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Review of the Supreme Court's 1991-92 Term and Preview of the 1992-93 Term for the Transnational Practitioner

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TABLE OF CONTENTS

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I. INTRODUCTION

Last year, my only prediction was that the Supreme Court would reverse the decision in *Defenders of Wildlife, Friends of Animals and Their Environment v. Lujan*,[1] where the Eighth Circuit held that (1) the organizational plaintiffs had standing to challenge a governmental regulation,[2] and (2) the governmental regulation, which provided that government agencies funding projects in foreign countries did not need to consult with the Secretary of the Interior about their projects' impact upon endangered species in the affected foreign countries, was inconsistent with the Endangered Species Act.[3] As I noted, the Court could reverse either by finding no standing or by finding in favor of the government on the merits.[4] The Supreme Court reversed on the standing issue and therefore had no need to reach the merits.[5]

Justice Clarence Thomas had just been confirmed by the Senate shortly before this Article went to press last year. As I noted then, all indications were that Thomas "will most often join Justice Scalia, thereby solidifying the extreme right wing of the Court."[6] This

1. 911 F.2d 117 (8th Cir. 1990).
2. *Id.* at 122.
3. *Id.* at 125.
4. J. Clark Kelso, *Review of the Supreme Court's 1990-91 Term and Preview of the 1991-92 Term for the Transnational Practitioner*, 4 TRANSNAT'L LAW. 391, 407-15 (1991).
5. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992).
6. Kelso, *supra* note 4, at 416.

prediction has also come true, with Justices Thomas and Scalia voting together in 89% of the cases.[7]

II. EXECUTIVE SUMMARY

A. Organizational Group Lacked Standing to Challenge Regulations Regarding Environmental Impact of United States Projects Overseas

In *Lujan v. Defenders of Wildlife*,[8] the Court held that the plaintiffs did not establish an "injury in fact" for Article III standing purposes when the plaintiffs' affidavits did not indicate specifically when the plaintiffs intended to return to overseas sites where government projects were threatening to harm endangered species. A generalized statement that the plaintiffs intended to return to such sites sometime in the future was held inadequate as a matter of law. The Court also held that the citizen suit standing provision of Section 11(g) of the Endangered Species Act could not constitutionally authorize "any person" to bring suit for governmental noncompliance with the Act because such a broad standing provision would violate Separation of Powers by requiring the Judicial Branch to see that the laws are properly executed, a governmental function explicitly entrusted to the Executive Branch.

Among other things, the decision is significant to transnational businesses and foreign governments who are seeking U.S. government development aid. The decision will make it much more difficult for U.S. environmental groups to block such overseas development projects through an extraterritorial application of U.S. environmental laws.

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7. *Voting Alignments on the Supreme Court: 1991-92 Term*, THE NAT'L L.J., Aug. 31, 1992, at S2.

8. 112 S. Ct. 2130 (1992).

B. Financing Governmental Operations and the Commercial Activity Exception to the Foreign Sovereign Immunities Act

In *Republic of Argentina v. Weltover, Inc.*,[9] the Court held that a New York District Court had jurisdiction under the commercial activity exception to the Foreign Sovereign Immunities Act to adjudicate a claim arising out of Argentina's default on bonds which were sold by Argentina in an effort to stabilize its fluctuating currency. The decision is a welcome one to international lenders and monetary markets which can operate efficiently in financing government operations only if financial instruments are enforceable in such leading money markets as New York.

C. Forcible Abduction of Criminals Overseas Does Not Bar Prosecution in United States Courts

In *United States v. Alvarez-Machain*,[10] the Court held that the extradition treaty between Mexico and the United States was not violated when the U.S. authorized the successful kidnapping of a Mexican national from Mexico to the U.S. for the sole purpose of prosecuting that person in a U.S. court. The decision recognizes that extradition treaties are only one way by which one country may gain personal jurisdiction over a person located in a foreign country and that U.S. courts will ordinarily not inquire as to how a particular defendant came to be brought into the U.S. Such matters, says the Court, are a matter for the Executive Branch and for diplomatic negotiations.

When this decision is combined with *United States v. Verdugo-Urquidez*,[11] which held that the search and seizure clause of the Fourth Amendment does not apply to a search of a foreign national's home overseas, it becomes clear just how much power the Executive Branch has in conducting extraterritorial investigations. Their investigatory power overseas far exceeds their domestic power.

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9. 112 S. Ct. 2160 (1992).
10. 112 S. Ct. 2188 (1992).
11. 110 S. Ct. 1056 (1990).

Operating a criminal enterprise overseas which has effects in the U.S. is a risky business.[12]

III. REVIEW OF THE 1991-92 TERM

A. Lujan v. Defenders of Wildlife — *Organizational Group Lacked Standing to Challenge Regulations Regarding United States Projects Overseas*

With the enactment of the Endangered Species Act of 1973,[13] the U.S. established itself as a world leader in the fight to preserve vanishing wildlife.[14] The Act directed the Secretary of the Interior to create what is commonly known as the Endangered Species List,[15] and species appearing on that list are accorded extraordinary protection from harm.[16]

Section 7(a) of the Act provides that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species . . . ."[17] The Department of the Interior in the Carter Administration enacted a regulation which required federal agencies to consult with the Secretary concerning actions in

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12. It is somewhat ironic that persons engaged in an international criminal enterprise might be well advised to locate that enterprise within the United States in order to trigger various constitutional protections.

