



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

-----x

OMNI CAPITAL INTERNATIONAL, ET AL., :  
Petitioners, :

v. : No. 86-740

RUDOLF WOLFF & CO., LTD., ET AL., :

-----x

Washington, D.C.

Thursday, October 6, 1987

The above-entitled matter came on for oral argument  
before the Supreme Court of the United States at 12:58 p.m.

APPEARANCES:

ROBERT A. KUTCHER, ESQ., New Orleans, Louisiana;  
on behalf of the Petitioners.

ELLIOT PASKOFF, ESQ., New York, New York;  
on behalf of Respondents

C O N T E N T S

1		
2	<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
3	ROBERT A. KUTCHER	
4	on behalf of the Petitioners	3
5	ELLIOT PASKOFF	
6	on behalf of the Respondent	23
7	ROBERT A. KUTCHER	
8	on behalf of the Petitioners	32
9	Rebuttal	
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		



1 some of the trades.

2 Accordingly, there was a substantial participation by  
3 not only among these petitioners but about 1400 United States  
4 taxpayers, all involved in the same transactions.

5 The facts of the case present the Court with clear  
6 alternatives. Under the Louisiana long arm statute, we have  
7 conceded that there are insufficient contacts to maintain this  
8 commodities fraud suit against Rudolf Wolff & Company and James  
9 Gourlay, one of whom is a British corporation, the other is a  
10 national of the United Kingdom.

11 However, it has also been determined that if one  
12 aggregates their contacts not only with the State of Louisiana,  
13 but throughout the United States, then there are sufficient  
14 contacts to subject them to suit under the Commodities Act.  
15 The question which is presented here is what standard should  
16 this Court apply.

17 In essence, Your Honors, this case comes down to the  
18 application of Federal Rule Civil Procedure 4(e) and whether  
19 that procedural rule imposes a substantive standard on personal  
20 jurisdiction. We submit that it does not and, as Judge Wisdom  
21 pointed out in his dissent in the Fifth Circuit opinion, Rule 4  
22 is nothing more than a procedural rule designed for efficient  
23 housekeeping of the Federal Courts. It was never intended nor  
24 should it be construed to impose substantive standards of  
25 personal jurisdiction.

1 QUESTION: Do you think Rule 4(e) ever applies to a  
2 purely Federal question case?

3 MR. KUTCHER: Justice White, Rule 4(e) applies --

4 QUESTION: Or it just doesn't apply when there is a  
5 foreigner involved?

6 MR. KUTCHER: Well, Rule 4(e) applies for the purpose  
7 of the physical means of effecting service of process, not the  
8 amenability of the individual to the court's law.

9 QUESTION: So, in a purely Federal question case,  
10 Rule 4(e) wouldn't apply at all if the question is the  
11 amenability of the defendant to service?

12 MR. KUTCHER: Yes, sir. And I think that has to be  
13 the logical conclusion of the argument and I think -- and I  
14 think your opinion, Your Honor, in Insurance Corporation of  
15 Ireland properly points out that the source for personal  
16 jurisdiction comes from the Fifth Amendment, comes from the due  
17 process clause, and 4(e), we submit is nothing more than the  
18 procedural means, the second half of determining whether or not  
19 you have got personal jurisdiction, but it doesn't effect the  
20 amenability.

21 This case involves foreign nationals and I certainly  
22 make the argument --

23 QUESTION: Well, what if the state didn't have a long  
24 arm statute at all and there is just a purely Federal question  
25 case pending in a Federal Court?

1 MR. KUTCHER: Yes, sir.

2 QUESTION: Can you serve at all?

3 MR. KUTCHER: I think that if the state does not have  
4 a long arm statute then what you are faced with is whether or  
5 not it comports with the due process clause. And, as you  
6 pointed out, the Fifth Amendment due process clause is the  
7 basis for personal jurisdiction. So, yes, sir, I think you  
8 can.

9 The question is whether or not you can -- the manner  
10 in which you physically effect that service I think, as Judge  
11 Wisdom said in his dissent, is something that can be fashioned  
12 on an ad hoc basis. You do not need to have a specific  
13 provision in 4(e) to determine all methods of service of  
14 process, because Rule 82 and 83 permit the courts to fashion  
15 rules which are not inconsistent with the Federal Rules.

16 QUESTION: Well, Mr. Kutcher, I think most decisions  
17 in this area have taken the position that Federal courts have  
18 only as much subject matter and personal jurisdiction as  
19 Congress gives them by affirmative grant.

