SAUDI ARABIA v. NELSON: ROLL OVER *WELTOVER*, TELL SCOTT NELSON THE NEWS

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One ill-fated day in September 1983, Scott Nelson was attracted to a job advertisement in a trade periodical that would eventually ensnare him in a bizarre and frustrating drama worthy of the imagination of Kafka. The job advertisement was placed by the Hospital Corporation of America (HCA). Pursuant to a contract signed with the Kingdom of Saudi Arabia in 1973, HCA recruited American personnel to work for the King Faisal Specialist Hospital (Hospital) in Saudi Arabia.[1] The Hospital was owned and operated by the Saudi government, and had an agent in the United States, Royspec Purchasing Services (Royspec).[2]

In response to the advertisement, Nelson applied for the position of "monitoring systems engineer" at the Hospital in September 1983.[3] He traveled to Saudi Arabia to interview for the position and, upon his return to the United States, signed an employment contract with the Hospital.[4] He then underwent personnel processing and attended an employee orientation session conducted by HCA.[5] During the orientation, HCA told Nelson that, in case of emergency, family members in the United States could reach him through Royspec.[6]

Nelson began his employment with the Hospital in Riyadh in December 1983.[7] In the course of his duties as monitoring systems engineer, he conducted safety inspections of the oxygen and nitrous oxide

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1. Saudi Arabia v. Nelson, 113 S. Ct. 1471 (1993).
2. *Id.*
3. *Id.*
4. *Id.* at 1474-75.
5. *Id.*
6. *Nelson*, 113 S. Ct. 1475.
7. *Id.*

lines at the facility.[8] In March 1984, Nelson discovered safety defects and fire hazards in the system and reported the situation to the Hospital administration.[9] He was told to ignore the problem.[10] He continuously warned the Hospital, as well as an investigative committee of the Saudi government, of the dangers presented by the defects.[11] On September 27, 1984, Hospital employees asked him to report to the Hospital security office,[12] where he was arrested by agents of the Saudi government.[13]

Nelson was confined to a jail cell for four days.[14] During this time, he was deprived of food, shackled, beaten, and tortured.[15] Although provided with an interpreter, Nelson was neither told the nature of the charges against him nor informed of the contents of a statement he was forced to sign in order to avoid further brutality.[16] Nelson was transferred to the Al Sijon Prison, ostensibly to await trial on charges still unknown to him.[17] He was subjected to interrogations in Arabic and forced to fight other inmates for food in an overcrowded, rat-infested cell.[18]

A Saudi official eventually informed Nelson's wife, Vivian, of his imprisonment and offered her husband's release in exchange for sexual favors.[19] Representatives from the United States Embassy were able to visit Nelson twice while he was imprisoned; however, they refused to accept Nelson's allegations of mistreatment.[20] It was not until a United

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8. *Id.*

9. *Id.*

10. *Id.*

11. *Nelson*, 113 S. Ct. 1475.

12. *Id.*

13. *See id.* at 1475 n.1. The Saudi government arrested Nelson on the grounds that he had falsely claimed to have received his degree from the Massachusetts Institute of Technology. The Nelsons did not dispute these allegations but offered that "[the allegations] occasioned Scott Nelson's arrest." *Id.*

14. *Id.*

15. *Id.*

16. *See Nelson*, 113 S. Ct. at 1475.

17. *Id.*

18. *Id.*

19. *Id.* at 1475.

20. *Id.*

States Senator petitioned the Saudi government that Nelson was finally released on November 5, 1984, 39 days after his arrest.[21]

The Nelsons brought suit in the United States District Court for the Southern District of Florida alleging personal injuries resulting from the tortious conduct of the Kingdom of Saudi Arabia, Royspec, and HCA.[22] The sixteen causes of action included various intentional torts, such as battery, false arrest, false imprisonment and infliction of mental anguish; negligent failure to warn of the dangers of employment, i.e., that the reporting of safety hazards might subject him to punishment; and derivative injuries sustained by Vivian Nelson.[23]

In his complaint, Nelson asserted that the District Court had subject matter jurisdiction pursuant to the "commercial activity" exception to the Foreign Sovereign Immunities Act of 1976 (FSIA), Section 1605(a)(2).[24] He argued that his causes of action were based upon commercial activity carried on in the United States by the three defendants; thus sovereign immunity did not shield them from suit.[25]

The District Court disagreed, reasoning that there was an insufficient nexus between the domestic recruitment by HCA and the injuries sustained in Saudi Arabia.[26] Although HCA's activities could reasonably be attributed to both the Hospital and the Saudi government, the connection "was far too tenuous" to establish jurisdiction under the FSIA.[27] In addition, Royspec's purchasing of supplies and equipment in the United States was insufficient to establish jurisdiction under the commercial activity exception because Royspec had merely served as a contact in the United States for Nelson's relatives in the event of any emergency.[28]

The United States Court of Appeals for the Eleventh Circuit reversed, concluding that Saudi Arabia and the Hospital were engaged in commercial activities in the United States through the recruitment and

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21. *Nelson*, 113 S. Ct. at 1475.

