OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1401

TITLE IAIN CALDER AND JOHN SOUTH, Appellants, v. SHIRLEY JONES, Appellee

PLACE Washington, D. C.

DATE November 8, 1983

PAGES 1 thru 48



(202) 628-9300 440 FIRST STREET, N.W.

	IN THE SUPREME COURT OF THE UNITED STATES
2	x
3	IAIN CALDER AND JOHN SOUTH,
4	Appellants, :
5	v. * No. 82-1401
6	SHIRLEY JONES .
7	Appellee :
8	x
9	Washington, D.C.
10	Tuesday, November 8, 1983
11	The above-entitled matter came on for oral
12	argument before the Supreme Court of the United States
13	at 11:04 a.m.
14	APPEAR ANCES:
15	JOHN G. KESTER, ESQ., Washington, D.C.; on behalf of
16	the Appellant.
17	PAUL S. ABLON, ESQ., Beverly Hills, California; on
18	behalf of the Appellee.
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1 PROCEEDINGS

- 2 CHIEF JUSTICE BURGER: We will hear arguments
- 3 next in Calder and South versus Jones.
- 4 Mr. Kester, I think you may proceed whenever
- 5 you are ready.
- 6 ORAL ARGUMENT OF JOHN G. KESTER, ESQ.
- 7 ON BEHALF OF THE APPELLANT
- 8 MR. KESTER: Thank you. Mr. Chief Justice,
- 9 and may it please the Court, this case is quite
- 10 different from the one you just heard, although both
- 11 involve personal jurisdiction. In that case, the
- 12 central issue, which apparently was the one, the only
- 13 addressed by the courts below, was jurisdiction over a
- 14 publishing company.
- This case, however, concerns exclusively two
- 16 individual corporate employees. It is not an appeal by
- 17 a publisher. The corporate publisher here, the National
- 18 Enquirer, Incorporated, is a Florida corporation. It
- 19 consented to the jurisdiction of the California courts.
- 20 It is the publisher's employees, who are two residents
- 21 of Florida, who have brought this appeal to this Court.
- The plaintiff below, who is the appellee here,
- 23 is Shirley Jones, a television actress. She and her
- 24 husband complained that they were both libeled by an
- 25 article in the National Enquirer that said that her

- 1 husband's behavior was driving her to drink. Later, her
- 2 husband dropped his complaint. Later still, Ms. Jones
- 3 amended her complaint to say that she complains now only
- 4 about two sentences in the article, two sentences that
- 5 said that her drinking had occurred at her place of work
- 6 and interfered with her work.
- 7 QUESTION: Mr. Kester, does the record show
- 8 why the husband dismissed his --
- 9 MR. KESTER: That is not in the record, Mr.
- 10 Justice Blackmun.
- 11 The plaintiffs sued the National Inquirer in a
- 12 Los Angeles state court for \$20 million, \$10 million
- 13 compensatory damages and another \$10 million punitive
- 14 damages. She also sued in the same complaint John
- 15 South, a National Enquirer employee whose by-line was on
- 16 the story that the Enquirer published, and Ian Calder,
- 17 who was the editor and the president of the National
- 18 Enquirer, the Number Two man in its corporate
- 19 organization.
- 20 As I said, the Enquirer consented to
- 21 jurisdiction in California. The case has not yet gone
- 22 to trial.
- 23 Calder and South, who are the appellants here,
- 24 were served by mailing copies of the complaint to them
- 25 from Florida addressed to them -- from California,

- 1 however, addressed to them in Florida. They entered
- 2 special appearances in California to contest the
- 3 jurisdiction of the California court.
- 4 The Superior Court of Los Angeles County cited
- 5 this Court's decisions in International Shoe against
- 6 Washington, Culco against Superior Court of California,
- 7 and Worldwide Volkswagen against Woodson, along with the
- 8 First Amendment, and held that it did not have
- 9 jurisdiction personally over these two Florida
- 10 individuals, and it commented that really all that they
- 11 would add to the California suit would be an opportunity
- 12 for the plaintiff to try to collect additional punitive
- 13 damage from them personally.
- 14 Ms. Jones appealed that ruling. The
- 15 California Court of Appeals sustained her position. It
- 16 held that these two Florida individuals were required to
- 17 come defend themselves in the California court. I will
- 18 discuss its reasons in more detail in a moment.
- 19 The Court of Appeal in California said it made
- 20 this holding even though it found, and I quote, "It may
- 21 not be said that defendants' activities in California
- 22 are extensive, wide-ranging, substantial, continuous, or
- 23 systematic.
- 24 The case comes before this Court on appeal
- 25 rather than certiorari because the two individuals

- 1 challenged in the lower courts the constitutionality of
- 2 California's long arm jurisdiction statute as applied to
- 3 them. That statute is Section 410.10 of the California
- 4 Civil Procedure Code, and this Court has jurisdiction
- 5 under 28 USC 1257.2 and the Dahnke-Walker Milling
- 6 Company doctrine. I don't intend to address that aspect
- 7 of the case further unless the Court wishes.
- 8 Now, the question in this case is very simple
- 9 and straightforward. It is whether the editor and the
- 10 writer here, who never entered California in connection
- 11 with this article, can be sued personally in California
- 12 nevertheless. It is whether the Constitution permits
- 13 California to assert jurisdiction in a libel case not
- 14 just over --
- 15 QUESTION: Mr. Kester?
- 16 MR. KESTER: Yes, sir?
- 17 QUESTION: Did you say that the writer never
- 18 entered California?
- 19 MR. KESTER: That is correct, Mr. Justice
- 20 Rehnquist. Now, where the record stands on that is that
- 21 there is an uncontradicted affidavit from the writer
- 22 saying that he never entered California in connection
- 23 with this story. He entered California from time to
- 24 time in connection with other stories.
- 25 QUESTION: Well, I didn't understand your

- 1 statement to have been qualified by the phrase, "in
- 2 connection with this story."
- 3 MR. KESTER: I am sorry. If I didn't say
- 4 that, I meant to say that. He did enter California cn
- 5 other occasions, on other stories.
- 6 OUESTION: Does the record show how he wrote a
- 7 story without going to California to get his facts?
- 8 MR. KESTER: Yes, sir, there is evidence in
- 9 the record that he made a number of long distance
- 10 telephone calls to California.
- 11 QUESTION: How many?
- 12 MR. KESTER: How many is -- in the record
- 13 there are four telephone calls to California
- 14 established. We would note to the Court that we know of
- 15 at least one more that was subsequently established. I
- 16 don't think the number is important. It was some
- 17 number.
- 18 QUESTION: Mr. Kester, was the only contact by
- 19 telephone?
- MR. KESTER: The only contact in the record
- 21 was --
- QUESTION: No mail communication?
- MR. KESTER: No mail communications at all, as
- 24 far as the record shows, simply the telephone calls,
- 25 plus the article also could be written from whatever