13. Pub. L. No. 93-205, 87 Stat. 884 (codified at 16 U.S.C. §§ 1531-1544 (1988)).

14. According to the Court, the Act is "the most comprehensive legislation for the presevation of endangered species ever enacted by any nation." Tennessee Valley Authority v. Hill, 437 U.S. 153, 180 (1978).

15. 16 U.S.C. § 1533.

16. The Act contains a long list of prohibited conduct regarding endangered species. 16 U.S.C. § 1538. To give merely a taste of the breadth of the Act's proscriptions, it is contrary to the Act "for any person subject to the jurisdiction of the United States" to import or export any endangered species or to "take any such species within the United States or the territorial sea of the United States . . . or upon the high seas." 16 U.S.C. § 1538(1). According to 16 U.S.C. § 1532, "'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

17. 16 U.S.C. § 1536(a)(2). There are, of course, certain statutory exceptions to the application of this provision. National security interests, for example, override the obligation created by Section 7(a). 16 U.S.C. § 1536(j).

foreign countries.[18] The Reagan Administration changed course, however, and enacted a regulation which limited the consultation obligation to actions "in the United States or upon the high seas."[19] In 1986, the Defenders of Wildlife filed suit against the then-Secretary of the Interior, Manuel Lujan, challenging the validity of the regulatory change as contrary to Section 7(a) of the Act.

The Court of Appeals for the Eighth Circuit struck down the regulation, holding that the organizational plaintiffs had standing to challenge the regulation and that the regulation was contrary to Section 7(a).[20] The Supreme Court granted a writ of certiorari to consider two important questions: First, do the plaintiffs have standing to challenge the regulations? Second, if the plaintiffs do have standing, is the regulation consistent with Section 7(a) of the Act?

The Court did not have to reach the second question upon which it granted review because the plaintiffs did not satisfy Article III standing requirements. The law of standing is one of the most complex and subtle fields known to the federal bench and bar, and has been a favorite topic for commentators and scholars.[21]

The plaintiff in the case was an organization, the Defenders of Wildlife, which had sued on behalf of its members. It is well accepted that an organization may sue either because of injuries to itself or because of certain kinds of injuries to its members. In cases where the organization sues on behalf of its members, the organization must satisfy a three-part test: (a) The members must "otherwise have

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18. 50 C.F.R. § 402.04 (1978).

19. 50 C.F.R. § 402.01 (1986).

20. Defenders of Wildlife, Friends of Animals and Their Environment v. Lujan, 911 F.2d 117, 125 (8th Cir. 1990).

21. *See generally* C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, JURISDICTION 2d, §§ 3531-3531.16 (1984). *See also* Jonathan Poisner, *Environmental Values and Judicial Review after Lujan: Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOLOGY L.Q. 335 (1991); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239 (1989); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Michael A. Perino, *Justice Scalia: Standing, Environmental Law, and the Supreme Court*, 15 B.C. ENVTL. AFF. L. REV. 135 (1987); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983); Abram Chayes, *The Supreme Court, 1981 Term — Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982).

standing to sue in their own right;" (b) the interests at stake in the suit are "germane to the organization's purpose;" and (c) "neither the claim asserted nor the relief requested requires participation of individual members in the lawsuit."[22]

Defenders of Wildlife easily satisfied the second and third prongs of this test. The interests at stake, protection of endangered species, were plainly germane to the organization's purpose, and the relief sought, a judgment declaring invalid a federal regulation, did not require participation by any organization members. The question, then, was whether any of the members of the organization could prove "standing to sue in their own right."

Several organization members submitted affidavits which attempted to establish that they would suffer some injury as a result of the regulatory change, an injury that would give the members a sufficiently concrete interest in the dispute to satisfy Article III requirements. Ms. Joyce Kelly, for example, stated that she had previously visited Egypt to observe the endangered Nile crocodile, that she intended to make another such visit in the future, and that she would be harmed by the American involvement in developing a dam on the Nile and in developing Egypt's Master Water Plan.[23] Ms. Amy Skilbred, another member, declared that she had previously visited Sri Lanka to observe the endangered Asian elephant and the endangered leopard, that a project funded by the Agency for International Development would threaten those species (and others), and that she intended to return to Sri Lanka sometime in the future to view the endangered species.[24] Although Kelly and Skilbred stated that they were concerned that threats to endangered species would injure them in the future, neither Kelly nor Skilbred indicated that they had any concrete plans to visit either country to see the endangered species in the immediate future.[25] Instead, both had only an intention to visit these countries sometime in the future.

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22. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977). *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.3.7, pp. 89-90 (1989).

23. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2138 (1992).

24. *Id.*

25. *Id.*

The Court, in an opinion by Justice Scalia, held that the affidavits did not satisfy Article III standing requirements. Article III limits the power of the U.S. judiciary to resolving "cases" or "controversies."[26] The standing doctrine—which is one of several doctrines used by the Court to insure that it has before it a case or controversy—focuses generally upon whether the plaintiff has suffered an injury at the hands of the defendant which a court can redress. More particularly, as reiterated in *Defenders of Wildlife*, the plaintiff must satisfy the following test:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally-protected interest which is (a) concrete and particularized... and (b) "actual or imminent, not 'conjectural' or hypothetical."... Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly... trace[able] to the challenged action of the defendant, and not... th[e] result [of] the independent action of some third party not before the court."... Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[27]

Beginning with the decision in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,[28] courts in environmental injury cases have often accepted relatively general allegations of injury-in-fact of precisely the sort submitted by the plaintiff in *Defenders of Wildlife*. The Supreme Court's retreat from this rather loose approach to standing began with its decision two years ago in *Lujan v. National Wildlife Federation*,[29] where the Court denied standing to an environmental group when the affidavits on standing alleged "only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action."[30] *National Wildlife Federation* arose on a Rule 56(e) motion for summary judgment, and

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26. U.S. CONST. art. III, § 2, cl. 1.
27. 112 S. Ct. at 2136 (citations omitted).
28. 412 U.S. 669 (1973).
29. 110 S.Ct. 3177 (1990).
30. *Id.* at 3189.

the Court distinguished its prior (and seemingly contrary) holding in *SCRAP* on the ground that *SCRAP* arose on a Rule 12(b) motion to dismiss.[31] Although this distinction was technically a valid one,[32] it suggested that the Court was not firmly committed to *SCRAP*'s broad view of standing.

The Court's decision this term in *Defenders of Wildlife* confirms that *SCRAP*, living up to its name, has been effectively consigned to the garbage pile (although the Court did not have the good grace expressly to overrule *SCRAP* and even cited *SCRAP* in support of its decision).[33] The affidavits presented by the plaintiffs were, in one sense, more specific than the affidavits found insufficient in *National Wildlife Federation*. The plaintiffs specifically stated that they had visited a specific site in a foreign country and that they intended to return to that site in the future.

That was not enough for the Court, however. The Court held that an intent to return to the site did not prove a sufficiently "imminent" injury to satisfy the first prong of the three-part standing inquiry: "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."[34]

As both the concurring and dissenting opinions point out, it would appear that the plaintiffs could satisfy the Court's test simply by providing the Court with a specific travel itinerary.[35] Yet there may be more to Scalia's opinion than the mere formality which it seems to require. More generally, Scalia's opinion for the Court suggests a tightening of the Court's three-pronged standing inquiry, and such a tightening could have important ramifications.

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31. *Id.*

32. On a Rule 12(b) motion to dismiss, the court is required to draw all reasonable inferences in favor of the non-moving party. This means, among other things, "that general allegations embrace those specific facts that are necessary to support the claim." 110 S.Ct. at 3189. Rule 56(e), by contrast, requires the non-moving party to submit affidavits or other evidence which "set[s] forth *specific* facts showing that there is a genuine issue for trial." F.R.C.P. 56(e) (emphasis added).

33. 112 S. Ct. at 2139.

34. *Id.* at 2138 (emphasis in original).

35. 112 S. Ct. at 2146 (Kennedy, J., concurring); 112 S. Ct. at 2153 (Blackmun, J., dissenting).

The potential impact of this possible tightening can be clearly seen in Part III-B of Scalia's opinion, which was joined by only three other justices (and thus only a plurality opinion). In Part III-B, Scalia indicates that the affidavits also failed to show that it was "likely" the plaintiff's alleged injury could be redressed by a judicial order. The plaintiff sued only the Secretary of the Interior. According to Scalia, the failure to name as defendants the heads of other departments which actually were funding foreign projects made it impossible for the courts to render complete relief (namely, an order requiring the termination of funding until consultation occurs).[36] Scalia rejected as unwarranted the suggestion that the trial court's determination in a suit against the Secretary of the Interior, that other agencies had a legal obligation to consult with the Secretary on such projects would constitute sufficient redressability to satisfy Article III requirements.[37] One could also imagine, although Scalia did not address this issue in his opinion, that the affidavits failed to demonstrate that the predicted harm to endangered species was "fairly traceable" to U.S. Government conduct, as opposed to the conduct of other nations or parties who were building in the sensitive areas.

The danger in requiring the sort of specificity which Scalia seems to think is necessary is that the merits of the case end up being litigated on the threshhold issue of standing. After all, the three-pronged test encompasses the issues of injury, causation, and remedy. If a plaintiff must prove all of these elements in order to satisfy the Article III standing rules, it would seem that the only issue left for the merits is a determination of liability or breach by the defendant.

