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Review of the Supreme Court's 1992-93 Term for the Transnational Practitioner

J. Clark Kelso
Pacific McGeorge School of Law

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I. INTRODUCTION

Last year, my only prediction was that the Supreme Court would reverse the decision in *Nelson v. Saudi Arabia*,[1] where the Eleventh Circuit held that the detention and torture in Saudi Arabia of an American citizen, working for a Saudi government-owned business, fell within the "commercial activity" exception of the Foreign Sovereign Immunities Act (FSIA)[2] because the detention and torture was "based upon" his recruitment and hiring in the United States.[3] I concluded that the Eleventh Circuit's "nexus test" for when a cause of action was "based upon" commercial activity—under which it was sufficient that there be some loose connection between the acts complained of and the commercial activity—was too broad and would be rejected by the Court in favor of a narrower "arises out of" test—under which the commercial acts complained of must themselves be sufficient to form the basis of a cause of action.[4] The Supreme Court essentially agreed with this analysis and reversed.[5]

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* Professor of Law, University of the Pacific, McGeorge School of Law.

1. 923 F.2d 1528 (11th Cir. 1991).
2. 28 U.S.C. §§ 1330, 1602-11 (1993).
3. *Id.* at 1535.
4. J. Clark Kelso, *Review of the Supreme Court's 1991-92 Term and Preview of the 1992-93 Term for the Transnational Practitioner*, 5 TRANSNAT'L LAW. 603, 622-25 (1992).
5. Saudi Arabia v. Nelson, 113 S. Ct. 1471 (1993).

In the only other case of predominate transnational interest, the Court held in *Smith v. United States*[6] that the Federal Tort Claims Act (FTCA) does not apply to tortious acts or omissions occurring in Antarctica because Antarctica is a "foreign country" for purposes of the FTCA. This holding has rather obvious and important implications not only for those persons and businesses operating in Antarctica, but also for those persons and businesses which ultimately will be operating in other sovereignless regions, such as outer space.

II. REVIEW 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?*

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.[7] The recruiting 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.[8] After visiting the hospital in Riyadh, Nelson returned to the United States and signed a contract of employment in Miami, Florida.[9] He then moved to Riyadh to begin work.[10]

Nelson alleged 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.[11] In retaliation for his whistle-blowing, Nelson was allegedly imprisoned and tortured by government agents for thirty-nine days, and his wife was told by a government official that Nelson could be released if she provided sexual favors.[12]

After returning to the United States, Nelson and his wife filed suit against Saudi Arabia, the hospital, and another government-owned business, Royspec, in the United States District Court for the Southern District of Florida.[13] The District Court granted the defendants' motion to dismiss for lack of subject matter jurisdiction under the FSIA.[14] The court held that HCA's recruitment activities were insufficiently connected with the defendants' conduct to satisfy the requirements that the foreign sovereign's commercial activity have "substantial contact" with the United States and that the action was not "based upon" any commercial activity within the United States.[15]

The Eleventh Circuit reversed.[16] It concluded that Nelson's recruitment and hiring by an agent of the Saudi government in the United States satisfied the FSIA's requirement

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6. 113 S. Ct. 1178 (1993).
7. *Nelson*, 113 S. Ct. at 1474.
8. *Id.*
9. *Id.* at 1474-75.
10. *Id.* at 1475.
11. *Id.*
12. *Id.*
13. *Id.*
14. 28 U.S.C. §§ 1330, 1602-11 (1993).
15. *Nelson*, 113 S. Ct. at 1476.
16. Nelson v. Saudi Arabia, 923 F.2d 1528 (11th Cir. 1991).

that an action be "based upon a commercial activity carried on in the United States by the foreign state."[17] Specifically, 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."[18]

The Supreme Court reversed.[19] Although separate opinions were written by Justice Souter (for the majority),[20] Justice White (concurring in the judgment),[21] Justice Blackmun (concurring in part and dissenting in part),[22] Justice Kennedy (concurring in part and dissenting in part),[23] and Justice Stevens (dissenting),[24] there is actually much more agreement than disagreement among the justices. As will be seen, eight justices fundamentally agreed upon the standard to be employed in deciding whether a claim is "based upon" a commercial activity, with Justice Stevens being the sole dissenter.

