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OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

GEOFFREY W. BARNARD, ETC., Petitioner V. SUSAN  
ESPOSITO THORSTENN, ET AL.; and  
VIRGIN ISLANDS BAR ASSOCIATION, Petitioner  
V. SUSAN ESPOSITO THORSTENN, ET AL.

**CAPTION:**

**CASE NO:** 87-1939 & 87-2008

**PLACE:** WASHINGTON, D.C.

**DATE:** January 11, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

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GEOFFREY W. BARNARD, ETC., ;

Petitioner ;

v. ;

No. 87-1939

SUSAN ESPOSITO THORSTENN, ET AL.; and ;

-----X

VIRGIN ISLANDS BAR ASSOCIATION, ;

Petitioner ;

v. ;

No. 87-2008

SUSAN ESPOSITO THORSTENN, ET AL. ;

-----X

Washington, D.C.

January 11, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:47 o'clock a.m.

APPEARANCES:

MARIA TANKENSON HODGE, ESQ., St. Thomas, V.I.; on behalf of the Petitioners.

CORNISH F. HITCHCOCK, ESQ., Washington, D.C.; on behalf of the Respondents.

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C O N T E N T S

<u>ORAL ARGUMENT OF</u>	PAGE
MARIA TANKENSON HODGE, ESQ. On behalf of the Petitioners	3
CORNISH F. HITCHCOCK, ESQ. On behalf of the Respondents	30
<u>REBUTTAL ARGUMENT OF</u>	
MARIA TANKENSON HODGE, ESQ.	57

1  
2  
3  
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6  
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P R O C E E D I N G S

(11:47 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-1939, Geoffrey W. Barnard v. Susan Esposito Thorstenn and Virgin Islands Bar Association v. Thorstenn.

Ms. Hodge, you may proceed whenever you're ready.

ORAL ARGUMENT OF MARIA TANKENSON HODGE  
ON BEHALF OF THE PETITIONER

MS. HODGE: Mr. Chief Justice, may it please the Court:

The question that is certified before you in this proceeding is whether Frazier v. Heebe prohibits the District Court of the Virgin Islands from requiring residence as a requisite for the practice of law in the Virgin Islands.

The United States Court of Appeals for the Third Circuit concluded that Frazier bound the Court of Appeals to strike the Virgin Islands rule of residency and to exercise its supervisory power to do so.

In reaching that conclusion, the Court of Appeals was of the view that it need not consider the facts surrounding the practice of law in the Virgin Islands, but -- that it was bound to treat Frazier as

1 controlling as a matter of law, and disallowing rules of  
2 residence for any district court under its jurisdiction,  
3 which the District Court of the Virgin Islands is.

4 But the Virgin Islands, and the court system  
5 in the Virgin Islands, are unique, and the factual  
6 circumstances surrounding our court system, we feel  
7 clearly make the rule that has been enforced in the  
8 Virgin Islands both reasonable and necessary.

9 We would contend that the Court of Appeals  
10 erred in failing to consider whether the rule of  
11 residency was reasonable and necessary in the context of  
12 the practice of law in the Virgin Islands, and instead  
13 in applying Frazier as a per se rule.

14 There are two basic reasons why the Court of  
15 Appeals in our view is in error in its application of  
16 Frazier. First, the District Court of the Virgin  
17 Islands is not a United States district court. It is a  
18 court created by Congress, but it is a court in which  
19 Congress has vested the judicial power of the Virgin  
20 Islands.

21 The court has also been given the jurisdiction  
22 of a United States district court, but its status and  
23 its role are quite different from that of the United  
24 States district courts.

25 It functions, in effect, as the supreme court

1 of the Virgin Islands. It is the highest insular court  
2 and its rules of practice are, by rule, the rules for  
3 admission to the Virgin Islands bar.

4 We have an integrated bar association, and  
5 thus when one is admitted by the District Court of the  
6 Virgin Islands to practice, he becomes a member of the  
7 Virgin Islands Bar Association.

8 QUESTION: There's nothing in the Virgin  
9 Islands judicial system, like the Supreme Court of  
10 Puerto Rico, that sits side by side with the federal  
11 district courts?