We have reason to hope that a majority of the Court will not follow Scalia down this path. Although Justices Kennedy and Souter joined Scalia's opinion insofar as it held that the affidavits did not specifically set forth a return trip to the affected areas, Scalia lost their support (and with it, the crucial fifth vote) when it came to

36. 112 S. Ct. at 2141-42.
37. 112 S. Ct. at 2141.

redressability.[38] This may suggest that Kennedy's and Souter's views on standing are not quite as rigid as Scalia's.[39]

Having held that the plaintiffs did not suffer any concrete injury-in-fact, the Court turned to the argument that standing existed by virtue of a "procedural injury" under the citizen standing provision of the Endangered Species Act. According to Section 11(g) of the Act, "any person may commence a civil suit on his own behalf — (A) to enjoin any person, including the United States . . . who is alleged to be in violation of any provision of this chapter."[40] Applied literally, this section appears to authorize "any person"—whether or not they have suffered actual injury-in-fact— to file a lawsuit against a violator of the Act. Because the standing doctrine is rooted in the Article III case or controversy requirement, Section 11(g) squarely presented the issue whether Congress may, by statute, grant standing to a person who has suffered no injury.

Viewing the case or controversy requirement as one aspect of the Separation of Powers principle, a majority of the Court held that Congress could not create standing in a person who has suffered no injury-in-fact to challenge the Executive Branch's compliance with an act of Congress. Such a statute would not only undermine the case or controversy requirement, but it would also upset the balance between the Executive and Judicial Branches. As Scalia explained,

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38. Scalia also had rejected the plaintiffs' argument that standing existed under either an "ecosystem nexus" theory, "animal nexus" theory, or "vocational nexus" theory. 112 S. Ct. at 2139. Under these broad nexus theories, the plaintiffs would not have been required to establish that they were planning to visit a specific foreign site. Instead, the plaintiffs' interest in the dispute would be established by some other aspect of the plaintiffs' lives, such as their use of any part of a contiguous ecosystem, their general interest in animals, or a professional interest in animals. Scalia rejected these theories as a matter of law. Although Justices Kennedy and Souter agreed that the facts in the case did not support standing under any of these theories, Kennedy and Souter did not foreclose the possibility that in another case, the nexus theories might be appropriately invoked. 112 S. Ct. at 2146 (Kennedy, J., concurring).

39. Justices Kennedy's and Souter's view of the standing requirement may be interpreted as different from Justice Scalia's in one of two ways. First, Kennedy and Souter may merely accept a broader definition of "imminent injury," the first prong of the three-part standing inquiry. Or, second, Kennedy and Souter may continue to view standing as only a threshhold inquiry rather than an inquiry that takes the court into the merits of the dispute. In contrast, Justice Scalia seems to require that the "imminent injury" aspect of the standing requirement is met only when a plaintiff demonstrates (at the pleading stage) an injury that would only be required by Kennedy and Souter during the merits stage of the dispute.

40. 16 U.S.C. § 1540(g).

"[t]o permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'"[41]

B. Republic of Argentina v. Weltover — *Application of the Commercial Activity Exception to the Foreign Sovereign Immunites Act*

Holding a foreign nation accountable in a U.S. court is a direct challenge to that foreign nation's sovereignty. The Foreign Sovereign Immunities Act of 1976 (FSIA) recognizes this reality and provides that "foreign state[s] shall be immune from the jurisdiction of the courts of the U.S. and of the States."[42] There are a number of exceptions to this immunity, however, the most important of which is the "commercial activity" exception.[43] This statutory exception is consistent with general principles of international law, which recognize that suits against a nation arising out of that nation's commercial activities do not pose the same threat to sovereignty as would a suit against a sovereign arising out of purely governmental activities.[44]

Section 1603(d) of the FSIA defines "commercial activity" as follows:

> A "comercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial

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41. 112 S. Ct. at 2145. *See* 112 S. Ct. at 2147 (Kennedy, J., concurring) ("I agree that it would exceed [Article III] limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen-suits to vindicate the public's nonconcrete interest in the proper administration of the laws").

42. 28 U.S.C. § 1604.

43. 28 U.S.C. § 1605(a)(2).

44. The restrictive theory of immunity, which is accepted world-wide, provides for sovereign immunity "except with respect to claims arising out of activities of the kind that may be carried on by private person." Restatement (Third) of the Foreign Relations Law of the United States, § 451. Commercial activities are the most significant activities which fall within this recognized exception. Restatement (Third) of the Foreign Relations Law of the Untied States, § 453.

> character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.[45]

The issue in *Republic of Argentina v. Weltover, Inc.* was whether a nation's decision to default on bonds that had been issued as part of a program to stabilize that nation's currency was a "commercial activity." On the one hand, when a nation attempts to manage and stabilize its currency, it would seem to be performing an important governmental function. On the other hand, issuing and satisfying (or not satisfying) bonds is an activity routinely engaged in by private persons in the commercial market.