22. Nelson v. Saudi Arabia, No. 88-1791-CIV-NESBITT, 1989 WL 435302 (S.D. Fla. 1989), *rev'd*, 923 F.2d 1528 (11th Cir. 1991), *rev'd*, 113 S. Ct. 1471 (1993).

23. *Nelson*, 113 S. Ct. at 1475-76.

24. Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2) (1976).

25. *See Nelson*, 113 S. Ct. at 1476.

26. *Id.*

27. *Id.*

28. *Id.*

hiring activities of their agent, HCA.[29] The court further held that Nelson's employment was so interrelated with his detention and torture that a sufficient nexus between the commercial activities and the injuries had been established.[30] In addition, the court held that Royspec was within its jurisdiction because it had been directly involved in Nelson's recruitment as the contact point in the United States.[31] The three defendants petitioned the Eleventh Circuit for a rehearing en banc.[32] When the petition was denied, the defendants filed for a writ of certiorari from the United States Supreme Court, which was granted on June 8, 1992.[33] The Supreme Court reversed, holding that the action was based upon a sovereign activity immune from the subject-matter jurisdiction of United States courts under FSIA Section 1605(a)(2).[34]

The doctrine of foreign sovereign immunity is a principle of international law that precludes domestic courts from asserting jurisdiction over suits against a foreign state.[35] The most expansive application of the doctrine extends "absolute" immunity to the foreign state, regardless of the nature of the act upon which a suit is based.[36] The narrow, or "modern," application provides for "restrictive" immunity from domestic jurisdiction only for activities of a sovereign or public nature (*jure imperii*).[37] When a foreign state, its agency, or instrumentality engages in behavior of a purely private or commercial nature (*jure gestonis*), the state loses its immunity and becomes subject to the forum state's jurisdiction, as would any other private actor.[38]

The doctrine of absolute sovereign immunity was first applied in 1812 by the United States Supreme Court in *The Schooner Exchange v.*

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29. Nelson v. Saudi Arabia, 923 F.2d 1528, 1536 (11th Cir. 1991), *rev'd*, 113 S. Ct. 1471 (1993).

30. *Id.*

31. *Id.*

32. *Nelson*, 113 S. Ct. at 1476.

33. Saudi Arabia v. Nelson, 112 S. Ct. 2937 (1992).

34. *Nelson*, 113 S. Ct. at 1480.

35. *See Nelson*, 923 F.2d at 1531.

36. *See id.* at 1531-32.

37. *Id.* at 1532.

38. *Id.*

M'Fadden.[39] Despite Chief Justice Marshall's ostensible application of the doctrine as a principle of international law,[40] the executive branch was the influencing factor behind the decision.[41] By the turn of the century, the Court was relying more on advice from the executive branch and the State Department to decide immunity cases than on principles of legal reasoning.[42]

In 1952, the State Department issued the Tate Letter, adopting the restrictive theory of sovereign immunity.[43] The Tate Letter caused further confusion over which governmental branch was responsible for immunity determinations. Through this vehicle, the State Department proclaimed its authority to decide which state actions were cognizable as public acts shielded by sovereign immunity.[44] The courts were left to determine commercial or private activities. The awkwardness of this procedure resulted in great uncertainty. A private actor dealing with a foreign sovereign found himself at the mercy of the State Department's political machinations. A foreign state, on the other hand, was able to keep a dispute out of the courts' reach by exerting "diplomatic influences."[45]

As the United States escalated its intermeddling abroad, it found itself a litigant in foreign jurisdictions. The Department of Justice

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39. 11 U.S. (7 Cranch) 116 (1812) (holding that courts of United States lack jurisdiction over armed ship of foreign state in U.S. ports). This case was the basis for extending absolute immunity to foreign sovereigns. In addition, however, it can also justly be regarded as the precedent for sovereign immunity determinations having their origins in the executive branch.

40. *See id.* at 126-29.

41. *See* Karleen McIntyre, *Nelson v. Saudi Arabia: Subject Matter Jurisdiction Under the Foreign Sovereign Immunities Act of 1976*, 1 J. TRANSNAT'L L. & POL'Y 273, 274 (1992).