20 MR. KUTCHER: Yes, ma'am.

21 QUESTION: And under your theory, there would not be  
22 an affirmative grant of jurisdiction then.

23 MR. KUTCHER: Justice O'Connor, a personal  
24 jurisdiction.

25 QUESTION: Yes.

1 MR. KUTCHER: You are correct. And that is the  
2 conclusion of our theory that the courts -- the Federal courts,  
3 the courts of limited jurisdiction, that is that Congress will  
4 only create those statutes and you do not have the authority to  
5 hear that case. But with respect to personal jurisdiction,  
6 with whether or not you can bring somebody in to hear a case,  
7 that comes either from the Fifth Amendment insofar as Federal  
8 question cases --

9 QUESTION: Well, I suppose the weight of authority  
10 might be against you on this point; wouldn't it?

11 MR. KUTCHER: Yes, ma'am. I can't do anything about  
12 that.

13 QUESTION: Well, it is very difficult to say that the  
14 Fifth Amendment is a source of authority to serve process. The  
15 Fifth Amendment is a restriction on the authority of  
16 government.

17 MR. KUTCHER: Yes, sir.

18 QUESTION: So, why do you say the Fifth Amendment is  
19 a source of authority?

20 MR. KUTCHER: Our argument is that the Fifth  
21 Amendment requires that there be due process in bringing  
22 someone into a court. That is whether --

23 QUESTION: But it's not. The Fifth Amendment, you  
24 agree, is not an affirmative grant of authority to anyone.

25 MR. KUTCHER: Yes, sir. I do. I do, Chief Justice

1 Rehnquist. And I can't argue that point with you, either. Our  
2 position is that the due process clause of the Fifth -- if  
3 there were no, as Justice White asked me: If there were no  
4 state long arm statute, I think that a state under the  
5 Fourteenth Amendment, not under the Fifth Amendment, can bring  
6 someone in, determine personal jurisdiction based on the limits  
7 of the Fourteenth Amendment. In fact, as the Court knows there  
8 are some state statutes which simply say if it is okay under  
9 the Fourteenth Amendment, you can do it.

10 QUESTION: If a state doesn't have a long arm statute  
11 it means that its courts -- you may never bring in a  
12 non-resident into its courts. Why shouldn't Rule 4(e) then  
13 govern that? You can't bring him in in a Federal court,  
14 either.

15 MR. KUTCHER: Well, that relates to the question of  
16 whether or not -- the distinction that I'm making, Justice  
17 White, is the distinction between the amenability to  
18 jurisdiction and the physical means of service of process. And  
19 I think you can't bring them in based on --

20 QUESTION: I know, but the state says that -- the  
21 state law is that you just may not serve this person at all.  
22 You just may not even try to bring him in. He is just not  
23 amenable to the service of process for the purposes of a state  
24 court suit. Now, why shouldn't the Federal court follow that  
25 under 4(e)?

1 MR. KUTCHER: Because this is a Federal question case  
2 and the authorities and the authority under which a Federal  
3 court is acting in a Federal question case stems from the  
4 Commodities Exchange Act and not from state action. And that  
5 is precisely the argument that we are making: that in this  
6 particular instance the authority under which the court is  
7 acting has no relationship to what jurisdiction or what state  
8 the District Court is sitting in. To do otherwise would permit  
9 a disparity in treatment, depending on a state's long arm  
10 statute. To do otherwise would permit a foreign national who,  
11 as in this case, has been found to have adequate contacts  
12 throughout the United States, but insufficient contacts in any  
13 one state to avoid ever having to answer on the merits of  
14 whether or not any commodities fraud was committed or not  
15 committed.

16 QUESTION: Mr. Kutcher, there are some Federal  
17 statutes in which Congress has expressly adopted a provision  
18 such as you would have us apply here without an express  
19 provision.

20 MR. KUTCHER: Yes, ma'am.

21 QUESTION: So, I guess, under your view, all those  
22 affirmative grants of jurisdiction on a national basis by  
23 Congress are superfluous. They are not necessary.

24 MR. KUTCHER: Well, I think that --

25 QUESTION: Isn't that right?

1 MR. KUTCHER: Insofar as a claim against foreign  
2 nationals is concerned, I think that the standard is --

3 QUESTION: Well, you think that that action by  
4 Congress is just not necessary. It's superfluous.

5 MR. KUTCHER: Insofar as claims against foreign  
6 nationals are concerned because the source of the authority  
7 comes from the due process of the Fifth Amendment.

8 QUESTION: There you go again and say the source of  
9 the authority comes.

10 MR. KUTCHER: Yes, sir.

11 QUESTION: The source of the authority has to come  
12 from somewhere else. Where does it come from?

13 MR. KUTCHER: Well, I think it comes from whether or  
14 not it meets the traditional notions of fair play and justice  
15 that this Court has adopted over the past 50 years.

16 QUESTION: Are you saying then that we can presume  
17 that Congress wished to reach out in every Federal question  
18 cause of action to the limits of the due process clause?

19 MR. KUTCHER: I don't think you have to make that  
20 presumption, Chief Justice Rehnquist. I think that the due  
21 process clause on its own permits you to determine whether or  
22 not you meet the standards of traditional justice and fair  
23 play.