- 1 materials were available in Florida, press clippings,
- 2 what other information there was.
- 3 So the question in this case is whether there
- 4 is jurisdiction not just over the corporate publisher,
- 5 but over the two Florida employees who never even
- 6 entered Florida in connection with this story.
- 7 QUESTION: I gather your suggestion is -- we
- 8 have no issue here of jurisdiction over the corporate
- 9 publisher.
- MR. KESTER: That's correct.
- 11 QUESTION: Just over these two individuals.
- 12 MR. KESTER: Just over the two individuals.
- 13 QUESTION: The publisher has submitted to
- 14 jurisdiction?
- 15 MR. KESTER: Yes, sir. No contest by the
- 16 publisher in that --
- 17 QUESTION: But all the publisher did other
- 18 than what the writer did was to send the magazines
- 19 into --
- 20 MR. KESTER: The publisher circulates its
- 21 newspaper in California, and --
- 22 QUESTION: Like it does elsewhere?
- 23 MR. KESTER: As it does elsewhere, and the
- 24 circulation in California is approximately proportional
- 25 to the population of California to the population of the

- 1 United States.
- 2 QUESTION: You haven't contested jurisdiction
- 3 over the publisher?
- 4 MR. KESTER: That's correct.

· 新加州市场的数"电影"。

- 5 QUESTION: I gather one of your arguments, Mr.
- 6 Kester, is that the fact of the publisher's submission
- 7 to jurisdiction ought bear on whether or not there is
- 8 constitutional jurisdiction over the individuals?
- 9 MR. KESTER: We think it should, because it
- 10 makes a great practical difference in this case, and as
- 11 I understand it, the standard jurisdictional analysis
- 12 that this Court makes when personal jurisdiction of a
- 13 state court is challenged, and the analysis that the
- 14 state courts themselves make, is, first of all, whether
- 15 the particular defendant had sufficient minimum contacts
- 16 with the state to make jurisdiction not unreasonable,
- 17 and then the second step is, as the International Shoe
- 18 case said, once there are other contacts, you then look
- 19 at their nature and quality, and see whether in all the
- 20 circumstances it is reasonable in that situation for
- 21 that state court to exercise jurisdiction.
- 22 QUESTION: And one of those against it, you
- 23 suggest, is that the publisher has consented to
- 24 jurisdiction, or submitted, rather?
- 25 MR. KESTER: Yes, because what we say, Mr.

- 1 Justice Brennan, is that essentially what is practically
- 2 at stake in here, as was recognized by the Superior
- 3 Court of Los Angeles County, is simply whether these two
- 4 individuals can be held personally liable for additional
- 5 punitive damages beyond what the plaintiff might be able
- 6 to recover against the publisher. There is no question
- 7 as to the solvency of the publisher here to pay a
- 8 judgment. The plaintiff can obtain, to the extent libel
- 9 provides an opportunity to -- a libel action provides an
- 10 opportunity to vindicate reputation, the plaintiff can
- 11 fully vindicate her reputation in the suit against the
- 12 National Enquirer if she is able to, if she is
- 13 successful.
- 14 QUESTION: Well, but that isn't really the
- 15 whole story, is it, Mr. Kester? Certainly, at least in
- 16 my day, it was thought to be advantageous if you were
- 17 suing the railroad company for a crossing accident, you
- 18 not only sued the railroad company, you joined the
- 19 conductor and the engineer, and dismissed them at the
- 20 close of the plaintiff's case, because you were able to
- 21 deal with them much differently, in depositions and in
- 22 handling them on the witness stand as adverse witnesses
- 23 if they were named parties. And actually, all you were
- 24 doing that for was to get a judgment against the
- 25 corporate defendant.

- 1 MR. KESTER: There is no question in my mind,
- 2 Mr. Justice Rehnquist, that the plaintiff brought the
- 3 suit in Los Angeles County because she thought that was
- 4 the best forum for her to bring a suit in, and she may
- 5 very well have concluded that there were advantages to
- 6 her in naming a whole string of defendants and not just
- 7 the real tort feasor if a tort occurred here, because in
- 8 libel the tort is publication, and the only publication
- 9 there was made by the publisher.
- 10 QUESTION: Well, if the defendant is the only
- 11 tort feasor, presumably the plaintiff's complaint would
- 12 ultimately be dismissed for failure to state a claim for
- 13 relief. I think the plaintiff's hypothesis is that the
- 14 two individuals are also tort feasors.
- 15 MR. KESTER: They could be proved to be tort
- 16 feasors, or they might not, but Mr. Justice Rehnquist,
- 17 the initial question here is not liability. We are
- 18 talking about jurisdiction. And I don't think there is
- 19 any question the mind of any member of the bar or any
- 20 judge that merely having to defend the lawsuit is a
- 21 substantial burden. If it were not, and if the
- 22 Constitution didn't recognize that, we wouldn't have all
- 23 these cases under the Fourteenth Amendment saying due
- 24 process is denied when a person is dragged across the
- 25 country into a foreign court where there are

- 1 insufficient contacts or it is not --
- 2 QUESTION: But of course there is an obverse
- 3 side to that here, too. If you prevail and the
- 4 plaintiff actually wants to obtain punitive damages
- 5 against these defendants, the plaintiff will go marching
- 6 off to Florida and have to sue in Florida.
- 7 MB. KESTER: That is right.
- 8 QUESTION: And she was liable in California,
- 9 where she lives.
- 10 MR. KESTER: That is the dilemma which the
- 11 courts face in any jurisdiction case where the plaintiff
- 12 wants to be in one court and the defendants want to be
- 13 in another, and what we are saying, Mr. Justice
- 14 Rehnquist, is that we think that the collective
- 15 defendants in this case have gone pretty far already.
- 16 The National Enquirer has said, you want to sue us in
- 17 Los Angeles County. All right. Here we are. Sue us.
- 18 We will defend ourselves there.
- 19 OUESTION: Well, how much of a concession was
- 20 that on the part of the National Enquirer? I mean, it
- 21 circulates hundreds of thousands of papers in
- 22 California. The plaintiff lived there. You know, all
- 23 of the arguments that were available to the defendant in
- 24 the preceding case as to jurisdiction over the
- 25 corporation seemed to me to be absent here.