42. *See id.*

43. *See* H.R. REP. NO. 1487, 94th Congress, 2nd Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606-07 (citing Letter of Jack B. Tate, Acting Legal Advisor, Department of State, to Acting Attorney General Phillip B. Perlman, *reprinted in* 26 DEP'T STATE BULL. 984-85 (1952)). "It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations." *Id.* It is apparent from the *Nelson* decision that some members of the Court still follow the advice of the Executive branch.

44. *Id.*

45. *Id.*

discovered that most civilized Western European countries applied the restrictive immunity doctrine as a principle of international law. Furthermore, interference by the executive branch and lack of international quid pro quo created an uncomfortable situation in the domestic courts. As a result, the executive branch began to relinquish its authority over the classification of a foreign sovereign's acts to the judiciary. Those efforts culminated in the Foreign Sovereign Immunity Act of 1976.[46] The FSIA was intended to codify the "restrictive theory" of sovereign immunity and to establish uniform application of the principle in United States courts.[47]

The FSIA generally provides that foreign states "shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in Sections 1605 to 1607" of the Act.[48] Pursuant to FSIA Section 1605(a)(2), foreign states are stripped of their immunity from suit when:

> 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.[49]

FSIA Section 1603 specifies that a foreign state "includes a political subdivision of the foreign state or an agency or instrumentality of the foreign state."[50] The FSIA broadly defines commercial activity as either a "regular course of commercial conduct or a particular commercial transaction or act."[51] It further provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct...rather than by reference to its

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46. Foreign Sovereign Immunity Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891, (codified as amended at 28 U.S.C. §§ 1330, 1602 *et seq.* (1976)).

47. *See* H.R. REP. NO. 1487, 94th Cong., 2d Sess. 7, (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604.

48. 28 U.S.C. § 1604.

49. *Id.* § 1605(a)(2).

50. *Id.* § 1603(a).

51. *Id.* § 1603(d).

purpose."[52] Finally, a commercial activity is deemed to be "carried on in the United States by a foreign state" when there is "substantial contact with the United States."[53]

The interplay between Sections 1603 and 1605 was debated in the circuit courts for some time.[54] In 1992, the Supreme Court addressed this issue in *Republic of Argentina v. Weltover*.[55] *Weltover* arose out of a breach of contract action brought by two Panamanian corporations and a Swiss bank against the Argentine government and the national bank of Argentina.[56] Argentina issued a number of bonds in order to stabilize the country's currency.[57] As the expiration date of the bonds approached, the Argentine government decided that it had insufficient foreign exchange to redeem the bonds and unilaterally decided to extend the time for repayment.[58] Although Argentina offered substitute instruments as a means of rescheduling the debt, the two Panamanian corporations and the Swiss Bank demanded repayment according to the original terms contracted for in New York.[59] Upon Argentina's refusal, the bondholders instituted an action in the United States District Court for the Southern District of New York asserting subject matter jurisdiction under the FSIA.[60] Argentina challenged the district court's jurisdiction on the grounds of sovereign immunity.[61] The United States Court of Appeals for the Second Circuit upheld the district court's denial of

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52. *Id.* § 1603(d).

53. 28 U.S.C. § 1603(e).

54. *See, e.g.*, Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511 (D.C. Cir. 1988); Shapiro v. Republic of Bolivia, 930 F.2d 1013 (2d Cir. 1991); Rush-Presbyterian-St. Luke's Medical Ctr. v. Hellenic Republic, 877 F.2d 574 (7th Cir. 1989); Gregorian v. Izvestia, 871 F.2d 1515 (9th Cir. 1989); America West Airlines, Inc. v. GPA Group, Ltd., 877 F.2d 793 (9th Cir. 1989); Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445 (6th Cir. 1988); Vencedora DeSanchez v. Banco Central de Nicaragua, 770 F.2d 1385 (5th Cir. 1985); Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 750 F.2d 195 (5th Cir. 1984); Velidor v. L/P/G Benghazi, 653 F.2d 812 (3d Cir. 1981); Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371 (5th Cir. 1980).

55. 112 S. Ct. 2160 (1992).

56. *Id.* at 2164.

57. *Id.* at 2163-64.

58. *Id.* at 2164.

59. *Id.*

60. *Weltover*, 112 S. Ct. at 2164.