The dispute in *Republic of Argentina* can be traced to Argentina's efforts during the 1980's to solve a serious foreign exchange problem. Because Argentina's currency is not accepted on the international market, Argentine businesses wishing to participate in the international market must pay in U.S. dollars (or some other accepted currency). However, these businesses had difficulty obtaining U.S. dollars, in part because the instability of Argentina's currency made it difficult to secure loans in U.S. dollars. To address this problem, in 1981 Argentina created a foreign exchange insurance contract program, pursuant to which the government assumed the risk of currency fluctuations in international transactions.[46]

In 1982, it became clear that Argentina did not possess sufficient reserves of U.S. dollars to finance the program. It then adopted various emergency measures, including the issuance of government bonds to creditors, payable in U.S. dollars on the London, Frankfurt, Zurich, or New York markets (at the creditor's election). By 1986, it again became clear that Argentina lacked sufficient foreign exchange to retire the bonds as they came due. By presidential decree, Argentina unilaterally extended the due dates of the bonds and offered bondholders substitute instruments to reschedule the debts. The plaintiffs in the case refused the substitute instrument, insisted

45. 28 U.S.C. § 1603(d).
46. 112 S. Ct. at 2163.

on full payment in New York, and then filed suit in New York when Argentina defaulted.[47]

It is plain enough that the issuance of the bonds and the subsequent presidential decree were actions which fulfilled an important governmental (rather than private) purpose. But the FSIA explicitly provides that it is the "nature" of the activity and not its purpose which determines whether it is commercial.[48] Focusing solely upon the nature of the activity,[49] a unanimous Court determined that the issuance of bonds constituted a "commercial activity." As the Court correctly noted, the bonds "are in almost all respects garden-variety debt instruments: they may be held by private parties; they are negotiable and may be traded on the international market (except in Argentina); and they promise a future stream of cash income."[50] Accordingly, jurisdiction was properly asserted in the Southern District of New York.

The result in this case should be of obvious importance to the transnational practitioner. The possibility that a foreign government may unilaterally change the terms of a contract or debt instrument makes dealing with foreign governments a risky business. If foreign governments engaged in commercial activities can be held to account in a U.S. forum, those risks can be reduced to a tolerable level, which will in turn promote greater commercial dealings between the private sector and foreign governments.

C. United States v. Alvarez-Machain — *Government Sponsored Kidnapping of a Foreign National Does Not Bar Criminal Trial of that National in United States Courts*

Two terms ago, the Court held in *United States v. Verdugo-Urquidez* that the Fourth Amendment did not apply to the search of

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47. 112 S. Ct. at 2164.

48. 28 U.S.C. § 1603(d).

49. The Court explicitly rejected the argument that the "nature" of an activity at times could be understood only by considering its "purpose," a position taken by at least one federal court. De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1393 (5th Cir. 1985). According to the Court, "this line of argument is squarely foreclosed by the language of the FSIA." *Republic of Argentina*, 112 S. Ct. at 2167.

50. 112 S. Ct. at 2166.

an alien's home outside of the U.S. notwithstanding the participation of United States government agents in the search.[51] This term, the Court held in *United States v. Alvarez-Machain* that U.S. courts had jurisdiction to prosecute a foreign national whose presence in the U.S. was the result of a kidnapping in which U.S. agents participated.[52]

Both of these extraordinary cases arose out of the same incident, the kidnap and murder in Mexico of a Drug Enforcement Administration special agent and his Mexican pilot. Verdugo-Urquidez was believed to be one of the leaders of a large drug operation operating out of Mexico and was believed to have participated in the kidnap and murder of the special agent.[53] Alvarez-Machain, a physician, allegedly participated in the murder by prolonging the special agent's life, thereby giving others the opportunity further to torture and interrogate him.[54]

The U.S. Government's reaction included (1) the warrantless search of Verdugo-Urquidez's home in Mexico, which was upheld in *United States v. Verdugo-Urquidez*, and (2) the U.S. government authorized kidnapping of Alvarez-Machain in order to bring him into the U.S., where he was arrested. The narrow issue before the Court in *Alvarez-Machain* was whether a government authorized abduction of a Mexican citizen to the U.S. from Mexico violated the extradition treaty between the U.S. and Mexico, thereby depriving a U.S. court of jurisdiction over the defendant.[55]

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51. 110 S. Ct. 1056 (1990). *See* J. Clark Kelso, *Review of the Supreme Court's 1989-90 Term and Preview of the 1990-91 Term for the Transnational Practitioner*, 3 TRANSNAT'L LAWYER 393, 405-10 (1990).

52. 112 S. Ct. 2188 (1992).

53. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1215 (9th Cir. 1988), *cert. granted*, 490 U.S. 1019, *rev'd*, 110 S. Ct. 1056 (1990).

54. *Alvarez-Machain*, 112 S. Ct. at 2190.

55. The district court had rejected the defendant's due process claim that the indictment must be dismissed because of "outrageous governmental conduct." 112 S. Ct. at 2190. The district court held that the kidnapping violated the extradition treaty, and the government appealed. *Id.* The Ninth Circuit affirmed, and the government sought a writ of certiorari, which was granted. 112 S. Ct. at 2190-91. Whether the kidnapping violated the extradition treaty was, accordingly, the only issue before the Court.