Prior to the Court's decision, lower federal courts identified four different interpretations of the "based upon" requirement.[25] Some courts adopted a "literal" approach, interpreting "based upon" to mean precisely what it appears to mean: that the cause of action arise directly out of commercial activity carried on in the United States.[26] Other courts adopted a "nexus" approach, in which the commercial activity must only have some "connection" to the act complained of in the suit.[27] A third group of courts—apparently unable to choose between the first two approaches—applied a bifurcated literal and nexus approach.[28] Finally, a fourth group fashioned a "doing business" approach, which requires that a broad course of commercial conduct within the United States be connected to the act complained of in the suit.[29]

Consistent with the restrictive theory of foreign sovereign immunity,[30] which the FSIA codifies,[31] the Supreme Court adopted the narrowest test, requiring that the commercial activity within the United States must itself be the basis for the cause of action

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17. 28 U.S.C. § 1605(a)(2) (1993).
18. *Nelson*, 923 F.2d at 1535.
19. Saudi Arabia v. Nelson, 113 S. Ct. 1471 (1993).
20. *Id.* at 1474.
21. *Id.* at 1481.
22. *Id.* at 1484.
23. *Id.*
24. *Nelson*, 113 S. Ct. at 1487.
25. Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 200 (5th Cir. 1984).
26. 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).
27. Velidor v. L/P/G 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).
28. *Vencedora Oceanica Navigacion, S.A.*, 730 F.2d at 200.
29. Rio Grande Transport, Inc., 516 F. Supp. 1155 (S.D.N.Y. 1981).
30. *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 451-53.
31. *See, e.g.*, Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160, 2165 (1992).

when jurisdiction is premised upon the first clause in section 1605(a)(2).[32] The Court had little difficulty in giving meaning to the phrase "based upon." Citing three standard dictionaries (and thus emphasizing its reliance upon the plain meaning approach to interpretation), the Court concluded that "the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case."[33] The Court bolstered this plain meaning interpretation by noting that two other clauses in the same section of the FSIA—neither of which applied in this case—created jurisdiction for suits "based . . . upon an act . . . *in connection with* a commercial activity."[34] Congress clearly knew how to adopt a loose "connection with" standard, and the absence of that language in the first clause of section 1605(a)(2) meant that "something more than a mere connection with, or relation to, commercial activity" was required by the first clause.[35]

In the lower courts, Nelson claimed that his recruitment and hiring, which took place in the United States, was connected to his subsequent imprisonment and torture, and that his cause of action for the imprisonment and torture was therefore "based upon" a commercial activity within the United States. Eight justices rejected this contention using the narrow definition of "based upon."[36]

Before the Supreme Court, Nelson also claimed that the torture and imprisonment in Saudi Arabia was "commercial activity" that bore a "substantial contact" to the United States. The majority rejected this argument on the ground that torture and imprisonment by state security forces constitute public or sovereign acts rather than private or commercial acts.[37] As the majority explained, "[t]he conduct boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature."[38]

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32. The section provides in relevant part as follows: "(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case— . . . (2) *in which the action is based upon a commercial activity carried on in the United States by the foreign state*; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a) (1993) (emphasis added).

33. Saudi Arabia v. Nelson, 113 S. Ct. 1471, 1477 (1993). Justices White, Blackmun, and Kennedy concurred separately on different grounds, but agreed with the majority that "based upon" required something more than a loose connection with a commercial activity. *Id.* at 1481 (White, J., concurring); *id.* at 1484 (Blackmun, J., concurring); *id.* at 1484-85 (Kennedy, J., concurring in part and dissenting in part).

34. 28 U.S.C. § 1605(a)(2) (1993) (emphasis added).

35. *Nelson*, 113 S. Ct. at 1478.

36. "While these activities [recruiting and hiring] led to the conduct that eventually injured the Nelsons, they are not the basis for the Nelsons' suit." *Id. See also id.* at 1481 ("I agree with the majority that [the recruiting and hiring] is 'not the basis for the Nelsons' suit.'") (White, J., concurring); *id.* at 1484 ("I join Justice White's opinion because it finds that respondents' intentional tort claims [i.e., torture] are 'based upon a commercial activity' and that the commercial activity at issue in those claims was not 'carried on in the United States.'") (Blackmun, J., concurring in part and dissenting in part); *id.* at 1484-85 ("I join all of the Court's opinion except the last paragraph of Part II," which deals with a failure to warn claim discussed in the text) (Kennedy, J., concurring in part and dissenting in part).

37. *Nelson*, 113 S. Ct. at 1479.

38. *Id.*

Finally, Nelson also claimed that the Hospital could be held liable for failing to warn him in the recruitment and hiring process that torture and imprisonment were possible employment sanctions. The Court rejected this contention as well, however. Although conceding, sub silentio, that this claim would have been "based upon" commercial activity within the United States, the majority refused to permit Nelson to plead his way around a jurisdictional defect by the expedient of recasting his intentional tort claim as a failure to warn that intentional torts were likely. As the Court noted, "[t]o give jurisdictional significance to this feint of language would effectively thwart the Act's manifest purpose to codify the restrictive theory of foreign sovereign immunity."[39]

Justices White and Blackmun concurred in the Court's conclusion that the claims in the case were not "based upon" Nelson's recruitment and hiring, but White and Blackmun disagreed that the torture and imprisonment was not a "commercial activity" under the FSIA. Justice White characterized Nelson's claims of torture and imprisonment as essentially similar to retaliation for whistle-blowing, which is plainly a type of "commercial activity."[40] Yet Justices White and Blackmun agreed that the torture and imprisonment, even though commercial, did not satisfy the requirement of the FSIA because, in their view, the torture and imprisonment was insufficiently related to activities in the United States.[41] In light of the Court's narrow interpretation of the "based upon" language in the FSIA, it is likely that a majority of the Court would agree with White and Blackmun that the torture and imprisonment in Saudi Arabia was insufficiently connected to activities within the United States.