61. *Id.*

Argentina's motion to dismiss the action, and the Supreme Court granted certiorari to consider the question of subject matter jurisdiction.[62]

Writing for a unanimous Court, Justice Scalia divided the issue into two questions: first, whether the issuance of the bonds was a commercial activity for purposes of the FSIA, and second, whether the activity had a direct effect in the United States.[63] It was concluded that Argentina and its bank were foreign states pursuant to the FSIA, and that the cause of action was "based upon an act outside the territory of the United States."[64]

Relying on the Court's pre-FSIA holding in *Alfred Dunhill of London, Inc. v. Republic of Cuba*,[65] Justice Scalia determined that a foreign sovereign's actions are commercial within the meaning of the FSIA when it "acts, not as a regulator of a market, but in the manner of a private player within it."[66] The Court construed the issue of FSIA Section 1603(d) to be "whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages" in commerce.[67] Although the purpose behind Argentina's participation in the bond market was the restructuring of its currency, a purely sovereign act, the nature of the act was the issuance of debt instruments "in the manner of a private actor."[68] Therefore, the issuance of the bonds was a commercial activity for the purposes of the FSIA.[69]

The direct effect in the United States, required by FSIA Section 1605(a)(2), did not have to be "substantial" or "foreseeable."[70] Rather, the Court determined that while jurisdiction could not be sustained for

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62. *Id.*

63. *Id.* at 2165.

64. *Id.* at 2164-65 n.1.

65. 425 U.S. 682 (1976). Although the main issue in *Dunhill* was whether the Act of State Doctrine applied to the expropriation of cigar companies by the Cuban government, the restrictive theory of sovereign immunity was the subject of considerable discussion and the definitions relating to that doctrine apparently were accepted by all members of the Court, including the plurality and dissent. Because this case took place six months before the Foreign Sovereign Immunities Act became effective, it is used as an example of how the restrictive theory was understood by the drafters of the FSIA.

66. *Weltover*, 112 S. Ct. at 2166.

67. *Id.*

68. *See id.* at 2167-68.

69. *See id.*

70. *See id.* at 2168.

"purely trivial" effects in the United States, it could be asserted if the effect of a commercial activity is "an immediate consequence of the defendant's activity."[71] Since the bondholders had designated New York as the place of performance and money to be delivered to a New York bank did not arrive, the Court concluded that Argentina's rescheduling of the bonds had a direct effect in the United States,[72] thereby fulfilling the second jurisdictional requirement.

The Supreme Court's decision in *Weltover* presumably had established the proper means for determining whether a foreign sovereign was engaging in commercial activity. Scott Nelson's predicament gave the Court an opportunity to apply the *Weltover* analysis to the area of tortious conduct by a foreign state. Nelson alleged that United States courts had subject matter jurisdiction over his dispute with Saudi Arabia under the first clause of Section 1605(a)(2) of the FSIA, which precludes sovereign immunity for an "action based upon a commercial activity carried on in the United States by the foreign state."[73] He claimed that his detention and torture had been based upon the employee recruitment activities carried on by the Saudi government in the United States.[74]

The Eleventh Circuit had little difficulty concluding that the recruitment and hiring of Nelson was a commercial activity carried on by the Saudi Government through its instrumentality, the Hospital, and its agent, HCA.[75] The court held that the Saudi recruitment activities satisfied the commercial activity definition of Section 1603(e) requiring "substantial contact with the United States."[76] The core of the Eleventh Circuit's opinion, however, was the requirement of the first clause of Section 1605(a)(2) that Nelson's "action be based upon a commercial activity carried on in the United States."[77] In other words, some "jurisdictional nexus" must exist between the acts of the sovereign forming the basis of the plaintiff's action and the commercial activity in which the sovereign was engaged.[78] This view was also adopted by the

71. *Id.*

72. *Id.* at 2168-69.

73. 28 U.S.C. § 1605(a)(2).

74. *See Nelson*, 923 F.2d at 1533.

75. *Id.*

76. *Id.* (citing 28 U.S.C. § 1603(e)).

77. 28 U.S.C. § 1605(a)(2).

78. *See Nelson*, 923 F.2d at 1534.

Third, Fifth, Sixth, and Ninth Circuits.[79] The Eleventh Circuit held that the cause of Nelson's detention and torture was "so intertwined with his employment at the Hospital that they [were] 'based upon' his recruitment and hiring."[80]

The Supreme Court reversed the Court of Appeals' jurisdiction determination on the grounds that Nelson's suit was not based upon any commercial activity by the Saudi government within the meaning of the FSIA.[81] As a result, the Court lacked subject matter jurisdiction over the suit.[82] The Court began its jurisdictional analysis by examining the "conduct" upon which Nelson's action was based under the "private person test."[83] The first prong of this test requires that "the conduct the action is based upon or *related to* qualifies as 'commercial activity.'"[84] The Court found conduct to mean that activity which serves to prove the elements of the tort claim asserted by the plaintiff.[85] The second prong of the test requires the commercial activity to bear the relation to the cause of action and to the United States as described under Section 1605(a)(2).[86] Justice Souter interpreted Congress' intent as requiring an action to be "*based upon* a commercial activity" in order to confer

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79. *Id.*

80. *Id.* at 1535.