12 MS. HODGE: That's correct, Judge. Our  
13 district court functions as the closest equivalent to a  
14 supreme court of the Virgin Islands.

15 It hears the appeals from the territorial  
16 court system, which is the lowest trial court system in  
17 the Virgin Islands in terms of -- supervisory authority.

18 The District Court of the Virgin Islands also  
19 acts as a court of original jurisdiction and hears civil  
20 matters where the amount in controversy is as little as  
21 \$500, hears criminal matters where the charge is a  
22 felony even if the charge does not arise under federal  
23 law.

24 But the District Court of the Virgin Islands  
25 also functions as the appellate court for all decisions

1 from the territorial court.

2 QUESTION: So we treat it as an  
3 instrumentality of the Virgin Islands?

4 MS. HODGE: I believe that that is the correct  
5 treatment, at least to this extent, Justice Kennedy. We  
6 think that the District Court of the Virgin Islands must  
7 be considered at least a hybrid court.

8 And in its rulemaking capacity, when it is  
9 fashioning rules for practice, since those rules by  
10 definition govern admission to the Virgin Islands bar as  
11 a whole, we think the proper standard to apply to that  
12 exercise of authority is at least the standard that the  
13 court would apply to a supreme court.

14 That is to say that the rule should not be  
15 struck under the exercise of the supervisory power,  
16 unless the rule would be unconstitutional, or unless it  
17 would be, in the language of the decisions from the  
18 territories that we have referred to, inescapably wrong  
19 or inescapably improper.

20 QUESTION: But by the same token, I take it if  
21 it's an instrumentality of the Virgin Islands, then the  
22 federal statute making the -- privileges immunities  
23 clause applicable to the Virgin Islands does apply here.

24 MS. HODGE: Yes, the statute does apply and we  
25 are subject to the privileges and immunities.

1 QUESTION: All right.

2 MS. HODGE: In addition to the fact that the  
3 District Court of the Virgin Islands is this special and  
4 unique hybrid court, the Virgin Islands is in a factual  
5 setting which is quite unlike any that have reached the  
6 federal courts before, either under Frazier or under the  
7 several other cases which have been decided, Piper v.  
8 New Hampshire and Friedman v. Virginia.

9 The facts that make us so different begin with  
10 our geography. We are, of course, at least 1,000 miles  
11 from the closest part of the continental United States,  
12 and this creates serious concern for the judicial  
13 system.

14 It means that a practicing lawyer who is not a  
15 resident of the Virgin Islands encounters travel  
16 difficulties which certainly do not face his  
17 counterparts, for example, who live in neighboring  
18 states like Vermont and New Hampshire.

19 QUESTION: Ms. Hodge, would you say the  
20 circumstances are not too different from those on Guam?

21 MS. HODGE: I -- I am a little bit hesitant to  
22 speak of the circumstances in Guam since that is not an  
23 area with which I'm deeply familiar. But at least to  
24 the extent that --

25 QUESTION: It is some distance from the

1 mainland.

2 MS. HODGE: Yes, Justice, I --

3 QUESTION: With similar problems, in some  
4 respects, at least as to transportation and distance.

5 MS. HODGE: The problems in Guam that I'm  
6 reluctant to comment on would be those that exceed the  
7 question of being a long way away across water.

8 QUESTION: And how has Guam dealt with this  
9 problem? A little differently.

10 MS. HODGE: We are told -- we are told that  
11 since the decision of this Court in Frazier, that Guam  
12 has rescinded its absolute prohibition on non-resident  
13 admissions and has adopted a rule which requires  
14 non-resident lawyers to have a local lawyer with whom  
15 they are affiliated, who appears with them in all  
16 proceedings and signs all pleadings with them.

17 QUESTION: How would that work in the Virgin  
18 Islands?

19 MS. HODGE: We don't think that it would work,  
20 Judge, for several reasons. First of all --

21 QUESTION: I think we're generally called  
22 Justice.

23 MS. HODGE: I'm sorry. I apologize, Justice  
24 O'Connor.

25 QUESTION: What -- how do you think that would

1 work here?

2 MS. HODGE: The reason that we don't think it  
3 would work is that the Virgin Islands has a set of  
4 circumstances that differ from those of other  
5 jurisdictions in excess of our geographic isolation.