24 QUESTION: Of course. But there is always the  
25 question entirely apart from the constitutional limitation

1 whether the person having the authority wishes to exercise it.  
2 And that is the intimation I drew from Justice O'Connor's  
3 question is that Congress in several sections of the Securities  
4 Act has indicated: Yes, we do want to reach as far as we can.  
5 But you say that you don't need any indication like that from  
6 Congress because in every case they have created a Federal  
7 question claim, they are going to be presumed to want to reach  
8 as far as they can.

9 MR. KUTCHER: I think that under, I think that under  
10 4(e) as was argued by Judge Wisdom in the dissent in the Fifth  
11 Circuit that Congress in a case -- in the case of this nature  
12 involving what has been in the legislative history deemed to be  
13 something of significant importance to the enforcement of  
14 commodities actions would permit the extension of a nationwide  
15 service of process.

16 Now, that I will address a little bit later if the  
17 Court doesn't mind regarding the application in Commodities  
18 Act, but it seems to me that if you take a look at the origin  
19 of the way the Commodities Act was originated and the history  
20 revolving around the Commodities Act that it is clear that a  
21 commodities action was designed to prohibit the very same  
22 abuses which the securities laws 50 years earlier were designed  
23 to prohibit. And, under those circumstances, we submit that  
24 there should certainly with regard to commodities actions be a  
25 nationwide service standard for service of process. Yes, sir?

1           QUESTION: Rule 4(e) says that whenever a statute of  
2 the United States or an order of the Court provides for service  
3 of summons, then you will serve the summons that way. What is  
4 the -- what does the reference to an order of the Court mean?

5           MR. KUTCHER: I think it refers to local rules or to  
6 rules which the courts --

7           QUESTION: You mean a Federal Court in a Federal  
8 question case could, where a statute does not provide for a  
9 service, just enter an order in that particular case providing  
10 for serving of process?

11          MR. KUTCHER: To effect the physical means of  
12 notifying a defendant of the pendency of an action in a  
13 jurisdiction. Yes, sir. And that is exactly what happened in  
14 the Petro Shipping case.

15          QUESTION: Well, what about amenability?

16          MR. KUTCHER: On amenability, it comes down to the  
17 standard of whether or not you meet the traditional notions of  
18 fair play and justice.

19          QUESTION: Well, could an order, could just -- I just  
20 don't know why the rule has a reference to an order of the  
21 Court.

22          MR. KUTCHER: Well, it seems -- my interpretation of  
23 that, Your Honor, is that it authorizes and incorporates Rule  
24 83 where the Court has the authority to enter rules as long as  
25 they are not inconsistent with the Federal Rules of Civil

1 Procedure. And that is how I interpret that particular  
2 provision.

3 QUESTION: Well, it could be, too, couldn't it to  
4 authorize substitute service, substitute service of process  
5 where one method has been tried and the person can't be found  
6 at the address? That was the practice in Arizona.

7 MR. KUTCHER: Yes, sir. I think that is another  
8 alternative that could apply.

9 QUESTION: Mr. Kutcher?

10 MR. KUTCHER: Yes.

11 QUESTION: If the Congress is not using the manner of  
12 service as a shorthand for prescribing what the reach of  
13 personal jurisdiction is, then why is it that when the manner  
14 of service is improper, the suit is dismissed for want of  
15 jurisdiction? Isn't that what happens? Is it dismissed for  
16 procedural --

17 MR. KUTCHER: The suit is dismissed for insufficiency  
18 of service of process. And the process is fair --

19 QUESTION: That is not a jurisdictional defect?

20 MR. KUTCHER: It is not a personal jurisdictional  
21 defect, no, sir. I think it is dismissed for insufficiency of  
22 service of process. And I think if you can properly --

23 QUESTION: Well, what other kinds of jurisdictions  
24 are there other than jurisdiction over the person and the  
25 subject matter?

1 MR. KUTCHER: That's it. But what I am suggesting--

2 QUESTION: So, you are saying that all these  
3 dismissals because of improper service really are not  
4 jurisdictional --

5 MR. KUTCHER: They are not necessarily. I think that  
6 they are separately addressed under Rule 12(b). You can bring  
7 a motion to dismiss for a lack of personal jurisdiction or you  
8 can bring a motion for insufficiency of service or  
9 insufficiency of process. So, the Federal Rules contemplate a  
10 distinction between personal jurisdiction and service of  
11 process. And I think what has happened -- and I can't argue  
12 with Justice O'Connor that the courts have done this -- is  
13 somehow they have adopted a substantive constitutional basis  
14 and incorporated that into the procedure of Rule 4 for  
15 obtaining service of process.

16 QUESTION: What if you have an improper service of  
17 process and the point is not noted by the defendant, the case  
18 goes on to judgment and that judgment is then sued on somewhere  
19 else.

20 MR. KUTCHER: That's waived. As I appreciate 12(b)  
21 the only thing that you can't waive is subject matter  
22 jurisdiction. You can waive personal jurisdiction and you can  
23 waive the service of process, Your Honor.