- 1 MR. KESTER: Well, I think that --
- QUESTION: I mean, I thought perhaps it could
- 3 be taken from your remark that as an act of kind of
- 4 graciousness the National Enquirer consented to be sued
- 5 in California, whereas it really could have gotten off
- 6 the hook very easily. It couldn't have gotten off the
- 7 hook at all, could it?
- 8 MR. KESTER: I would say, sir, that the
- 9 National Enquirer is not incapable of graciousness on
- 10 occasion.
- 11 (General laughter.)
- 12 MR. KESTER: I really don't think that that is
- 13 central to the case anyway. I suppose that had it
- 14 appeared that there was a very strong winning argument
- 15 that that court had no jurisdiction over the National
- 16 Enquirer, its attorneys might well have urged them to
- 17 make that argument. But the point is, there isn't
- 18 anything really at stake here for the plaintiff against
- 19 these two individuals except the possibility that they
- 20 might be held personally liable for punitive damages in
- 21 addition to whatever all else she might recover in Los
- 22 Angeles County.
- 23 QUESTION: But shouldn't punitive damages have
- 24 been recovered in Florida for the damage in California?
- MR. KESTER: Punitive damages probably could

- 1 be recovered in Florida.
- QUESTION: So the harm inflicted was something
- 3 the plaintiffs could sue for and recover from these two
- 4 people. It's just a question of where?
- MR. KESTER: Well, it's a little more than
- 6 just the question of where, Mr. Justice White, because
- 7 had the suit been brought against them personally in
- 8 Florida, one thing they would have had would be the
- 9 advantage of a different standard in Florida law as to
- 10 what must be shown to collect punitive damages than is
- 11 the case in California.
- 12 OUESTION: Do you think that Florida would
- 13 apply its own punitive damages --
- 14 MR. KESTER: I surely would urge them
- 15 strenuously to do sc.
- 16 QUESTION: I know you would urge them, but --
- 17 (General laughter.)
- 18 QUESTION: Of course you would, unless they
- 19 would give more punitive damages than California.
- 20 MR. KESTER: I would say that the chance of
- 21 getting Florida to apply its own law in this case would
- 22 be pretty good, because Florida just two years ago
- 23 said --
- 24 QUESTION: Well, in any event, the major
- 25 factor is just where, just where the suit has to be.

- 1 MR. KESTER: That may be the major factor for
- 2 the plaintiff, but the major factor for the --
- 3 QUESTION: You apparently concede that in one
- 4 place or another these two people could be sued in
- 5 connection with the damage to reputation in California.
- 6 MR. KESTER: She could fi'e a complaint in
- 7 Florida that would state a cause of action in Florida.
- 8 Yes, sir. But where they are sued is extremely
- 9 important to these two individuals, obviously.
- Now, the consititutional provisions that bear
- 11 on this, as I said earlier, are three, the due process
- 12 clause of the Fourteenth Amendment, the commerce clause,
- 13 and because these are corporate employees of a
- 14 publisher, the First Amendment applies as well.
- 15 QUESTION: Do you mean First Amendment
- 16 considerations may argue agin or for jurisdiction? Is
- 17 that it?
- 18 MR. KESTER: That is our position as --
- 19 QUESTION: Have we ever said that?
- 20 MR. KESTER: You have never said it, Mr.
- 21 Justice Frennan, never --
- 22 QUESTION: I guess Justice Stewart has
- 23 suggested it once or twice.
- 24 MR. KESTER: If he said that, I missed it, but
- 25 if he said it, I commend his perspicacity.

- 1 QUESTION: Well, you recall his emphasis on
- 2 the word "press" in the First Amendment.
- MR. KESTER: Oh, yes, but when we say the
- 4 First Amendment is at stake here to some degree, we are
- 5 not asking really for any special favor for the press,
- 6 and we are not saying that the institutional press has
- 7 some rights that other people don't have. It is not
- 8 that at all.
- 9 What we are saying here is simply that this
- 10 Court at least since International Shoe and going
- 11 through Culco against California, many other cases --
- 12 Worldwide Volkswagen mentioned it in passing -- has said
- 13 policy is something we look at. After those contacts
- 14 are found, we weigh it all, we look at the policy, and
- 15 we have got that scale of justice there with the two
- 16 pans going up and down, and one of the little brass
- 17 weights that you put on one side is what is this going
- 18 to do to the First Amendment, to the system of free
- 19 trade and ideas, as this Court said in the Red Lion --
- 20 QUESTION: But the First Amendment
- 21 consideration would entirely drop out, I take it, if the
- 22 suit was brought in Florida?
- 23 MR. KESTER: Against these two individuals?
- 24 OUESTION: Yes.
- 25 MR. KESTER: They would be sued at their home

- 1 residence.
- QUESTION: Well, I know, but there would be no
- 3 First Amendment barrier to suit there?
- 4 MR. KESTER: I would think that the
- 5 jurisdiction there would be so clear, Mr. Justice
- 6 White --
- 7 QUESTION: All right.
- 8 MR. KESTER: -- that it wouldn't make a
- 9 difference.
- 10 QUESTION: So the answer is, there is no --
- 11 QUESTION: Well, that is the point, Mr.
- 12 Kester. The jurisdiction would be so clear, you
- 13 suggest.
- 14 MR. KESTER: Yes, sir.
- 15 QUESTION: This is a jurisdictional issue.
- 16 MR. KESTER: Um-hm.
- 17 QUESTION: I don't quite understand why the
- 18 First Amendment is an inhibitor against jurisdiction if
- 19 otherwise it is appropriate.
- 20 MR. KESTER: Because one has to look at the
- 21 effect on First Amendment activity if jurisdiction is
- 22 brought on very, very slender reeds against individuals,
- 23 as I said in this case.
- 24 QUESTION: In a defamation case?
- 25 MR. KESTER: In a defamation case, because

- 1 what you have to consider is, what does it do to an
- 2 individual when he or she is impleaded, is brought into
- 3 the case as a defendant individually, held up, possibly
- 4 liable, not just for a share of the compensatory
- 5 damages. Let's assume that the publisher would pay
- 6 those.
- 7 QUESTION: I take it this would apply not only
- 8 to the media, this argument, but to any citizen critic,
- 9 would it --
- 10 MR. KESTER: This --
- 11 QUESTION: -- any individual not a member of
- 12 the media?
- 13 MR. KESTER: That's correct, and it would
- 14 apply further to the doctrine that --
- 15 QUESTION: So this isn't a suggestion which
- 16 you limit to First Amendment press protection then, is
- 17 it?
- 18 MR. KESTER: No, indeed, and in this very case
- 19 it isn't the institutional media which is the complainer
- 20 here. It is individuals. And what the court --
- 21 QUESTION: I know, but they are one a reporter
- 22 and one an editor.
- MR. KESTER: One a reporter, one an editor.
- QUESTION: What if you just have an ordinary
- 25 citizen who had done the same thing?