6 We have, as we have mentioned in the briefs,  
7 the highest per capita crime rate in the United States,  
8 the lowest per capita income, and the highest number of  
9 cases per judgeship in our courts, in our federal  
10 courts, of any place in the United States for which  
11 statistics are available.

12 A consequence of that is that we have been  
13 required to develop a system under which all members of  
14 the bar are required to share the duty of serving in  
15 effect as public defenders.

16 That is not a system that seems workable with  
17 non-residents. They could not respond to the needs of a  
18 defendant who's been incarcerated promptly enough. We  
19 don't even feel like it would be (inaudible).

20 QUESTION: Could the lawyer who is assigned to  
21 do that for them, under a system like Guam, respond?

22 MS. HODGE: There would be at least one  
23 immediate problem with a system of that sort, and that  
24 is that it would clearly establish a kind of two-class  
25 system for the practice of law.

1           The Virgin Islands has, I think, developed a  
2 quite delicate social fabric in which it is extremely  
3 important that Virgin Islanders know and believe that  
4 people who come to the islands from the United States do  
5 not come equipped with a set of special rights which  
6 allows them to have preference in the way they conduct  
7 themselves.

8           And if we had a system where non-residents  
9 were admitted to the bar, but were not required to  
10 function as the local lawyers do in taking their full  
11 share of criminal appointments, if they could in effect  
12 hire a mercenary substitute for themselves, I think  
13 there would be damage to the system that the District  
14 Court has devised for requiring all lawyers to fulfill  
15 their share of responsibility equally.

16           Also, we don't know that the system in Guam is  
17 working. It's quite a recent innovation in response to  
18 what that court apparently believed was its obligations  
19 under this Court's decision in Frazier, and we have  
20 absolutely no evidence on this record that they are not  
21 encountering difficulties with it.

22           QUESTION: Excuse me, have our cases drawn any  
23 distinction as, as far as what the states must do  
24 between what they must do for residents of neighboring  
25 states as opposed to states on the other side of the

1 country?

2 I mean, I, I think it's further from --  
3 California to Maine than it is from Florida to the  
4 Virgin Islands.

5 MS. HODGE: The only distinction that I am  
6 aware that's been recognized in the decisions between  
7 admission of nearby residents and very distant residents  
8 is, number one, that the cases have said that they think  
9 it is fair to assume that the vast majority of  
10 applicants for admission to a bar in a state in which  
11 they do not reside will be nearby residents.

12 Obviously that presumption doesn't apply to  
13 the Virgin Islands.

14 QUESTION: But we didn't say that you wouldn't  
15 -- you wouldn't have to apply the same rule to, to  
16 distant residents, if they -- if they want to benefit  
17 from it?

18 MS. HODGE: Actually, if I may say so, the  
19 Court did say that a different rule could apply to  
20 distant residents.

21 What it said was that in the case of distant  
22 residents the lawyer could be required to have local  
23 counsel retained. That is recognized both in Frazier  
24 and in Piper.

25 The, the concern that we have is that if the

1 only problem with admission to the Virgin Islands bar  
2 were distance, if we only needed somebody to  
3 occasionally answer a motion call on short notice, aside  
4 from the District Court's concern that in most cases  
5 when that local lawyer appears in pro hac vice cases he  
6 answers, not ready, Judge, I don't know this case.

7 But putting that concern aside, we have the  
8 complicated situation that it is, in the case of the  
9 Virgin Islands, not merely distance, but distance  
10 complicated with a transportation system that's very  
11 limited.

12 We as a destination are a tiny island. We  
13 don't have the kind of commercial transportation  
14 facilities that exist for the cross-country commuters  
15 between, say, California and New York.

16 We have a limited number of airlines serving  
17 us, we have very high tourist travel. And the District  
18 Court said in its decision, it clearly did not feel that  
19 ready access to transportation was available to the  
20 Virgin Islands.

21 The other thing that the Court said, Justice  
22 Scalia, in both Frazier and Piper, was that perhaps  
23 there need not be quite so much concern about distance  
24 alone, since it was becoming increasingly common to use  
25 telephone conferences as a substitute for in-person

1 appearances in some of the courts.