81. The opinion was written by Justice Souter and joined by Chief Justice Rehnquist, Justice O'Connor, Justice Scalia, and Justice Thomas.

82. *Nelson*, 113 S. Ct. at 1474.

83. *Id.* This test was explained in Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981). The *Texas Trading* test is:

> 1. Does the conduct the action is based upon or related to qualify as "commercial activity?
> 2. Does that commercial activity bear the relation to the cause of action and to the United States described by one of the three phases of § 1605(a)(2), warranting the court's exercise of subject matter jurisdiction under § 1330(a)?

Id. The other three parts of the test relate to Article III judicial power, personal jurisdiction, and due process. Although Justice Souter appears to be endorsing the *Texas Trading* test, he was merely searching for convenient language found later in the opinion. The *Texas Trading* test requires a strict view of "based upon" or it would not have offered the alternative option that the conduct merely be "related to" commercial activity.

84. *Texas Trading*, 647 F.2d at 308 (emphasis added).

85. *See Nelson*, 113 S. Ct. at 1478.

86. *Texas Trading*, 647 F.2d at 308.

jurisdiction under the first clause of FSIA Section 1605(a)(2).[87] To show that Nelson's actions were based upon a commercial activity, the Court required "something more than a mere connection with, or relation to, commercial activity."[88] As a result, the Court reasoned that although the employment activities "led to the conduct that eventually injured the Nelsons, they are not the basis for the suit."[89] It concluded that the tortious conduct, not the Saudi commercial activities preceding the tort, formed the basis for the action.[90]

The Court next concerned itself with the question of commercial activity.[91] Relying on *Weltover*, the Court addressed "whether the particular actions that the foreign state perform[ed] are the type of actions by which a private party engages in 'trade and traffic or commerce.'"[92] Justice Souter characterized Saudi Arabia's actions as an "abuse of its police power," an activity in which a private person was incapable of engaging and, therefore, a power "peculiarly sovereign in nature."[93] Consequently, the Court reasoned that Nelson's action was based not on the Saudi government's commercial activity, but on an exercise of sovereign power shielded by the immunity doctrine.[94]

The Court gave scant attention to the second cause of action, the failure to warn of the possible consequences of employment.[95] It classified the action as a "semantic ploy" which enabled a plaintiff "to recast virtually any claim of intentional tort committed by a sovereign act as a claim of failure to warn, simply by charging the defendant with an obligation to announce its own tortious propensity before indulging in

87. *Nelson*, 113 S. Ct. at 1478 (emphasis added).

88. *Id.* at 1477-78. This requirement seems to apply a standard of relation higher than that contemplated by Congress, thereby effectively negating the "related to" language of the test.

89. *Id.* at 1478.

90. *See id.*

91. *See id.* at 1478-81.

92. *Nelson*, 113 S. Ct. at 1479 (citing Republic of Argentina v. Weltover, 112 S. Ct. 2160, 2166 (1992)).

93. *Id.* at 1479.

94. *See id.* at 1479-80.

95. *Id.* at 1480.

it."[96] With this final comment, the Court reversed the Eleventh Circuit's decision and dismissed Nelson's case.[97]

The Court's cursory disposition of Nelson's intentional tort claims, not to mention the almost cavalier treatment accorded to the claim of failure to warn, shows a curious reluctance on the part of the majority to address the case in detail. Had the Court done so, it might have been forced to reach a different conclusion. Justice Souter seemed to confuse Nelson's claims when he stated that the employment and recruiting activities "led to the conduct that eventually injured the Nelsons, [but]...are not the basis for the Nelsons' suit."[98] Nothing could be further from reality since Nelson's injuries did, in fact, directly result from HCA's and, more importantly, Saudi Arabia's recruiting activities.

Justice White, joined by Justice Blackmun, concurred in the majority's judgment on the basis that the commercial conduct complained of was not "carried on in the United States," as FSIA Section 1605(a)(2) requires.[99] Justice White did not focus on the recruiting activities, but rather on the conduct occurring in Saudi Arabia which was similar to that of any other tortious conduct committed in the workplace by a private employer and "well within the bounds of commercial activity."[100] The purpose of the restrictive theory is to strip a state of its immunity when it chooses to act as a private player in the commercial market.[101] Simply because a state chooses to use its police force, rather than its private security personnel, to commit an intentionally tortious act should not alter the result of the commercial activity exception analysis.[102] In essence, the Court's focus on the "nature" of the act as an exercise of police power was misplaced.[103] The nature of the conduct was the retaliatory treatment of an employee who displeased his superiors.[104]

Justice Kennedy observed in his dissent that "the failure to warn counts [did] not complain of a police beating in Saudi Arabia, rather, they complain[ed] of a negligent omission made during the recruiting of a

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96. *Id.*

97. *Nelson*, 113 S. Ct. at 1480-81.