- 1 MR. KESTER: An ordinary citizen we would ask
- 2 be subject to the same jurisdictional standards, and
- 3 really what we are asking this Court to do is the same
- 4 thing that Mr. Grutman said in the first argment. When
- 5 you are deciding jurisdiction, you look at the contacts
- 6 of each individual individually, what were his contacts,
- 7 not what were somebody else's contacts.
- 8 In Hanson against Denckla, in Worldwide
- 9 Volkswagen, a whole string of cases, this Court has
- 10 always said, look at the contacts of the individual, and
- 11 I would say that for a person to be sued personally in a
- 12 case is a very different feeling from knowing that your
- 13 corporate employer is being sued. There is a certain
- 14 detachment about the latter.
- 15 QUESTION: Well, what if there were no
- 16 corporate employer here, but these two people were
- 17 simply partners in circulating a newsletter, and they
- 18 circulated in California, and they libeled somebody?
- MR. KESTER: If they had published in
- 20 California --
- 21 QUESTION: Well, they put the letter out in
- 22 Florida, and they sent it all over the country, just
- 23 like --
- 24 MR. KESTER: So a publication occurred in
- 25 California, or it was circulated there. I would think

- 1 that had they been in that position, then there probably
- 2 would be jurisdiction over them, other things being
- 3 equal, but they are not the publisher.
- 4 QUESTION: You say that the fact that they are
- 5 employees makes all the difference?
- 6 MR. KESTER: The fact that they are employees,
- 7 the fact that --
- 8 QUESTION: Of a publisher.
- 9 MR. KESTER: -- that they aren't the
- 10 publisher. They aren't the ones who did it. John Scuth
- 11 couldn't control where the Enquirer circulates. Ian
- 12 Calder, although he is the Number Two in the
- 13 organization, there is no indication that he could
- 14 control it, either.
- 15 QUESTION: Would there be any particular
- 16 individual in the publisher that could be sued
- 17 consistent with your theory?
- 18 MR. KESTER: I would say consistent with my
- 19 theory you could have a situation where a company had an
- 20 individual who was in effect an alter ego.
- 21 QUESTION: Well, scmebody made the decisions
- 22 in this company.
- MR. KESTER: Sure, collectively, a number of
- 24 people made decisions, and indeed, the way the company
- 25 works, a number of people work on the story.

- 1 QUESTION: Then aren't all of them subject to
- 2 suit?
- 3 MR. KESTER: They are all subject to suit, Mr.
- 4 Chief Justice. The only question is whether and where
- 5 they are all subject to jurisdiction.
- 6 QUESTION: But, Mr. Kester, your suggestion
- 7 that these particular individuals couldn't control where
- 8 the National Inquirer Went suggests that that is a
- 9 highly discriminating inquiry, that perhaps the
- 10 publisher might think it was suitable to send to
- 11 California, but not to Washington or Oregon. I mean,
- 12 publishers are interested in expanding their
- 13 circulation. Isn't that true? They want to get as many
- 14 copies sold as they can of a national magazine.
- 15 MR. KESTER: I would think so. Yes, sir.
- 16 QUESTION: So the idea that these two
- 17 individuals would somehow have balked at circulating it
- 18 in California if only they had been asked doesn't make
- 19 much sense.
- MR. KESTER: No, I --
- 21 QUESTION: Especially when they both certainly
- 22 knew the story concerned a California resident.
- 23 MR. KESTER: Oh, I am sure that they knew
- 24 that.
- 25 QUESTION: And to say they didn't think the

- 1 Enquirer was circulated in California is a --
- 2 MR. KESTER: Oh, no, I am not suggesting that
- 3 at all.
- 4 QUESTION: So they contemplated their story
- 5 would be circulated in California.
- 6 MR. KESTER: Well, the auto dealer in
- 7 Worldwide Volkswagen, Mr. Justice White, the argument
- 8 was made to this Court, could have contemplated that it
- 9 would wind up in Oklahoma, but this Court said in that
- 10 opinion just the fact that he knew it could have wound
- 11 up in Oklahoma does not suffice in itself --
- 12 QUESTION: Yes, but the dealer made no plans
- 13 to send it to Oklahoma in that case, and here there are
- 14 intentional plans to circulate it in California, which
- 15 these two people knew as well as anybody else.
- 16 MR. KESTER: No doubt. There is no question
- 17 that they knew it. They were members of the
- 18 corporation. They, like anybody else in the
- 19 corporation, presumably participated in some way -- the
- 20 record doesn't show in what way -- in the decision of
- 21 where to circulate, but the fact that --
- 22 QUESTION: Mr. Kester, may I ask you a
- 23 guestion? Would you agree that by reason of the fact
- 24 that there was jurisdiction over the corporate
- 25 defendant, that the trial court could compel the

- 1 presence of the two individuals to testify at the trial?
- MR. KESTER: Yes, sir, and in fact --
- 3 QUESTION: So they could be compelled to go to
- 4 California?
- 5 HR. KESTER: Of course, of course, and what
- 6 has been going on in this case is that these two
- 7 individuals have been deposed at length, and in fact the
- 8 record contains deposition testimony from them. There
- 9 is no impediment to the plaintiff from that situation.
- 10 What this Court has to consider is that this is a case
- 11 involving a publisher, but really, this is a case
- 12 involving a corporation, and it applies just as much to
- 13 the Riggs Bank, General Motors, IBM, Texas Instruments.
- 14 How much do the acts of the corporation --
- 15 QUESTION: But as a practical matter, these
- 16 two people are going to be sitting in the courtroom
- 17 throughout the trial, even if they are not parties.
- 18 MR. KESTER: I think there probably, as a
- 19 practical matter, there is a difference in that, Justice
- 20 Stavens. I think if they are parties, their attorneys
- 21 would insist that they be there.
- QUESTION: And they may not be liable for
- 23 punitive damages.
- MR. KESTER: Right.
- 25 QUESTION: But in terms of the burdens of

- 1 going and testifying and worrying about what happens to
- 2 their reputations --
- 3 MR. KESTER: No, I would think that the trial
- 4 in the instance of John South, he would be a witness, he
- 5 would be in and out, but if he is a party in that trial,
- 6 and I am his lawyer, I want him in the courtroom all the
- 7 time. I think there is some difference here.
- 8 QUESTION: You don't think you'd want the
- 9 author of the story in the courtroom all the time?
- MR. KESTER: I am not sure. I am not sure.
- 11 It would depend on how the issues were framed and how
- 12 the trial went, but if it is a month-long trial,
- 13 possibly not. Possibly not.
- 14 QUESTION: Mr. Kester --
- MR. KESTER: Yes, sir?
- 16 OUESTION: -- if the corporation had been
- 17 bankrupt, and judgment proof, would that make any
- 18 difference with respect to whether the individuals could
- 19 be sued in California?
- 20 MR. KESTER: I think that would make a
- 21 difference, Mr. Justice Powell. Again, there is --
- QUESTION: Why would it, from the viewpoint of
- 23 jurisdiction of the California court?
- MR. KESTER: Because I suggest to you, and I
- 25 think the opinions of this Court say the same thing,

- 1 that jurisdiction does depend on practicality as much as
- 2 anything else. In the Hatori case, Judge Weinstein
- 3 makes the very point that you make, and he says in that
- 4 case there is no question as to the solvency of the
- 5 corporation, and that if it were an insolvent

and the second second second

- 6 corporation, or if it were a corporation that was simply
- 7 a shell for one individual, that would be a different
- 8 case, but the burden is on the plaintiff to establish
- 9 jurisdictional facts. There are no jurisdictional facts
- 10 of that sort here, and indeed none could be
- 11 established.
- 12 I would like to take one moment to talk about
- 13 forum non-convenience, which Justice O'Connor and
- 14 Justice Marshall mentioned in the previous case. I
- 15 think there is a case written 20 some years ago by Judge
- 16 Friendly in which he suggested that the First Amendment
- 17 certainly has a constitutional role in cases of this
- 18 sort, but he said, why not turn forum non-convenience
- 19 into a constitutional doctrine and deal with it at that
- 20 point.
- 21 I would suggest to you that as a practical
- 22 matter there is a lot wrong with that approach, even
- 23 though logically it seems fine. In the first place,
- 24 forum non-convenience, as the term implies, is an
- 25 inconvenient forum, and jurisdiction is more than a