2 In the Virgin Islands, as the District Court  
3 has pointed out, however, that is not a ready  
4 substitute, since our telephone service is not  
5 reliable.

6 The District Court specifically found that  
7 telephone service to the Virgin Islands is subject to  
8 problems with transmission, echoes, loss of connections,  
9 and so on. And, therefore, the Court could not rely on  
10 telephone conferences in the Virgin Islands as a ready  
11 substitute.

12 QUESTION: Who provides the telephone -- who  
13 provides the telephone service?

14 MS. HODGE: The name of our telephone company  
15 is the Virgin Islands Telephone Company, Justice.

16 QUESTION: I see.

17 MS. HODGE: It is a single company, it has an  
18 exclusive franchise, and there have been problems  
19 reported --

20 QUESTION: And, it doesn't work.

21 MS. HODGE: I, I (inaudible).

22 QUESTION: You know, you can talk to Paris,  
23 you can talk to Tokyo, but you can't talk to the Virgin  
24 Islands --

25 MS. HODGE: It, it is certainly not a system

1 that is a total failure, Justice Stephens. It does  
2 function.

3 QUESTION: Maybe you -- maybe you ought to get  
4 a new system, is --

5 MS. HODGE: We are able to call the United  
6 States. As a matter of fact, the District Court said  
7 that service has improved over the last ten years.

8 But it has not improved to the point at which  
9 the court is comfortable relying on telephone  
10 conferences as a substitute for an attorney's presence,  
11 because the court, as we've pointed out, has a really  
12 unusual judicial burden.

13 QUESTION: It seems to me that burden would --  
14 might be alleviated somewhat if you had more lawyers?

15 MS. HODGE: Well that -- it might be  
16 alleviated if we had more lawyers who were actually  
17 there, Judge -- Justice, excuse me, Justice Stephens.  
18 But it cannot be --

19 QUESTION: Well, your, your mistake in calling  
20 me Judge is also made in Article III of the  
21 Constitution, by the way.

22 (Laughter.)

23 MS. HODGE: I do, do apologize. But it is not  
24 alleviated, if you have attorneys of record on cases for  
25 whom the court must wait, who are not there, who call

1 and say I can't arrive, or who don't call and say I  
2 can't arrive --

3 QUESTION: What do you do with pro hac vice  
4 admissions? Do they let them come in, or do they --

5 MS. HODGE: Yes. We have pro hac vice  
6 admissions under our rules.

7 QUESTION: Is it fairly common?

8 MS. HODGE: It is relatively common. They are  
9 required to have a local attorney with them on the  
10 pleadings and in their court appearances. But --

11 QUESTION: I don't understand why you couldn't  
12 do the same thing with these people.

13 QUESTION: That's right.

14 MS. HODGE: Well, the, the court has said two  
15 things about that, Judge. Number one -- Justice -- it  
16 has said -- I'm going to stop addressing people. Number  
17 one, the court has said --

18 QUESTION: We'll, we'll resume there at 1:00  
19 o'clock, Ms. Hodge.

20 MS. HODGE: Thank you.

21 (Whereupon, at 12:00 p.m., the Court was  
22 recessed, to reconvene at 1:00 p.m. this same day.)

23

24

25

1 AFTERNOON SESSION

2 (12:59 p.m.)

3 QUESTION: We'll resume, Ms. Hodge.

4 MS. HODGE: Thank you. I believe when the  
5 recess was announced I was asked about the significance  
6 of the Virgin Islands experience with pro hac vice  
7 admissions.

8 And it seemed to be suggested in the question  
9 that if the territory has been able to accommodate pro  
10 hac vice admissions that it would follow that we  
11 probably could accommodate full-fledged admission of  
12 non-residents, so long as they were required to  
13 associate themselves with local counsel.

14 The primary difference, however, between those  
15 two categories of admission in our territory is that all  
16 active members of the bar are required to fulfill their  
17 responsibility under Rule 16 to serve as, in effect,  
18 federal public defenders, also territorial public  
19 defenders, and also to accept appointments at the  
20 territorial court level to represent indigents in family  
21 matters.

22 QUESTION: Well, there's, there's nothing in  
23 the rule that says appointed counsel can't send a  
24 colleague to any hearing on any matter in an indigent  
25 case, is there?