98. *Id.* at 1478.

99. *See id.* at 1481 (White, J., concurring in judgment).

100. *See id.* at 1481-82 (White, J., concurring in judgment).

101. *See id.* at 1484 (White, J., concurring in judgment).

102. *See Nelson*, 113 S. Ct. at 1482-83 (White, J., concurring in judgment).

103. *See id.*

104. *See id.*

hospital employee in the United States."[105] The negligent omission claim meets both requirements of *Weltover*.[106] First, the claim of failure to warn is based on a negligent omission made by an agent or instrumentality of a foreign sovereign in the course of conducting its commercial activity of recruiting and hiring employees in the same manner as a private employer.[107] Second, the claim is based on a commercial activity which had been carried on in the United States for sixteen years.[108] Thus, Saudi Arabia's recruitment and employment of Americans qualifies under FSIA Section 1605(a)(2) as a commercial activity that has been "carried on" in the United States.[109] If the Court had applied the jurisdictional test in this manner, it at least would have been compelled to remand this claim for a rehearing. Justice Kennedy categorized the majority's failure to do so as "peculiar" and tried to justify its oversight as stemming "from doubts about the validity of the underlying negligence cause of action."[110] Regardless of the Court's doubts concerning the potential outcome of this action, it should have followed the requisite analysis under the FSIA.

Although *Weltover* has been lauded as ending speculation over the issue of commercial activity, it can now be said that when sovereign acts touch more politically sensitive areas, the courts may set different standards for commercial activity.[111] Whereas the Court in *Weltover* seemed to broaden the definition of commercial activity, the Court in *Nelson* did as much to narrow it, leaving the definition of commercial activity under the FSIA where it was before *Weltover*: in the eye of the beholder.

Nelson does recognize a "literal approach" to defining the "based upon" language in the first clause of FSIA Section 1605(a)(2). Justice Souter stated that "[an] action is based upon the elements that prove the claim, no more and no less."[112] This approach to the first clause of

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105. *Id.* at 1485 (Kennedy, J., dissenting).

106. *Id.* at 1485-87 (Kennedy, J., dissenting).

107. *Nelson*, 113 S. Ct. at 1485 (Kennedy, J., dissenting).

108. *Id.* (Kennedy, J., dissenting).

109. *See id.* at 1485-86 (Kennedy, J., dissenting).

110. *Id.* at 1486 (Kennedy, J., dissenting).

111. *See* Trolan S. Link, *Sovereign Immunity, Expropriation, Acts of State and Comity, in* 635 INT'L COM. AGREEMENTS 109 (Practicing Law Institute, Commercial Law & Practice Course Handbook Series, 1992).

112. *Nelson*, 113 S. Ct. at 1477 (quoting Santos v. Compagnie Nationale Air France, 934 F.2d 890, 893 (7th Cir. 1991)).

Section 1605(a)(2) mandates that a plaintiff's cause of action be based directly upon a commercial activity in the United States, not upon an act "in connection with" the activity.[113] Hence, both the act and the commercial activity must take place in the United States.[114]

The literal approach has been criticized because it would exclude jurisdiction over a claim based upon an act performed abroad in connection with a commercial activity carried on in the United States, a scenario which is not addressed by the clauses of Section 1605(a)(2).[115] A literal reading of the second clause of Section 1605(a)(2) applies the FSIA to acts occurring in the United States in connection with a foreign state's commercial activity elsewhere.[116] The third clause literally applies to acts not occurring in the United States but in connection with a foreign state's commercial activity elsewhere, and having a direct effect in the United States.[117] The more reasonable interpretation encompassing all three clauses is that, provided the commercial activity was conducted in the United States and the act disputed was related to that activity, it is immaterial that the act occurred in a foreign state.[118]

If the Court had used a literal interpretation of the first clause, Nelson's claim probably would have received a different disposition. As Justice Stevens' dissent illustrates, the correct analysis under the first clause focuses on two distinct questions: whether the plaintiff's action was based upon commercial activity, and whether that activity had substantial contacts with the United States.[119] The purpose of the first inquiry is to exclude "commercial activity from the scope of the foreign sovereign's immunity."[120] The second query evaluates the "contacts

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113. *See* Santos v. Compagnie Nationale Air France, 934 F.2d 890, 892-93 (7th Cir. 1991).