- 1 matter of convenience, as this Court has said many
- 2 times.
- As a practical matter, to assert forum
- 4 non-convenience, you have to come into the court, you
- 5 have to submit to the jurisdiction, and then you have to
- 6 try to convince the local judge that he is not a
- 7 convenient person to hear the case. That is not a
- 8 position a lawyer likes to be in very often. It is not
- 9 a persuasion that is very easy to accomplish. I would
- 10 say this is something that simply is not as a practical
- 11 matter a very good solution to the case, particularly
- 12 because --
- 13 QUESTION: Sometimes judges like to get rid of
- 14 cases.
- 15 MR. KESTER: That happens, too, Mr. Justice
- 18 Blackmun, but not as often as one might like sometimes.
- 17 And further, forum non-convenience is -- we have talked
- 18 about murky doctrines and gray areas, but forum
- 19 non-convenience is probably the murkiest area that
- 20 exists in the law. There are no rules practically for
- 21 it, and it provides no certainty. As difficult as the
- 22 jurisdictional cases are to understand, and I don't
- 23 think they are that difficult, forum non --
- 24 OUESTION: I can think of a few other murky
- 25 areas. We seem to encounter them every week.

- 1 MR. KESTER: Right. I would suggest there is
- 2 no reason to create another one.
- 3 I will reserve the balance of my time.
- 4 CHIEF JUSTICE BURGER: Mr. Ablon, you may
- 5 proceed whenever you are ready.
- 6 ORAL ARGUMENT OF PAUL S. ABLON, ESC.,
- 7 ON BEHALF OF THE APPELLEE
- 8 MR. ABLON: Mr. Chief Justice, and may it
- 9 please the Court, I think Mr. Kester's presentation is
- 10 indicative of the briefs that have been filed in terms
- 11 of the differences in the perception of the facts of
- 12 this case. We feel that a more thorough view of the
- 13 facts are essential to see exactly what Mr. Calder's and
- 14 Mr. South's contacts with California were.
- 15 First, Mr. Kester has referred to Mr. Calder
- 16 as an employee of the Enquirer. In fact, not only was
- 17 he the editor, but he was also the president of the
- 18 Enquirer and the second person in command. He in
- 19 deposition testimony acknowledged that he was in fact
- 20 the person who oversaw the entire functioning of the
- 21 Enquirer, including its editorial function. So, we are
- 22 not dealing with an individual who was just remotely
- 23 related or involved in the control of the publication.
- 24 Additionally, the evidence that was adduced in
- 25 the court below makes it clear that he also had

- 1 significant involvement in this particular article. So
- 2 we have combined in Mr. Calder both the elements of a
- 3 general control of the publication and at the same time
- 4 specific involvement in this article, and that
- 5 involvement included awareness of the fact that Mr.
- 6 Engles on behalf of himself and his wife had denied the
- 7 truthfulness of the publication prior to publication.
- 8 He was also the person who had seen the page proof of
- 9 the article before publication, the evaluation of the
- 10 article before publication, and in fact admitted -- I am
- 11 sorry -- and in fact had -- was the person who could
- 12 have precluded the story from being published.
- 13 Additionally, he was the man who admitted
- 14 specifically refusing to publish a retraction when a
- 15 demand for such a retraction was made in this case.
- 16 With respect to Mr. South, there is also, I
- 17 think, a disparate view of the facts between the parties
- 18 in this case. The trial court, contrary to the
- 19 suggestion of Mr. Kester, and this is the trial court
- 20 that ruled against the appellees in this case, stated,
- 21 "In addition, Reporter South visited California at least
- 22 once for purposes relating to the article."
- Both the trial court and the court of appeals
- 24 reached that same conclusion, that there was a pretrial
- 25 visit by Mr. South to California with respect to this

- 1 particular article, and as Mr. Kester has conceded, I
- 2 don't view whether in fact there was such a visit or
- 3 whether there were five telephone calls or 15, and I
- 4 think we have a dispute in the record with respect to
- 5 precisely how many investigative calls were made by Mr.
- 6 South to California, the point being that the thrust of
- 7 the investigation was aimed at California.
- 8 We feel that the fact that Mr. South and Mr.
- 9 Calder were employees has no bearing on the
- 10 jurisdictional question in the facts, in the
- 11 jurisdictionally relevant facts that are presented in
- 12 this case. Were this the Keaton case, where it had been
- 13 indicated had a great deal fewer jurisdictionally
- 14 relevant contacts, possibly the employee status might
- 15 have some additional significance.
- In this matter, however, it is clear that both
- 17 Mr. South and Mr. Calder were aware that the state of
- 18 largest circulation of the Enquirer was California, in
- 19 excess of or approximately 600,000 copies, and in fact
- 20 that the Enquirer was a publication which proclaimed
- 21 itself to be largest circulation of any paper in
- 22 America, and in fact, as the record before this Court
- 23 indicates, only 6 percent of the National Enquirer's
- 24 publication was distributed in the state in which it was
- 25 published, that is, in Florida.

- 1 So, California was the largest state, and that
- 2 was known to both Mr. South and Calder, and the facts
- 3 here are even more compelling. The article dealt with a
- 4 subject that were known to both Mr. South and Mr. Calder
- 5 to be residents of California, in an industry that
- 6 related to California, and clearly injury, if it were to
- 7 occur, would be focused in California. Certainly in
- 8 this case where you are dealing with celebrities of some
- 9 national reputation, a claim for injury in many, if not
- 10 all other states might be involved, but that is not
- 11 before the Court because there was no forum shopping
- 12 here. The lawsuit was basically filed in California,
- 13 where the plaintiffs reside.
- 14 With respect to the conduct of the defendants,
- 15 it is clear that both Mr. South and Mr. Calder are joint
- 16 tort feasors. As Mr. Kester has indicated, it is our
- 17 belief that they could be subject to jurisdiction, and
- 18 the sole question before this Court is whether or not
- 19 the appellees who resided in California did nothing to
- 20 bring this attack upon them in that state and nationally
- 21 must now go to another jurisdiction, that is, Florida,
- 22 to sue two of the primary participants in this
- 23 publication.
- 24 We think that the case of Worldwide Volkswagen
- 25 in fact supports jurisdiction in this case. There was