According to the *Ker-Frisbie* doctrine,[56] the courts will ordinarily not inquire as to the method by which a criminal defendant was brought before the court. In both *Ker* and *Frisbie*, the defendant had been kidnapped from a foreign jurisdiction,[57] and in both cases, the court held that jurisdiction existed notwithstanding the kidnapping.[58] Once the U.S. has invoked an extradition treaty, however, it must follow the procedures set forth in that treaty, and a treaty violation divests the court of its jurisdiction. So, for example, in *United States v. Rauscher*,[59] the court held that the applicable extradition treaty prohibited the government from prosecuting the defendant for a crime other than the crime for which he had been extradited, and the court ordered the defendant released.

The extradition treaty between the U.S. and Mexico was silent on the question of whether one country could forcibly abduct another country's nationals as a way of obtaining jurisdiction over that person, or, more generally, whether the extradition treaty provided the exclusive method by which one country could assert jurisdiction over another country's nationals. The majority of the Court believed that the treaty's silence indicated the limits of the treaty. As the Court noted, "[e]xtradition treaties exist so as to impose mutual obligations to surrender individuals in certain defined sets of circumstances, following established procedures."[60] It is therefore not possible for a country which has not invoked the extradition treaty to have violated the procedures established by the treaty, even if the country

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56. Ker v. Illinois, 119 U.S. 436 (1886); Frisbie v. Collins, 342 U.S. 519 (1952).

57. In *Ker*, the defendant was kidnapped by private persons from Peru and brought into the U.S. *Alvarez-Machain*, 112 S. Ct. at 2192. In *Frisbie*, the defendant was kidnapped in Chicago by Michigan police officers and brought to trial in Michigan. *Alvarez-Machain*, 112 S. Ct. at 2192.

58. The *Ker-Frisbie* doctrine has become a favorite topic for the law reviews. Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 AM. J. INT'L L. 880 (1989); Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continue*, 84 AM. J. INT'L L. 444 (1990); Andreas F. Lowenfeld, *Kidnapping by Government Order: A Follow-Up*, 84 AM. J. INT'L L. 712 (1990); H. Moss Crystle, Note, *Fighting the War on Drugs in the 'New World Order': The Ker-Frisbie Doctrine As A Products of its Time*, 24 VAND. J. TRANSNAT'L L. 535 (1991); Note, *International 'Fugitive Snatching' in U.S. Law: Two Views from Opposite Ends of the Eighties*, 24 CORNELL INT'L L.J. 521 (1991); Andrew B. Campbell, Note, *When Rights Fall in a Forest . . . The Ker-Frisbie Doctrine and America's Judicial Countenance of Extraterritorial Abduction and Torture*, 9 DICKINSON J. INT'L L. 387 (1991).

59. 119 U.S. 407 (1886).

60. 112 S. Ct. at 2194.

has otherwise violated international norms. Because the treaty was not violated, the *Ker-Frisbie* doctrine applied, and the court would not inquire further into the method by which the defendant was made to appear.

The dissenters interpreted the treaty's comprehensive provisions dealing with extradition, and the silence with respect to prohibiting forcible abductions, to include an implied term prohibiting one country from violating the other's territorial sovereignty in circumstances that would appear to have called for invocation of the treaty. That is, the dissenters believed that the treaty's comprehensive regulation of the extradition process indicated an intent that the treaty be the sole basis for one government gaining personal jurisdiction over citizens located in another country.[61]

In purely abstract terms, the dissenters may have had the better argument. Why would two countries bother agreeing to a comprehensive set of procedures regarding extradition if either country could simply ignore the procedures at will? The answer would seem to be that diplomacy involves more than just explicit agreements between sovereigns. With some regularity, the U.S. government receives requests from a "host" country not to request extradition of a criminal but, instead, to use other means outside of the extradition treaty (referred to as "irregular rendition").[62] This informal procedure saves the host country from having to accede publicly to a U.S. demand for extradition while at the the same time not offending the U.S. government by refusing to cooperate. This practice strongly suggests that extradition treaties are widely recognized as not being the sole basis for securing the presence of the defendant.

Although the decision in *Alvarez-Machain* appears to put the U.S. courts on record as supporting government authorized kidnapping, the majority of the Court was essentially trying to put the ball back in the Executive Branch's court without necessarily approving the

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61. 112 S. Ct. at 2198-99.

62. Abraham Abramovsky, *Extraterritorial Abductions: America's 'Catch and Snatch' Policy Run Amok*, 31 VA. J. INT'L L. 151, 155-56 (1991); Proceedings, *Strengthening the Rule of Law in the War Against Drugs and Narco-Terrorism*, 15 NOVA L. REV. 795, 851 (1991).

"snatch and catch" policy. In that regard, the court highlighted "[t]he advantage of the diplomatic approach to the resolution of difficulties between two sovereign nations, as opposed to unilateral action by the courts of one nation. . . ."[63] In other words, defendants should not expect the courts to come to their aid in these circumstances. Instead, defendants should contact their former host country and seek relief through diplomatic channels.

