sup>

However, at least with respect to federal issues, the picture is not complete. Most of Souter's opinions on the court involved criminal matters under state law. His views on civil rights and abortion are as yet unknown.

The good news is that his opinions on the New Hampshire Supreme Court were well-drafted, with particular care and attention given to the facts of prior cases. Souter's opinions do not have the air of controversy about them; they appear, rather, to be well-grounded in prior law and reasoning. Press reports have suggested that Souter patterns himself on Justice Oliver Wendell Holmes, which would be consistent with his style of judicial opinion-writing.

The only specific clue as to Souter's judicial philosophy is found in his written answers to the Senate Judiciary Committee's judicial evaluation questionnaire. In response to a question concerning judicial activism, Souter wrote:

The obligation of any judge is to decide the case before the court, and the nature of the issue presented will largely determine the appropriate scope of the principle on which its decision should rest. Where that principle is not provided and controlled by black letter authority or existing precedent, the decision must honor the distinction between personal and judicially cognizable values.

Souter's confirmation hearing did not produce any significant revelations. Like most nominees, Justice Souter avoided answering

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134. Indeed, during his short tenure on the federal appeals court, Judge Souter did not have the opportunity to write a single opinion.

specific questions concerning issues, such as abortion, which are presently before the Court. Court observers simply will have to wait and see how Justice Souter rules while on the Court.