24 And I think that, as in this case, if you don't file  
25 a motion to dismiss for --

1 QUESTION: The individual never appears.

2 MR. KUTCHER: And if you've got good service and the  
3 individual never appears and the default is taken, I don't  
4 think you can collaterally --

5 QUESTION: Improper service. Improper service and  
6 the individual never appears and judgment is entered  
7 nonetheless?

8 MR. KUTCHER: As I appreciate it, you would have to  
9 come back and argue the same way you would in any other  
10 default. The service -- the question of the propriety of  
11 service is waived if it is not asserted under Rule 12(b).

12 QUESTION: There is jurisdiction over the person,  
13 then, right?

14 MR. KUTCHER: I think so. It's waived. It's--  
15 there --

16 QUESTION: How do you waive it by not appearing?

17 MR. KUTCHER: Well, the same way that you would if  
18 you don't assert it, you waive it. And if you appear, Judge.  
19 Justice. It seems to me --

20 QUESTION: Well, that is a rather extreme position.  
21 Say the defendant never even heard of the lawsuit.

22 MR. KUTCHER: Well, then he has got the same remedies  
23 available to him --

24 QUESTION: Well, he has some remedy other than 12(b)?

25 MR. KUTCHER: Yes, sir.

1 QUESTION: Well, what is the difference if you have  
2 never heard of it and you are improperly served? What is the  
3 distinction? When is an improper service waived and when isn't  
4 it?

5 MR. KUTCHER: I think an improper service is waived  
6 if -- I think an improper service such as would be dismissable  
7 under Rule 12(b) would be waived in any instance that any other  
8 12(b) motion would be waived.

9 QUESTION: Even if he never even heard of the fact  
10 that a lawsuit had been brought against him?

11 MR. KUTCHER: Well, if he never heard of it --

12 QUESTION: How could he waive?

13 MR. KUTCHER: -- then I assume, then I would assume  
14 that when they went to try to collect on the judgment he would  
15 have remedies available to him.

16 QUESTION: Well, he hears about it when they collect  
17 on the judgment, but the time to file a 12(b) motion is long  
18 gone.

19 MR. KUTCHER: I think that is something that is  
20 addressed, frankly, to the discretion of the trial court as to  
21 whether or not there was -- whether he should have known about  
22 it or not. But that really --

23 QUESTION: Do you have any cases for this rather  
24 novel approach?

25 MR. KUTCHER: No, sir, because I didn't plan on

1 getting on the question of whether or not a default was taken.  
2 I think we are taking the position that under the -- that  
3 Rule 4 simply prescribes the method by which you physically  
4 notify someone of a suit. Rule 4, by its own language, says  
5 service may be made under the circumstances which we argue and  
6 which Judge Wisdom and five other Circuit Court judges in the  
7 Fifth Circuit, viewed to be discretionary, not the mandatory  
8 method of if you can't do it this way, you can't do it at all,  
9 but simply, you can another route.

10 And the whole basis should be whether or not the  
11 presence of the defendant in the Federal Court is such that it  
12 does not offend the traditional notions of fair play and  
13 justice.

14 QUESTION: Well, you mentioned earlier, I think, that  
15 a source of authority to fashion the service of process rule is  
16 83.

17 MR. KUTCHER: Yes, sir.

18 QUESTION: Which deals with local rules; doesn't it?

19 MR. KUTCHER: As I understand it it deals with --

20 QUESTION: Beyond that?

21 MR. KUTCHER: Yes, sir. As I appreciate it and again  
22 as the dissent pointed out and as was determined in the Petro  
23 Shipping case which is cited in Judge Wisdom's dissent that the  
24 Court has the -- the Federal District Court has the authority  
25 to effect a method by which service is obtained. And what we

1 are submitting --

2 QUESTION: But if it is on alien defendants lack  
3 minimum contacts with the states, it nevertheless has to be  
4 sufficient national contacts?

5 MR. KUTCHER: Oh, absolutely.

6 QUESTION: To be amenable jurisdiction under the  
7 Fifth Amendment.

8 MR. KUTCHER: Absolutely.

9 QUESTION: So, to that extent, your submission is not  
10 as broad as I thought you were referring --

11 MR. KUTCHER: Oh, no. I'm not suggesting that. What  
12 I am suggesting is that in Federal question cases, which the  
13 Commodities Act certainly is, and certainly in cases involving  
14 foreign nationals. And, if you look at the national contacts  
15 cases which have been decided, which are cited in our brief,  
16 they all talk about -- one of the factors that we --

17 QUESTION: Let me ask you one question, Mr. Kutcher.

18 MR. KUTCHER: Yes.

19 QUESTION: To the extent that you rely on Rule 83,  
20 does that mean that the District Court in New Orleans can have  
21 a rule saying: We want to go to the full extent of the Fifth  
22 Amendment in these cases. And Western District in Shreveport  
23 can say: Well, no, we don't think we will go that far. I mean  
24 is it 93 different rules for 93 different districts?