114. *See* Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094, 1108-09 n.5 (S.D.N.Y. 1982). For an excellent discussion of the four approaches to the "based upon" language see McIntyre, *supra* note 42, at 285. The other methods are: the "bifurcated literal and nexus approach" used in Gilson v. Republic of Ireland, 517 F. Supp. 477 (D.D.C. 1981); the "doing business test" of the In the Matter of Rio Grande Transp., Inc., 516 F. Supp. 1155 (S.D.N.Y. 1981); and the "nexus test" used in Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale de Navigation, 730 F.2d 195 (5th Cir. 1984).

115. *Gibbons*, 549 F. Supp. at 1108-09 n.5.

116. *See* 28 U.S.C. § 1605(a)(2).

117. *See id.*

118. *See Gibbons*, 549 F. Supp. at 1108-09 n.5. *See also* Sugarman v. Aeromexico, 626 F.2d 270 (3d Cir. 1980).

119. *See Nelson*, 113 S. Ct. at 1487-88 (Stevens, J., dissenting).

120. *Id.* at 1488 (Stevens, J., dissenting).

with the United States that support the assertion of jurisdiction over the defendant."[121] Saudi Arabia engaged in the commercial activity of operating a hospital which engaged in employment, recruitment, and disciplinary efforts in the United States.[122] Since Nelson was disciplined for conduct directly relating to his performance as an employee of the hospital, his detention and torture were "unquestionably 'based upon' those activities."[123] Thus, the first requirement of Section 1605(a)(2) has been satisfied.[124]

Saudi Arabia's commercial activities also satisfy the jurisdictional nexus requirement. Section 1603(e) requires only that a commercial activity has "substantial contact with the United States" in order for federal courts to assert jurisdiction over the claim.[125] This standard does not seem to be any more stringent than the direct effect requirement of the third clause of Section 1605(a)(2) which authorizes federal jurisdiction over scenarios in which both the act and the commercial activity take place outside United States territory.[126] If United States courts can recognize the validity of the dispute in *Weltover*, where neither party was a United States citizen and the sole effect in the United States was the absence of a deposit in a New York bank, it would seem fairly obvious that United States courts can entertain a dispute involving an American citizen and a foreign sovereign that conducts substantial business in the United States. After all, the Saudi government established a purchasing agent in Maryland, namely Royspec, for the sole purpose of equipping and supplying its Hospital. Additionally, its agent, HCA, had been recruiting United States citizens for employment at the Hospital for sixteen years.[127] Further, Nelson was recruited, employed, and attended an employee orientation session in the United States. Plainly, these activities qualify as "substantial contacts." Justice Stevens reiterated the focus of *Weltover*: that the "touchstone of the inquiry" should be whether the same activities, when performed by a private business, would subject it to jurisdiction.[128]

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121. *Id.*

122. *See id.* at 1482-83 (White, J., concurring in judgment).

123. *Id.* at 1488 (Stevens, J., dissenting).

124. *Nelson*, 113 S. Ct. at 1488 (Stevens, J., dissenting).

125. *See* 28 U.S.C. § 1603(e).

126. *See id.* § 1605(a)(2).

127. *See Nelson*, 923 F.2d at 1533-34.

128. *Nelson*, 113 S. Ct. at 1489.

We are now left to ponder the adage that "bad facts make bad law." Due to the Court's reluctance to intrude on the sovereign affairs of Saudi Arabia, the inferior federal courts are left with a more restrictive interpretation of the first clause of Section 1605(a)(2) than Congress probably intended. Other claims that might be of a purely commercial character may drop through the loophole left by the Supreme Court's adoption of a literalist view of the first clause. The Court apparently was willing to go to great ends to secure the "proper" conclusion. It not only adopted a manifestly unreasonable view of the "based upon" language of the statute, but also confused Nelson's intentional tort claims with his negligence claim and shied away from the broad commercial activity definition it unanimously espoused in *Weltover*. The question remains as to why the most conservative members of the Supreme Court would sign such a poorly-crafted opinion. One conceivable response is that determinations of sovereign immunity are not solely in the hands of the judiciary when politically sensitive issues are involved.

In light of the Saudi government's importance during the Gulf War and its continuing role in supplying oil to the United States, the American government felt it necessary to express its views about this matter which could have significant effects on international relations. The United States government not only submitted a "Statement of Interest" to accompany Saudi Arabia's petition for rehearing *en banc*,[129] but also directed the Solicitor General of the United States to file a brief expressing the government's views once the Supreme Court granted certiorari.[130] Later, the Solicitor General was granted leave to participate in divided oral argument.[131] The Court's deference in the *Nelson* disposition to the State Department's political judgment did not greatly diverge from its position prior to the enactment of the FSIA.