- 1 certainly no -- the foreseeability of being sued in
- 2 California was well known to both Mr. Calder and Mr.
- 3 South, and in fact Mr. Calder had been sued in other
- 4 celebrity litigation involving the National Enquirer in
- 5 California and at that point did not even bother to
- 6 object to personal jurisdiction.
- 7 The intent here on behalf of both Mr. Calder
- 8 and Mr. South were clearly to inflict wilful and
- 9 malicious injury to the plaintiff -- I am sorry, to the
- 10 appellee and her husband in the state of California, and
- 11 we respectfully submit that the restatement, Section 36,
- 12 restatement of conflicts, the effects doctrine, would
- 13 certainly be applicable and justified in the context and
- 14 facts of this case where you have wilful and knowing
- 15 intentional conduct not only causing injury in
- 16 California but aimed and intended to cause injury
- 17 there.
- 18 With respect to the difficulty of suit in
- 19 California, we would submit that the added burden to Mr.
- 20 South and Mr. Calder to be sued in California is
- 21 certainly not as great as indicated by the appellants.
- 22 They have in fact been deposed in this matter, which
- 23 would --
- 24 QUESTION: Mr. Ablon, what position would a
- 25 typical California Superior Court of Los Angeles County

- 1 take so far as who should pay the expenses for a Florida
- 2 defendant's deposition being taken? Would the superior
- 3 court require the plaintiff to go to Florida to take the
- 4 deposition?
- 5 MR. ABLON: It is my understanding, Your
- 6 Honor, that it would be required for -- we cannot compel
- 7 even a named defendant to come from Florida to
- 8 California for their deposition. We would have had to
- 9 go to Florida, which we did --
- 10 QUESTION: At your expense.
- 11 MR. ABLON: -- at our expense. Now,
- 12 ultimately those expenses --
- 13 QUESTION: Are taxed.
- 14 MR. ABLON: -- might be taxable, but that
- 15 would be resolved towards -- to the conclusion of the
- 16 case. In addition, in addition, we feel that the case
- 17 of Church of Scientology versus Adams is extremely
- 18 appropriate. That is the Ninth Circuit's decision,
- 19 which weighs and balances the minimum contacts and
- 20 jurisdictional standard in the context of a libel case,
- 21 and there the court indicated, and again, the court
- 22 indicated that the contacts would basically turn upon
- 23 the knowing foreseeability of the defamatory article
- 24 causing injury in a particular state, namely, the state
- 25 of California.

- 1 It has also been referred by Mr. Kester that
- 2 suing the individual defendants rather than the
- 3 corporate entity allows them to have a certain
- 4 detachment, and it is in fact that detachment that we
- 5 feel is appropriate to eliminate, as has been suggested
- 6 by the court, the --
- 7 QUESTION: I thought he said -- he was stating
- 8 as a matter of fact that if your corporation which
- 9 employs you is a party to the suit, but you are not, you
- 10 have a certain detachment that you lose when you are
- 11 named a defendant yourself. I don't think he said that
- 12 all personal -- all persons ought to have a right to
- 13 that.
- 14 QUESTION: I understand, Your Honor, but I
- 15 think that a malicious and intentional wrongdoer might
- 16 not be entitled to that detachment, that in fact maybe
- 17 it is the people at the Enquirer, for the Enquirer as a
- 18 corporation could not itself do anything but for or
- 19 through the people who work for it, that in fact those
- 20 people not be permitted that detachment, that they in
- 21 fact, their wrongful conduct be on the line, so to
- 22 speak, that they be answerable for their conduct.
- It is in fact Mr. South and Mr. Calder and the
- 24 other employees of the Enquirer who publish the articles
- 25 which may and sometimes do lead to libel litigation.

- 1 It seems that in terms of, again, considering
- 2 the practicalities of the situation, that there is very
- 3 little additional burden with respect to the individual
- 4 defendants. They will likely be represented by the same
- 5 counsel. It is very frequently the case in libel
- 6 litigation that there are insurance companies involved
- 7 in terms of providing counsel and at least a certain
- 8 degree of -- a certain degree of coverage, at least with
- 9 respect to compensatory damages.
- Turning to the First Amendment considerations,
- 11 we feel that it is inappropriate to add an additional
- 12 obfuscation to the already somewhat confusing and at
- 13 least hard to articulate jurisdictional standards. The
- 14 First Amendment is amply considered through these
- 15 courts' prior precedents in New York Times versus
- 16 Sullivan and its progeny, and the chill which this
- 17 litigation might cast upon individual employees was also
- 18 considered.
- 19 It seems to me that the proper and primary
- 20 focus of whether or not these employees should be
- 21 subjected to any chill if any there be by virtue of
- 22 being subjected to suit in California is determined by
- 23 the substantive law of whether or not employees can in
- 24 fact be sued for libel. That law -- we feel that that
- 25 has been determined. The substantive law says they are

- 1 responsible. Why should we now engraft upon standard
- 2 jurisdictional analysis another burden for purposes of
- 3 evading jurisdiction?
- 4 Going back for a moment to the authority
- 5 stated in the restatement, Section 37, the effects test,
- 6 we feel that the effects test clearly is being applied
- 7 if this Court is going to apply it in this case to Mr.
- 8 Calder, who we have acknowledged had no direct contacts
- 9 in terms of telephone calls, visits, or anything else
- 10 with California. If this Court will apply that
- 11 principle to him, we feel it is the clearest application
- 12 of that principle, for of the various situations to
- 13 which the effects principle could be directed, that is
- 14 the one which -- that is the one which basically has the
- 15 strongest support with respect to this Court's prior
- 16 precedents.
- 17 There can be no unfairness in subjecting
- 18 someone to jurisdiction who has intentionally directed
- 19 his wrongful conduct at a particular state.
- 20 With respect to the fiduciary shield doctrine,
- 21 so to speak, the appellants here are asking this Court
- 22 to in fact enshrine that principle, a principle which
- 23 insulates employees from jurisdiction because they are
- 24 employees and because acts which they have committed in
- 25 the course of their employment may in fact -- excuse

- 1 me. Acts which they have accomplished in the course of
- 2 their employment somehow don't count in terms of having
- 3 any jurisdictional significance.
- 4 QUESTION: Mr. Ablon, on the effects test
- 5 which you ask us to apply, do you think that there would
- 6 be jurisdiction over a writer who never entered
- 7 California at all and made no telephone calls at all
- 8 based on simply the foreseeability that the article
- 9 might be published there?
- 10 MR. ABLON: Your Honor, I believe that that
- 11 would be the case. The only question I have with
- 12 respect to the way in which the issue were posed was
- 13 whether the issue might be published there. It seems to
- 14 me that where it is known that the article will be
- 15 published there, or at least there is a reasonable
- 16 probability that that will occur, I see no reason why
- 17 someone having no direct contacts in terms of physical
- 18 contacts, visiting, telephone calls, sending mail, or
- 19 anything of that nature, should not be subject to the
- 20 jurisdiction of the court.
- 21 I might also add that that response is given
- 22 considering the facts of this case where the article is
- 23 aimed at the particular jurisdiction in terms of the
- 24 subject matter of the article, the residence of the
- 25 plaintiffs of the article, the knowledge of the extent