25 MR. KUTCHER: I think the authority is such that --

1 QUESTION: Well, what authority?

2 MR. KUTCHER: I think that the argument that we are  
3 asserting, Chief Justice, is that under the -- that the Federal  
4 Rules should not substantively effect the rights of a plaintiff  
5 to maintain an action against a foreign national.

6 Judge Wisdom analogized the state long arm statute to  
7 the national contacts theory in cases involving foreign  
8 nationals. And I think that is a pretty fair analogy.

9 QUESTION: Well, now, are you going to get back to my  
10 question about Rule 83?

11 MR. KUTCHER: Well, I think that 83 just permits you  
12 to fashion -- no, I don't think that you can have 93 different  
13 rules.

14 QUESTION: So, how do you determine which rule is  
15 right in the various districts?

16 MR. KUTCHER: I think as long as the rule is in  
17 compliance --

18 QUESTION: In compliance with what?

19 MR. KUTCHER: With the limits of what is permitted  
20 under the Fifth Amendment.

21 QUESTION: Well, then you say that every district has  
22 to promulgate a rule that goes as far as the Fifth Amendment  
23 permitted.

24 MR. KUTCHER: Well, every district has, I think -- I  
25 think the Federal Courts have that authority.

1           QUESTION: What if one particularly, the Chief Judge  
2 up in Shreveport says: I may have that authority, but I just  
3 don't choose to exercise it. That is not the way I read this  
4 statute.

5           MR. KUTCHER: Chief Justice, I think that under those  
6 circumstances that there would be some sort of appellate  
7 review. I can't answer your question specifically because it  
8 seems to me that the likelihood, frankly, of 93 different  
9 opinions as to what they can do or what a District Court judge  
10 can do --

11           QUESTION: It is not what they can do, it is what  
12 they choose to do. The Chief Justice's question focuses on the  
13 fact that Rule 83 is not mandatory. It says that in cases not  
14 provided for by rule, they may regulate their practice in any  
15 manner not inconsistent with these rules.

16           Now, it wouldn't be inconsistent to assert the full  
17 scope of jurisdiction that you assert exists, but it also would  
18 not be inconsistent to assert something less than that. So,  
19 how would you be reversed if you chose to exercise less than  
20 that?

21           MR. KUTCHER: In thinking about it, I think, as  
22 Mr. Lee did this morning, I think that I have got to change my  
23 response and say that as long as it is constitutional a  
24 District Court judge can do anything which is permitted under  
25 the Fifth Amendment

1 QUESTION: So, you can have 93 different rules.

2 MR. KUTCHER: Theoretically, you can have 93  
3 different rules. I think -- but the venue provisions which are  
4 going to limit where you can maintain an action regardless of  
5 personal jurisdiction are going to have an effect here as well.  
6 And that is something that I think needs to be addressed. As  
7 the Fifth Circuit has held in several cases, the Federal Courts  
8 have never had to fashion a personal jurisdiction basis because  
9 your strict venue requirements dictate that you can either  
10 bring your action where the plaintiffs reside or the cause of  
11 action arose where the defendants reside, depending on whether  
12 or not you have got diversity of Federal question jurisdiction.

13 And under those circumstances, I think the  
14 limitation, if you will, on the power of a Federal District  
15 Court stems from the venue provisions and not from the personal  
16 jurisdiction basis. And that is the argument which we are  
17 asserting: that venue is what is going to limit the hailing of  
18 a foreign national, such as Rudolf Wolff & Company, into a  
19 court where there wouldn't -- where the court may have the  
20 personal jurisdiction and it may be constitutional and it may  
21 meet traditional notions of fair play, but it simply is not the  
22 proper venue. And you have got to shop elsewhere.

23 QUESTION: You say that 4(e) just deals with the  
24 manner of service of process and never in any action doesn't go  
25 to amenability of service outside the state.

1 MR. KUTCHER: I think that, yes, sir. That's my  
2 argument and I think that in Federal --

3 QUESTION: And so, I suppose you would say Federal  
4 District Court could by rule say that when the suits are  
5 against non-residents service of process may be had on those  
6 people to the extent the Fifth Amendment will allow.

7 MR. KUTCHER: And I think -- yes, sir.

8 QUESTION: And provide the method.

9 MR. KUTCHER: And provide the method. And I think  
10 that is accurate.

11 QUESTION: And without having to worry about Rule  
12 4(e).

13 MR. KUTCHER: That's exactly right. And that's the  
14 national contacts theory. You look to the basis of the foreign  
15 nationals contacts with the entire United States. And this  
16 Court has held in at least once case that in terms of foreign  
17 relations that this is one country. It is not 50 separate  
18 states. It is not 50 separate autonomous units. It is one  
19 country with regard to foreign nationals. I think that  
20 standard applies. And I think it particularly applies in a  
21 case of this nature in an action which is a commodities fraud  
22 case which was initially filed as a securities fraud claim.