Justices Kennedy and Blackmun agreed that the torture and imprisonment claims did not meet the requirements of the FSIA, but they dissented from the Court's conclusion that the failure to warn claim should be rejected. Justice Kennedy viewed the failure to warn claim as raising purely a substantive law question that could properly be decided only by reaching the merits, which were not before the Court.[42] Justice Kennedy's approach may be formally more precise, but one certainly can sympathize with the majority's sense that permitting the failure to warn claim to go forward would significantly undermine the restrictive theory of sovereign immunity.

Backing away from the details of the case, it appears the Court has essentially adopted a territorial approach to jurisdiction under section 1605(a)(2). If the cause of action arises out of commercial activity within the United States or causes direct effects within the United States, then jurisdiction lies. But if the conduct and injury occurs elsewhere, jurisdiction is absent. This common sense, simple, and predictable approach should be welcome news to foreign governments engaged in commercial activities and concerned about the reach of United States law.

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39. *Id.* at 1480.
40. *Nelson*, 113 S. Ct. at 1481-82 (White, J., concurring).
41. *Id.* at 1484.
42. *Id.* at 1486-87.

B. Smith v. United States—*Is Antarctica a "Foreign Country" for Purposes of the Federal Tort Claims Act?*

John Emmett Smith worked in Antarctica as an employee of a construction company under contract to the National Science Foundation, an agency of the United States government.[43] While taking a recreational hike with companions, Smith strayed from the marked path and fell into a crevasse where he died from internal injuries and exposure.[44] His widow and representative of his estate, Sandra Jean Smith, filed a wrongful death action against the United States in the District Court for the District of Oregon, her place of residence, under the FTCA.[45]

The district court held her claim was barred by the foreign-country exception to the FTCA, which precludes the exercise of jurisdiction over "'[a]ny claim arising in a foreign country.'"[46] The Court of Appeals for the Ninth Circuit affirmed.[47]

In a straightforward opinion, the Supreme Court affirmed by a vote of 8-1, with only Justice Stevens dissenting.[48] The FTCA does not apply to "[a]ny claim arising in a foreign country,"[49] and the only issue before the Court was whether Antarctica was a "foreign country." Turning to the 1945 edition of *Webster's New International Dictionary*, the Court adopted the "plain meaning" of the word "country": "The first dictionary definition of 'country' is simply '[a] region or tract of land.'"[50] Since Antarctica is plainly a foreign region or tract of land, tortious acts or omissions in Antarctica may not be the basis for a suit against the United States under the FTCA.

The Court supported this common sense definition by noting that the choice of law provision in the FTCA directs federal courts to apply "the law of the place where the act or omission occurred."[51] This requirement makes no sense since Antarctica is "a sovereignless region without civil tort law of its own."[52] Venue could also be a problem since the FTCA provides for venue "only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred."[53] In the case of a suit by a foreign national who resides outside the United States, the FTCA would in effect provide for no venue since no federal district encompasses Antarctica.[54]

The majority's decision is undoubtedly a correct interpretation of the FTCA. The spirit of Justice Stevens' dissent is found in the following quote near the end of his opinion: "The international community includes sovereignless places but no places where there is no rule of law. Majestic legislation like the Federal Tort Claims Act should be read with the vision of the judge, enlightened by an interest in justice, not through the

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43. Smith v. United States, 113 S. Ct. 1178, 1180 (1993).
44. *Id.*
45. *Id.*
46. Smith v. United States, 702 F. Supp. 1480, 1481 (D.C. Or. 1989). *See also* 28 U.S.C. § 2680(k) (1993).
47. Smith v. United States, 953 F.2d 1116 (9th Cir. 1991).
48. Smith v. United States, 113 S. Ct. 1178 (1993).
49. 28 U.S.C. § 2680(k) (1993).
50. *Smith*, 113 S. Ct. at 1181.
51. 28 U.S.C. § 1346(b) (1993).
52. *Smith*, 113 S. Ct. at 1180.
53. 28 U.S.C. § 1402(b) (1993).
54. *Smith*, 113 S. Ct. at 1182.

opaque green eye-shade of the cloistered bookkeeper."[55] While Stevens' sentiment is certainly a noble one (and Congress should now plainly consider amending the FTCA to provide some form of redress for torts which occur in Antarctica or in space), the Court's approach, which respects not only the language which Congress has enacted, but also Congress' ability to correct seemingly unjust results by amending that language, is to be preferred because it promotes greater predictability and certainty in law than a rule which would permit judges to rewrite statutes or treaties to reach what judges believe are just results.

55. *Id.* at 1189-90 (Stevens, J., dissenting).