IV. PREVIEW OF THE 1992-93 TERM

A. Nelson v. Saudi Arabia — *When is an Action "Based Upon" Commercial Activity Within the United States for Purposes of the Foreign Sovereign Immunities Act*

In *Republic of Argentina v. Weltover, Inc.*,[64] the issue was whether the issuance of bonds constituted a "commercial activity" notwithstanding that the purpose of the bonds was to stabilize Argentina's currency. In *Nelson v. Saudi Arabia*,[65] the Court will determine what it means for an action against a foreign sovereign to be "*based upon* a commercial activity carried on in the United States by the foreign state."[66]

Scott Nelson, the plaintiff, answered a printed advertisement in the United States recruiting employees for the King Faisal Specialist Hospital located in Riyadh, Saudi Arabia. The recuiting company, Hospital Corporation of America (HCA), had been previously hired by the Royal Cabinet of the Kingdom of Saudi Arabia to recruit employees for the hospital. After visiting the hospital in Riyadh, Nelson returned to the United States and signed the employment contract in Miami, Florida. He and his wife then moved to Riyadh to begin work. Nelson alleges that in the course of performing his duties as a monitoring systems engineer, he discovered safety hazards which he reported to an investigative commission of the Saudi government.

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63. 112 S. Ct. at 2196 n.16.
64. 112 S. Ct. 2160 (1992).
65. 923 F.2d 1528 (11th Cir. 1991), *cert. granted* 112 S. Ct. 2937 (June 8, 1992).
66. 28 U.S.C. § 1605(a)(2) (1988) (emphasis added).

In retaliation for his whistleblowing, Nelson allegedly was imprisoned and tortured by government agents for 39 days, and his wife was told by a government official that Nelson could be released if she provided sexual favors.[67]

Nelson and his wife filed suit against Saudi Arabia, the hospital, and another government-owned business, Royspec, in the U.S. District Court for the Southern District of Florida. The District Court granted the defendants' motion to dismiss for lack of subject matter jurisdiction, holding that HCA's recruitment activities were insufficiently connected with the defendants' conduct to satisfy the requirement that the foreign sovereign's commercial activity have "substantial contact" with the U.S. and that the action was not "based upon" any commercial activity within the U.S.[68] The Eleventh Circuit reversed.

The Eleventh Circuit rather easily found that HCA was an agent of the Saudi government for purposes of recruitment and hiring within the United States. The court could not have concluded otherwise. The contract between HCA and the Saudi government gave HCA power to recruit and employ medical personnel on behalf of the hospital, to set initial salaries, to supervise such employees, and to terminate the employment of such employees.[69] The contract expressly identified HCA "as agent" for the Saudi government for purposes of executing written employment contracts in the United States.[70] Since HCA was the Saudi government's agent, the court concluded, quite properly, that the recruitment activities were a "commercial activity carried on in the United States by the foreign state."[71]

The more difficult issue is whether the plaintiffs' "action is based upon" the recruitment activities. The complaint alleges that "'[t]he arbitrary prolonged detention and the physical torture of Mr. Nelson . . . is based directly upon the recruitment activity carried on in the

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67. All of these facts are taken from the court of appeal's opinion, 923 F.2d at 1530.

68. 923 F.2d at 1530. (quoting Nelson v. Saudi Arabia, No. 88-1791, slip op. at 5 (S.D. Fla. Aug. 11, 1989)).

69. 923 F.2d at 1533.

70. *Id.*

71. 28 U.S.C. § 1605(a)(2) (1988).

United States by agents of Saudi Arabia."'[72] The issue is whether this characterization of the action satisfies the "based upon" requirement contained in the Foreign Sovereign Immunities Act.

Courts have identified four different interpretations of the "based upon" requirement.[73] Some courts have adopted a "literal" approach, interpreting "based upon" to mean precisely what it appears to mean: that the cause of action arises directly out of commercial activity carried on in the U.S.[74] Other courts have adopted a "nexus" approach, in which the commercial activity must only have some "connection" to the act complained of in the suit.[75] A third group of courts—apparently unable to choose between the first two approaches—have applied a bifurcated literal and nexus approach.[76] Finally, a fourth group have fashioned a "doing business" approach which requires that a broad course of commercial conduct within the U.S. be connected to the act complained of in the suit.[77]

The Eleventh Circuit adopted the most liberal approach, the nexus test, which requires only some loose connection between the acts complained of and the commercial activity. Under that approach, the Eleventh Circuit found that "the detention and torture of Nelson are so intertwined with his employment at the Hospital that they are 'based upon' his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia."[78]

I predict the Supreme Court will reverse the Eleventh Circuit's decision. The key to the court of appeals' decision was the conclusion that a claim is "based upon" commercial activity of a foreign state when there exists a "jurisdictional nexus" between the commercial

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72. *Nelson*, 923 F.2d at 1533.

73. Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 200 (5th Cir. 1984).

74. For a discussion and rejection of the "literal" approach, *see* Gibbons v. Udaras Na Gaeltachta, 549 F. Supp. 1094, 1109 n.5 (S.D.N.Y. 1982).

75. Velidor v. L/PG Benghazi, 653 F.2d 812 (3d Cir. 1981), *cert. denied*, 455 U.S. 929 (1982); Sugarman v. Aeromexico, Inc., 626 F.2d 270 (3d Cir. 1980); Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 452 (6th Cir. 1988).

76. *Navigacion*, 730 F.2d at 200.

77. Rio Grande Transport, Inc., 516 F. Supp. 1155 (S.D.N.Y. 1981).

78. *Nelson*, 923 F.2d at 1535.

activity and the acts for which damages are sought.[79] The Supreme Court should reject the jurisdictional nexus approach. Congress did not use the words "jurisdictional nexus" in the Act; Congress used the phrase "based upon." An action that only has some connection with commercial activity is not the same thing as an action that is based upon that commercial activity. If Congress had intended "some connection" to be the standard, Congress could just as readily have used those words instead of the phrase "based upon."

Anyone familiar with the Court's recent jurisprudence on statutory interpretation will at once recognize that the analysis just set forth is consistent with (indeed, virtually commanded by) the "plain meaning" approach to statutory interpretation that a majority of the Court appears to have adopted.[80] Under the plain meaning approach, the court first determines whether the statutory language is ambiguous; if it is not ambiguous, then there is no need to look further into the legislative history. Only if there is ambiguity may the court consult other indicia of the legislative intent.

That a claim be "based upon" a commercial activity would not seem to be a particularly ambiguous requirement. A claim is "based upon" a particular activity when the claim arises out of that activity (as opposed to some other connected activity). Indeed, the plain meaning is so clear, that courts which have rejected this meaning are forced to use a different phrase entirely, "jurisdictional nexus," to achieve the desired results.

But even if one consults the legislative history, one finds that Congress chose the phrase "based upon" very deliberately. The second clause of § 1605(a)(2) provides for jurisdiction in actions "based . . . upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere."[81] The House Judiciary Committee Report explained that this clause applies in circumstances where "a claim *arises out of* a specific act in the United States which is commercial or private in nature and which

79. *Id.* at 1534.

80. J. Clark Kelso, *Review of the Supreme Court's 1990-91 Term and Preview of the 1991-92 Term for the Transnational Practitioner*, 4 TRANSNAT'L LAW. 391, 395-96 (1991).

81. 28 U.S.C. § 1605(a)(2) (1989).

relates to a commercial activity abroad."[82] The Report also indicates that "the acts (or omissions) encompassed in this category are limited to those which in and of themselves are sufficient to form the basis of a cause of action."[83]

Like the second clause of § 1605(a)(2), the first clause requires that the action be "based upon a commercial activity carried on in the United States by the foreign state."[84] Some might argue that interpreting "based upon" to mean "arises out of" in the first clause would make the first and second clauses essentially overlap in their coverage. What is the difference between an action that arises out of commercial activity in the United States and an action that arises out of acts in the United States that are connected to a commercial activity abroad?

There are two responses to this argument. First, Congress realized that there would be a significant or total overlap between the first and second clauses and decided to include the second clause for the sake of clarity.[85] Second, the first clause would apply to a commercial activity carried on in the United States even if the actionable acts (e.g., beating and torture) took place in a foreign country; the second clause would plainly not apply to this situation.[86]

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82. H.R. Rep. No. 94-1487, 94th Cong., 2d Sess., 19 (Sept. 9, 1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6618. (emphasis added).

83. *Id.*

84. 28 U.S.C. § 1605(a)(2) (1989).

85. The House Report indicates that "[a]lthough *some or all* of these acts [under the second clause] might also be considered to be a 'commercial activity carried on in the United States,' as broadly defined in section 1603(e), it has seemed advisable to provide expressly for the case where a claim arises out of a specific act in the United States which is commercial or private in nature and which relates to a commercial activity abroad." H.R. Rep No. 94-1487, 94th Cong., 2d Sess., 19 (Sept. 9, 1076), reprinted in 1976 U.S.S.C.A.N. 6604, 6618. (emphasis added).

86. Under this interpretation, if the Saudi government's commercial activity was defined as running a hospital, and *that* activity could be found to be carried on in the U.S., then the Nelsons' claims would plainly be "based upon" the government's activity of running the hospital. The Nelsons' difficulty with this argument, however, is that the operation of the Saudi hospital did not have "substantial contact with the United States." It appears that the only contact with the U.S. was the recruitment and hiring of some employees, and the Eleventh Circuit found only the recruitment and hiring to be a commercial activity carried on in the U.S. 923 F.2d 1528, 1533 (1991).

In light of the plain meaning of the phrase "based upon" and the supporting legislative history, which confirms that Congress chose its words carefully in this context, the Supreme Court is very likely to reverse the decision of the court of appeals.