23 The irony is that this lawsuit when it was initially  
24 filed, was filed as a securities fraud claim. No dispute that  
25 Section 27 permits nationwide service of process.

1 Subsequently, the case is amended to include a commodities  
2 fraud claim, then it is determined that the commodities remedy  
3 is the exclusive remedy. And, now, all of a sudden, these  
4 Petitioners, who when the suit was filed had service of process  
5 against Rudolf Wolff & Company and against James Gourlay, all  
6 find themselves relegated to the state remedy, the Louisiana  
7 state long arm statute to determine whether or not they have  
8 got jurisdiction over the foreign nationals. They went from no  
9 contest as to having it to being relegated to the state claim  
10 simply -- and the facts, and the underlying facts of causes of  
11 action never changed.

12 And under those circumstances, we believe that  
13 insofar as this cause of action is concerned that a nationwide  
14 national contacts theory should apply and that Rudolf Wolff and  
15 James Gourlay have both been found to have national contacts  
16 with the United States, although not with the State of  
17 Louisiana. And I will reserve the rest of my time for  
18 rebuttal. Thank you, Your Honors.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kutcher.

20 We will hear now from you, Mr. Paskoff.

21 ORAL ARGUMENT OF ELLIOT PASKOFF, ESQ.

22 ON BEHALF OF THE RESPONDENT

23 MR. PASKOFF: Mr. Chief Justice, and may it please  
24 the Court:

25 To address the limitations of personal jurisdiction

1 in Federal Courts over non-residents, I think we should start  
2 in the beginning. Pursuant to Article 3, Section 1 of the  
3 Constitution, it is Congress that is ordained -- that may  
4 ordain and create the lower Federal Courts.

5 Our Federal Court system is a creature of  
6 Congressional grant as a limited -- as a court of limited  
7 jurisdiction, our Federal District Courts may not create their  
8 own jurisdictional premise.

9 If we delve back into history, we find that the  
10 members of this nation's First Congress were concerned with  
11 pre-revolutionary oppressiveness of causing persons to travel  
12 long distances to settle their disputes.

13 QUESTION: Mr. Paskoff, before you get into your  
14 legal argument, could you help me on one factual matter?

15 MR. PASKOFF: Yes, sir.

16 QUESTION: Your opponent indicated at the end of his  
17 argument something I hadn't really quite understood. That the  
18 London parties who deny personal -- who claim there is no  
19 personal jurisdiction over them, were subjected to the personal  
20 jurisdiction of the court while it was a Securities Act claim  
21 and then they subsequently claim there was no jurisdiction. I  
22 had thought they were brought in as Third Parties after the  
23 Securities Act --

24 MR. PASKOFF: Your Honor, what has happened is in the  
25 original Point Landing litigation, one of my clients, Rudolf

1 Wolff & Co., Ltd., was named as a direct party. That Defendant  
2 moved to dismiss for failure to assert impersonum jurisdiction  
3 under Section 27. We never conceded that we were subject to  
4 the jurisdiction of the Federal District Court in Louisiana  
5 pursuant to Section 27.

6 The reason why we never conceded that, Justice  
7 Stevens, is that the assertion of personal jurisdiction over a  
8 non-resident is a dual-pronged requirement. And these are not  
9 parallel prongs. The initial prong is you require a statutory  
10 grant from Congress

11 QUESTION: You had it in Section 27.

12 MR. PASKOFF: Yes, but then you had the next step.  
13 The next step was whether or not that statutory grant as  
14 applied comports with traditional notions of fair play and  
15 substantial justice.

16 QUESTION: Whether your contacts with the whole  
17 country were adequate.

18 MR. PASKOFF: Exactly. Now, understanding the --

19 QUESTION: And that motion was never decided. Is  
20 that right?

21 MR. PASKOFF: Your Honor, that motion -- that motion  
22 was decided -- the motion was decided and that was Point  
23 Landing 1. In Point Landing 1, the Federal District Court held  
24 that there was impersonum jurisdiction.

25 QUESTION: So, then your client was before the court.

1 MR. PASKOFF: Yes. But we also argued at that time,  
2 Your Honor, that the Commodities Act as amended in 1974  
3 granted exclusive jurisdiction -- I know this is not part of  
4 this petition, but we did argue that it granted exclusive  
5 jurisdiction through the Commodity Futures Trading Commission  
6 and to the Federal District Courts.

7 QUESTION: But if you had lost on that argument, your  
8 client would have been before the court?

9 MR. PASKOFF: If I had lost under that argument, we  
10 would have been before the court. That's right.

11 QUESTION: And, of course, if the District Court was  
12 right on the contacts rule.

13 MR. PASKOFF: That is correct. Under Section 27 of  
14 the Federal Securities --

15 QUESTION: What if the District judge had deferred  
16 ruling on your pre-emption argument or the, you know, that  
17 there's no Securities Act claim here, until the end of the  
18 Plaintiffs' case, something like that. And then they had said,  
19 "Well, I was wrong. I never should have gone to trial on the  
20 Securities Act because there is just no -- it has been  
21 preempted by the Commodities Exchange Act." Would you still be  
22 able to get out on your present jurisdictional theory, do you  
23 think?