- 1 and breadth of the circulation of that article within
- 2 the jurisdiction.
- 3 QUESTION: I suppose if it has a big article
- 4 about someone in California, you could expect to sell
- 5 more copies in California when that -- in the issue in
- 6 which that article appears than you might ordinarily.
- 7 AR. ABLON: I would think so, Your Honor, and
- 8 I think that is directed in the Church of Scientology
- 9 case. That is that one can reasonably anticipate more
- 10 injury in the state of residence. If there can be said
- 11 to be a state where one's reputation resides, it would
- 12 certainly be primarily or at least predominantly within
- 13 the state of residency, and because of California being
- 14 the state of residency, one could also anticipate that
- 15 the interest of the readership will be largest in the
- 16 community in which the plaintiff happens to reside.
- We think that there are some severe problems
- 18 with this Court's finding some type of due process
- 19 insulation or guarantee or protection for employees of
- 20 corporations. The fiduciary shield doctrine which has
- 21 been advocated by the appellants is one that we feel has
- 22 very shaky both precedential and logical roots, and in
- 23 fact one can hardly consider or believe that if Mr.
- 24 Calder and Mr. South were not employed by the Enquirer
- 25 but somehow engaged on their own, and could be held

- 1 responsible for certain acts in California, why should
- 2 the fact that merely because they are employees of the
- 3 Enquirer they somehow be mystically insulated from
- 4 jurisdiction?
- 5 QUESTION: As a matter of substantive law, and
- 6 I suppose this would depend on the law of California,
- 7 ordinarily an agent is not insulated from personal
- 8 liability because the principal is liable for his
- 9 conduct also. Isn't that correct?
- 10 MR. ABLON: That's correct as a matter of
- 11 substantive liability, and here we are not -- we may not
- 12 be talking in terms of agency, because of the element of
- 13 punitive damages which may be interjected. That is, the
- 14 law would be that if in fact Mr. South or Mr. Calder
- 15 engaged in wrongful conduct not authorized by the
- 16 Enquirer, it is conceivable that agency principle might
- 17 not apply, but certainly then the intentional wilful
- 18 wrongdoing of those individuals would equally subject
- 19 them to substantive liability.
- I would also pose to the Court the problem of
- 21 in effect utilizing different jurisdictional standards,
- 22 and that is really what is advocated here by the
- 23 appellants. They are advocating a different
- 24 jurisdictional standard for the media because of First
- 25 Amendment considerations. They are advocating a

- 1 different jurisdictional standard for employees of
- 2 corporations rather than the corporations themselves.
- 3 We feel that the standard jurisdictional analysis should
- 4 be applied, and when that application is made in the
- 5 facts of this -- in this case, jurisdiction over both
- 6 Mr. Calder and Mr. South is clear.
- 7 The cases for which -- which are cited in
- 8 support of the due process restriction on subjecting
- 9 employees to jurisdiction for acts they committed in the
- 10 course of their corporate employment we feel are largely
- 11 inapposite. They generally deal with the situation
- 12 where there is an effort to impute jurisdiction by the
- 13 corporation -- I am sorry, impute jurisdiction from the
- 14 corporation to the employee where the employee cannot be
- 15 shown to have in fact had the contact himself, even if
- 16 it was as an agent of the corporation with the
- 17 jurisdiction, and under those circumstances, we have no
- 18 problem with at least suggesting that in fact there may
- 19 be a more serious due process problem.
- Where, however, the jurisdiction is premised
- 21 upon the acts of the individual, as is presented in the
- 22 facts of this case, then it seems clear that those acts
- 23 should be counted for purposes of jurisdiction over that
- 24 individual. If that individual is not responsible or
- 25 liable for whatever the wrongdoing might be, then the

- 1 substantive law is sufficiently adequate to ensure that
- 2 they will not be subjected to any substantive
- 3 liability.
- 4 QUESTION: You don't think the printer, for
- 5 example, would be liable? Or would be subject to
- 6 jurisdiction in California?
- 7 MR. ABLON: Well, Your Honor, we would
- 8 certainly --
- 9 QUESTION: Suppose it was printed in Florida.
- 10 MR. ABLON: If it were printed in Florida, and
- 11 assuming that the printer had no knowledge specifically
- 12 with respect --
- 13 QUESTION: Well, he knew exactly what was in
- 14 the magazine, what was in the paper. He read it.
- 15 MR. ABLON: I think that is different, because
- 16 the printer does not have a responsible part in the
- 17 publication, and certainly in the publication of this
- 18 particular article. Furthermore -- And I think with
- 19 that notion of responsibility goes the notion of some
- 20 element of knowledge of what is going on and what is
- 21 going into the article. Certainly --
- QUESTION: What about the newsstand man in
- 23 California?
- 24 MR. ABLON: I think, Your Honor, the same
- 25 would be applicable, and I think that is covered under

- 1 the substantive law. I don't know that the newsstand
- 2 man would be responsible substantively if it could be
- 3 determined that in fact he had no knowledge of the
- 4 defamatory contents of the article or anything with
- 5 respect to this publication which would suggest that
- 6 articles contained in it are frequently or regularly of
- 7 a defamatory nature.
- 8 QUESTION: Well, what about a newspaper in
- 9 California that repeated the statements in the
- 10 Enquirer?
- 11 MR. ABLON: I think that might be a different
- 12 situation, Your Honor, and I think the reason for that
- 13 difference --
- 14 QUESTION: Well, it would be, wouldn't it?
- 15 MR. ABLON: I think so. I think if for no
- 16 other reason that they are in effect republishing the
- 17 libel, and they are doing so where they at least have an
- 18 obligation to make sure that what they are republishing
- 19 meets the standards that are set forth with respect to
- 20 libel and the constitutional parameters. That certainly
- 21 would not be the case with respect to someone who has no
- 22 knowledge with respect to that.
- There has been some reference in the briefs
- 24 with respect to whether or not the conduct here was
- 25 intentional, or whether the conduct here was wilful, and

- 1 that in effect the appellants -- I'm sorry, the
- 2 · appellees are stated to have assumed and the court is
- 3 stated to have assumed that there was intentional
- 4 wrongful conduct.
- We submit that under the facts presented here,
- 6 the wrongful conduct is made out clearly by the facts,
- 7 at least as clearly as one could anticipate with the
- 8 understanding that a publication and its primary
- 9 employees are unlikely to admit intentional wrongdoing
- 10 in the libel context, but given that parameter, we have
- 11 here an article which on its face is at least horrendous
- 12 and possibly worse.
- 13 We have a telephone call made by Mr. South,
- 14 and we think that this particular call may have more
- 15 jurisdictional signficance than the other investigatory
- 16 calls which he made. Prior to publication, Mr. South
- 17 telephoned the appellee and her husband, spoke with them
- 18 at their residence, spoke with Mr. Engels at his
- 19 residence, and in that telephone call read the article
- 20 to them approximately three weeks prior to publication.
- 21 And at least with respect to that call, it is
- 22 our position that it may well be more jurisdictionally
- 23 significant insofar as the complaint herein alleges not
- 24 only libel and invasion of privacy but intentional
- 25 infliction of emotional distress, and that call may