Justice Powell stated in his concurrence in *Dunhill* that "the line between commercial and political acts of a foreign state often will be difficult to delineate."[132] This seems to have been the precise problem in *Nelson*. The Court relied on the Saudi government's use of police power to determine the commercial quality of the act rather than on the commercial nature of the activity, as required by *Weltover*.

The problem remains, however, that a United States citizen may be deprived of any redress when a foreign state commits an act that

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129. *See* McIntyre, *supra* note 42, at 288 n.125.

130. *See* Saudi Arabia v. Nelson, 112 S. Ct. 436 (1991).

131. *See* Saudi Arabia v. Nelson, 113 S. Ct. 39 (1992).

132. *Dunhill*, 425 U.S. at 682.

violates the rights of a United States citizen in connection with a commercial activity carried on in the United States. After *Nelson*, this will not be actionable under FSIA Section 1605 for, as Justice Souter noted in the majority opinion, "the Act's commercial activity exception is irrelevant to cases alleging that a foreign state has violated human rights."[133] The FSIA does provide a tort exception for acts committed within the United States, but that is no help for someone in Scott Nelson's position.[134] The "waiver exception", permitting foreign states to waive their immunity either explicitly or implicitly notwithstanding any withdrawal of the waiver by the foreign state, has also been used in attempts to assert jurisdiction in cases of human rights violations and terrorism.[135] The general assertion under the human rights waiver theory is that states have implicitly waived their jurisdictional immunity under the FSIA by signing international conventions relating to violations of human rights such as the International Covenant on Civil and Political Rights.[136] However, these attempts have been largely unsuccessful due to the lack of an explicit waiver of immunity within the conventions themselves and the generally hortatory language of such multinational agreements.[137]

An interesting idea is that sovereign immunity should be per se unavailable when a nation violates international law.[138] This argument finds no support in the FSIA. Rather, the notion is premised on the argument that refusing jurisdiction over human rights violations is a breach of a general obligation that the United States and other nations have within the world community to deter and condemn such conduct.[139] This is a fine-sounding concept that amounts to little when the executive branch exerts political pressure on the courts.

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133. *Nelson*, 113 S. Ct. at 1480 (citing KENNETH C. RANDALL, FEDERAL COURTS AND THE HUMAN RIGHTS PARADIGM 93 (1990)).

134. 28 U.S.C. § 1605(a)(5).

135. *Id.* § 1605(a)(1).

136. *Nelson*, 113 S. Ct. at 1480 (citing KENNETH C. RANDALL, FEDERAL COURTS AND THE HUMAN RIGHTS PARADIGM 96 (1990)).

137. *See* KENNETH C. RANDALL, FEDERAL COURTS AND THE HUMAN RIGHTS PARADIGM 99-100 (1990) (citing Von Dardel v. Union of the Soviet Socialist Republics, 623 F. Supp. 246 (D.D.C. 1985), as successful use of waiver exception, and Frovola v. Union of the Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985), as example of how most courts treat attempt to use waiver exception).

138. *See id.*

139. *See id.*

Nelson illustrates the impracticability of attempting to force concepts of American morality and justice on a foreign state which, acceptable to the United States or not, has different cultural, legal, and political values. Another approach to the problem could be to inquire whether a United States citizen carries the protections of his or her legal system throughout the world. If so, may foreign citizens bring their own legal values into the United States? It seems apparent that Americans want to be protected by their laws anywhere they go, but expect foreigners to submit to United States laws when in the United States. For example, if Saudi Arabia had had strict laws against mendacious job applications with violations punishable by torture, it is inconceivable that a United States court would allow Nelson to be extradited to Saudi Arabia to face the consequences. Yet, if the Supreme Court had applied the proper analysis, Nelson would have been able to subject the Saudi government to suit in United States courts and to assert damages for the application of their domestic laws. Such are the difficulties of extraterritorial enforcement of national laws.

While Justice Souter complained of a lack of guidance given to the courts when defining commercial activity under the FSIA, he aptly remarked that "congressional diffidence necessarily results in judicial responsibility to determine" the meaning of the term.[140] As evidenced by the *Nelson* decision, responsibility does not necessarily mean capability. Congress would do well to analyze their own handiwork to determine whether the statute is meant solely to address problems strictly of a commercial nature, or if plaintiffs like Nelson are meant to take shelter under the umbrella of its provisions. It is especially frustrating for the scholar, student, and practitioner when the Court relies upon a clearly-reasoned precedent, like *Weltover*, in order to reach a different result, like *Nelson*. This only serves to create additional confusion in an already uncertain area of the law.

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