24 MR. PASKOFF: I believe so, Your Honor.

25 QUESTION: After the case is half tried?

1           MR. PASKOFF:    Because if the Commodities Exchange  
2 Act has preempted the regulation of commodities futures  
3 trading, then Section 27 does not apply because the commodity-  
4 - because the Securities Exchange Act is not applicable to  
5 determining the duties and liabilities involved with trading of  
6 commodity futures.

7           QUESTION:    What if instead of the preempt, the  
8 argument that the Commodities Act superceded the other, you had  
9 simply persuaded the District judge that it didn't state a  
10 cause of action under the Securities Act and, yet, you were  
11 properly before -- if you were before the court on the  
12 Securities Act, I presume they also could have tried the  
13 commodities exchange claim at the same time.  Couldn't they?  
14 You can't have a pending jurisdiction motion.

15           MR. PASKOFF:  Well, I understand what you are saying,  
16 Your Honor, except Congressional history has clearly indicated  
17 that the Commodity Exchange Act preempts --

18           QUESTION:    Well, I understand that.  I understand.  
19 But at least that he had the right to bring you before the  
20 court and require you to make that argument to the court and  
21 demonstrate that there really is no valid claim under the  
22 Securities Act.

23           MR. PASKOFF:  That is correct.

24           QUESTION:    So, you were, for a brief period of time  
25 at least, subject to the jurisdiction of the Louisiana court.

1 It's a kind of a puzzle. I don't know what -- they haven't  
2 really argued this, but I have to confess I don't quite  
3 understand it.

4 QUESTION: You don't really want to give that pendant  
5 jurisdiction necessarily applies to jurisdiction over the  
6 person as well as it applies to jurisdiction over subject  
7 matter?

8 MR. PASKOFF: That's correct.

9 Part of the second prong of the Petitioners' request  
10 to this Court is to ask for an implication of nationwide  
11 service of process under the Commodity Exchange Act. Congress  
12 has had three separate opportunities within the last 12 years  
13 to speak on the subject of nationwide service of process.

14 In 1974, the Commodity Futures Trading Commission Act  
15 was enacted and it specifically conferred nationwide service of  
16 process under Section 13(a)(1) on the Commodity Futures Trading  
17 Commission. It similarly conferred nationwide service of  
18 process on the sister states' attorney generals under Section  
19 13(a)(2). Nowhere was there a mention that there was a  
20 nationwide service of process for private litigants.

21 This Court decided Merrill Lynch v. Curran in 1982,  
22 holding that a private right of action exists under the  
23 Commodity Exchange Act.

24 In 1982, the Futures Trading Act amending the  
25 Commodity Exchange Act expressly provided for a private right

1 of action by a private litigant aggrieved under the Commodity  
2 Exchange Act. That was the perfect place if Congress had so  
3 intended to assert a nationwide service of process clause for  
4 private litigants. That Act is silent. That provision does  
5 not provide for nationwide service of process in enforcing  
6 private claims.

7 Congressional history with respect to the enactment  
8 of Section 25 in 1982 indicates that Congress recognized -- the  
9 Agricultural Committee of the House stated that Congress does  
10 not intend to rely upon private litigants as the policemen of  
11 the Commodity Exchange Act.

12 More recently, Congress enacted the Futures Trading  
13 Act of 1986 which among other provisions granted to the  
14 Commodity Futures Trading Commission the power to serve  
15 extra-territorial subpoenas beyond the United States'  
16 territories.

17 In the conference committee report relating to that  
18 provision, the conference committee has instructed the  
19 Commissioners that prior to the issuance of a pre-complaint  
20 investigatory subpoena they must confer with the Department of  
21 State in order to meet with representatives of the receiving  
22 nation so as not to cause a perception of intrusion on the  
23 sovereignty of the receiving nation.

24 It is not surprising in light of the caution and  
25 sensitivity expressed by Congress in dealing with aliens under

1 the Commodity Exchange Act that a restrictive scope of personal  
2 jurisdiction has been defined because Congress simply cannot  
3 restrain private litigants in their dealing with aliens.

4 So, we are left with the statutes, the Commodity  
5 Exchange Act. It has in some sections grants of nationwide  
6 service of process with respect to the Commodity Futures  
7 Trading Commission and in other sections relating to private  
8 action, there is no such language.

9 This Court has observed in Russello v. United States  
10 as a matter of constitutional construction that where Congress  
11 includes particular language in one part of the statute but  
12 omits that language in another section of the statute, it will  
13 be presumed that that omission was intentional and deliberate.  
14 The basic assumption is that Congress knows how to write its  
15 statutes.

16 I think the likely inference that I draw is that  
17 Congress did not intend to grant extra-territorial jurisdiction  
18 as a weapon to private litigants. For that reason, I would  
19 urge this Court to reject the request by the Petitioners to  
20 imply a nationwide service of process clause under the  
21 Commodity Exchange Act.