- 1 well, like the telephone call in Brown versus Flowers,
- 2 the case in which this Court denied cert last term, in
- 3 fact may have constituted the operative conduct with
- 4 respect to the tort of intentional infliction of
- 5 emotional distress.
- Just as a matter of conclusion, let me just
- 7 state that we think that the facts of this case do not
- 8 -- it is important to consider what this case does not
- 9 present. It does not present a question, as suggested
- 10 by some of the amicus briefs, of self-employed, small
- 11 authors of books or local publications being -- having
- 12 their employees subjected to jurisdiction. It is not
- 13 concerned with mere employees, that is, insignificant
- 14 employees being subjected to jurisdiction, but rather a
- 15 president, an officer of the corporation, and the person
- 16 who actually wrote the article and investigated the
- 17 article.
- 18 This is not a case dealing with a publication
- 19 which did not hit home and in which the publication and
- 20 its employees were not --
- 21 QUESTION: Isn't it a case about the author of
- 22 a book that he gets published, and the publisher
- 23 circulates it around the country? How about the author?
- MR. ABLON: Your Honor, I think that case
- 25 would be distinguishable because one would have to look

- 1 at the competence of the book. What did that author
- 2 foreseeably anticipate?
- 3 QUESTION: Let's assume a man wrote a -- an
- author wrote a book and had these very allegations in it
- 5 that are in this case, and he sold it to a publisher,
- 6 and the publisher sold it wherever he could.
- 7 MR. ABLON: I think if that author had reason
- g to believe that the publisher would sell it wherever he
- g could, or would sell it specifically to California, and
- 10 knowing the contents of that book, there would be every
- 11 reason and certainly no unfairness.
- 12 QUESTION: So this case does concern that kind
- 13 of a person.
- MR ABLON: That kind of a person it would,
- 15 Your Honor. We don't think it deals with the type of
- 16 person who could not anticipate that California under
- 17 Worldwide Volkswagen was an appropriate forum to
- 18 anticipate being hailed into court.
- 19 QUESTION: Do you have anything further, Mr.
- on Kester?
- ORAL ARGUMENT BY JOHN G. KESTER, ESQ.,
- ON BEHALF OF THE APPELLEE REBUTTAL
- MR. KESTER: Yes, Mr. Chief Justice.
- QUESTION: Mr. Kester, I assume you will
- address the effects argument.

1 MR. KESTER: Yes, sir, Mr. Justice Powell.

- 2 With respect to the effects argument, that was one of
- 3 the three bases on which the court of appeal relied for
- 4 its decision in this case. Causing an effect in a state
- 5 is a very mushy basis for jurisdiction. It has been
- 6 applied in a limited area of cases, mainly product
- 7 liability cases. In product liability cases you have a
- 8 very definite injury. You know whom it happened to,
- 9 where it happened, and it is easy to measure, and you
- 10 have somebody who is essentially setting something forth
- 11 in interstate commerce who knows that it could cause
- 12 harm some place or who should be forced to be careful to
- 13 ensure against --
- 14 QUESTION: You are not suggesting that one who
- 15 knowingly publishes libel doesn't anticipate harm, are
- 16 you?
- 17 MR. KESTER: I am saying that metaphorically
- 18 we can say that a libelous article is launched and
- 19 causes harm, but the harm is much more difficult to
- 20 define, and in products liability cases, Mr. Justice
- 21 Powell, we have a different standard of liability which
- 22 matches the different standard for jurisdiction. We
- 23 have --
- QUESTION: But doesn't that cut the other
- 25 way? When you come down to the standard of liability in

- 1 a First Amendment case, you have New York Times and
- 2 Gertz that afford very substantial protection that
- 3 perhaps isn't available in a products liability case.
- 4 MR. KESTER: But I would say exactly for the
- 5 two cases you cite, Mr. Justice Powell, Gertz says that
- 6 you do not have strict liability in the First Amendment
- 7 area in libel cases, and yet in products liability cases
- 8 that is exactly what you have in the law of most states,
- 9 a very high standard --

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- 10 QUESTION: But not in all states.
- 11 MR. KESTER: In most states, Your Honor, and
- 12 in the states where those cases have come up, cases
- 13 which have never been reviewed by this Court, indeed.
- 14 It is a very simple matter for plaintiff to allege, as
- 15 the plaintiffs did here, that this was intentional, this
- 16 was malicious, this was harmful, but what this Court has
- 17 always asked for are jurisdictional facts, not broad
- 18 allegations in a complaint.
- 19 Certainly this case applies, as Mr. Justice
- 20 White mentioned a while ago, to an author. The decision
- 21 here would apply to authors who get sued, and I take it
- 22 Mr. Ablon is saying, well, it doesn't apply to authors
- 23 who don't get sued, but every author who gets sued is
- 24 going to be facing a complaint that says he acted
- 25 maliciously, wilfully, with the intent to harm people,

- 1 and so on.
- 2 If effect is carried to that extreme, then all
- 3 the limits on jurisdiction for individuals in libel
- 4 cases are essentially eradicated.
- I would mention that this Court from at least
- 6 the time of International Shoe has also recognized that
- 7 individuals are not the same thing as corporations when
- 8 you are dealing with the guestion of personal
- 9 jurisdiction. When you have got a corporation, you are
- 10 immediately faced with the question, where is it,
- 11 because nobody can see a corporation. It is an
- 12 incorporeal presence. It is a jurisdictional
- 13 construct. An individual, you generally know where he
- 14 is, what he is doing, and the individual has some rights
- 15 under the Constitution that corporations don't always
- 16 enjoy.
- 17 QUESTION: When an individual, Mr. Kester,
- 18 when individuals and a corporation with which they have
- 19 a relationship are joined in the same posture as
- 20 defendants, do you think that makes possibly some
- 21 difference on how the individuals are treated?
- MR. KESTER: I think that we have to do
- 23 exactly what Mr. Grutman said and what this Court has
- 24 said, Mr. Chief Justice. We have to look, as the Court
- 25 said in Hanson against Denckla, at the contacts of each

1 defendant individually and say what were his contacts in 2 the case, and in this case these individuals did not 3 have those contacts. It is not necessary to decide this case even 5 to reach the First Amendment, because this is not a 6 close case. This case can be decided under the standard 7 jurisdictional principles of the Fourteenth Amendment as 8 they have always been applied, and what we have here are 9 individuals. I can't improve on the language of Mr. 10 Justice Rehnquist in his dissent in the Beloti case, 11 which I --CHIEF JUSTICE BURGER: Thank you, counsel. 12 13 Thank you. The case is submitted. (Whereupon, at 12:01 p.m., the case in the 14 15 above-entitled matter was submitted.) 16 17 18 19 20 21 22 23 24

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:
#82-1401 - IAIN CALDER AND JOHN SOUTH, APPELLANTS, v. SHIRLEY JONES Appelled

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