22 QUESTION: It seems to me that argument would also  
23 demonstrate that Congress didn't intend any cause of action to  
24 be implied.

25 MR. PASKOFF: Your Honor, not necessarily. And the

1 reason -- I am quite familiar with your decision in Merrill  
2 Lynch v. Curran. The Congressional intent relied upon by the  
3 majority seemed to want to preserve a private right of action  
4 which existed by case law prior to the enactment of the  
5 Commodity Futures Trading Commission Act of 1974. There was a  
6 private right of action by case law. So all that decision does  
7 is preserve. Congress did not intend, Congress did not  
8 specifically intend to eliminate that private right of action.

9           When a Federal statute is silent as to a provision  
10 for nationwide service of process, Rule 4(e) instructs us how  
11 to obtain impersonum jurisdiction over a non-resident. 1963,  
12 we had 4(e) amended to the Federal Rules of Civil Procedure.  
13 It used the language, "Service of process may be made under the  
14 circumstances and in the manner prescribed by the statute or  
15 rule of the state where the District Court is sitting."

16           The commentators including the reporter to the  
17 Advisory Committee in 1963 have indicated that it was the  
18 intent to incorporate by reference the state's standard of  
19 amenability to personal jurisdiction. There is no other reason  
20 to include the language under the circumstances but for to  
21 include the state standard of personal jurisdiction.

22           Thus, if Respondents Wolff and Gourlay were amenable  
23 to the impersonum jurisdiction of the Louisiana long arm  
24 statute, then they would be amenable to the impersonum  
25 jurisdiction of the Federal District Court under 4(e).

1 Petitioners concede and this can be found at page 50 of the  
2 joint appendix. Petitioners concede and Plaintiffs concede  
3 that there is no personal jurisdiction under the Louisiana long  
4 arm statute.

5 What concerns me is an implication of nationwide  
6 service of process under the Commodity Exchange Act. If that  
7 were to be granted today would, by analogy, be applicable to  
8 every single Federal question statute which is silent as to  
9 service of process. I do not believe that that is what  
10 Congress intended.

11 Mr. Chief Justice, if any Member of the Court has a  
12 question for me, I would respond. Otherwise, I will sit.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Paskoff.

14 Mr. Kutcher, you have four minutes remaining.

15 ORAL ARGUMENT OF ROBERT A. KUTCHER, ESQ.

16 ON BEHALF OF PETITIONERS - REBUTTAL

17 MR. KUTCHER: First, I will respond to Justice  
18 Stevens inquiry regarding what happened in the District Court  
19 below. The District Court judge did find that there existed  
20 adequate national contacts based on -- for Mr. Rudolf Wolff and  
21 Mr. James Gourlay, and held that he had personal jurisdiction.  
22 Subsequently, the Fifth Circuit in DeMelo came out and said:  
23 You have to look to the state statute under 4(e). And that was  
24 when they came back for motion for reconsideration. And the  
25 District Court judge reversed himself based on the DeMelo

1 decision, but there was no question that the judicial  
2 determination after discovery as to the contacts found that  
3 there weren't adequate national contacts.

4 The national contacts theory in Federal question  
5 cases I think has application here and, as Judge Wisdom  
6 indicated in dissent, in the appellate court opinion, is  
7 something which the court should consider in Federal question  
8 cases.

9 Mr. Paskoff's argument that what is going to result  
10 are rampant lawsuits everywhere in all Federal question cases  
11 ignores what I alluded to in my argument in chief and that is  
12 the venue provisions of the United States Code which will limit  
13 where litigation can take place.

14 Before 1963, this Court in International Shoe and its  
15 successors determined that all that is required is traditional  
16 notions of fair play and justice. The argument that a rule of  
17 procedure which has been described as a housekeeping rule  
18 should somehow control the rights of a Federal litigant in a  
19 Federal cause of action in a Federal court is something which  
20 places procedure over substance.

21 This is a commodities fraud claim. The exclusive  
22 place to bring it is in the United States District Courts. And  
23 the effect of the Fifth Circuit decision is to insulate the  
24 foreign aliens from any action in any District Court because  
25 they don't have adequate contacts with that particular

1 district, although there is no question that they have contacts  
2 with the entire country.

3 I thank Your Honors for your time. If you have got  
4 any questions, I will be happy to answer them.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kutcher.  
6 The case is submitted.

7 (Whereupon, at 1:38 o'clock p.m., the case in the  
8 above-entitled matter was submitted.)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C E R T I F I C A T E

Heritage Reporting Corporation 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:  
Omni Capital International, et al., v. No. 86-740  
Rudolf Wolff & Co., Ltd., et al.

and that these pages constitute the original Transcript of the proceedings for the records of the Court.

Heritage Reporting Corporation  
BY Margaret Dely

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE

'87 OCT 13 P4:57