1 MS. HODGE: There is not a statement in the  
2 written rule, but there is a well-established judicial  
3 authority to the effect that each lawyer in the Virgin  
4 Islands must accept his appointments on an individual  
5 basis, and his failure to do so can result in his loss  
6 of entitlement to be an active practitioner in the  
7 Virgin Islands. The District Court specifically  
8 adverted to that in its decision below.

9 QUESTION: You can't appoint an associate  
10 counsel?

11 MS. HODGE: That's correct. And indeed --

12 QUESTION: So suppose you don't think that  
13 you're qualified to hear a homicide case, you've got to  
14 try it all by yourself?

15 MS. HODGE: The only way that an attorney can  
16 be excused from the obligation to accept an appointment  
17 is by petitioning the court and making a showing that he  
18 is not qualified in his view to handle a particular  
19 matter. And the court then has the discretion to make a  
20 substitute appointment. He will then take another  
21 appointment at a subsequent time.

22 But it is not a matter within the discretion  
23 of the attorney to find a substitute for himself. It is  
24 an individual and personal obligation under our system  
25 of appointments. And as a policy --

1           QUESTION: Is that justified as being  
2 necessary for the smooth functioning of the public  
3 defender system?

4           MS. HODGE: It is justified by the courts of  
5 the Virgin Islands as being necessary to have a smooth,  
6 functioning, equitable system.

7           The system is designed to ensure that all  
8 members of the bar, not only the newcomers recently  
9 admitted, but the well-established, expensive,  
10 sought-after lawyers, take their share of the  
11 appointments, and that an indigent --

12          QUESTION: So you're a tax attorney and you  
13 have to try the homicide case.

14          MS. HODGE: Well, it's quite unlikely that a  
15 tax attorney would not, if he petitioned for  
16 substitution, be permitted to have a different  
17 appointment. But it is entirely unlikely, indeed it's  
18 unheard of in the Virgin Islands --

19          QUESTION: They just give him a robbery case?

20          MS. HODGE: Well, there are many kinds of  
21 cases for which we're appointed, there are immigration  
22 cases.

23          The District Court of the Virgin Islands, as I  
24 mentioned earlier, is both a federal and a local court  
25 in its jurisdiction. So it does not hear only the most

1 terrible felonies, it hears all matters of criminal  
2 cases, and needs appointments in all those matters. It  
3 has tax cases in which appointments must be made.

4 The purpose of the rule, however, is twofold.  
5 It ensures that the system has attorneys for indigent  
6 defendants, that they are given adequate counsel, and it  
7 ensures that each member of the bar contributes his fair  
8 share of his time to that endeavor.

9 It is thought to be a system that is fair to  
10 all lawyers, but in effect taxes them all equally. We  
11 all pay our taxes on our income in the Virgin Islands,  
12 lawyers pay a tax on our time as well.

13 It is an obligation of all active members of  
14 the bar, and we would understand this Court's decisions  
15 to require that if a non-resident wanted to be admitted  
16 he would be expected to carry an equal share with any  
17 other admitted lawyers of those duties.

18 The problem is that it seems clear to the  
19 District Court at least that the non-resident lawyer  
20 could not do so, and that he would inevitably be put in  
21 the position of wanting to hire a substitute for  
22 himself, and that that would inevitably create a system  
23 in which there were a hired bar that replaced the  
24 non-residents, in effect a two-class system, which the  
25 District Court thought not acceptable.

1 QUESTION: How many -- how many cases are we  
2 talking about for the average member of the -- how many  
3 appointed cases --

4 MS. HODGE: The affidavit --

5 QUESTION: -- does the tax -- the one who gets  
6 the least, the tax lawyer who really doesn't want to get  
7 involved in criminal law at all, how many appointments  
8 will he typically take a year?

9 MS. HODGE: Can I just clarify and say, all  
10 lawyers take an equal number of appointments. Whether  
11 they want them or not, they all take an equal number.  
12 It's not whether they like them or not, they all get  
13 them. It rotates.

14 QUESTION: Well, I just want to be sure that  
15 I'm asking about, you know, the most --

16 MS. HODGE: The affidavits below suggest that  
17 as of the date of the evidentiary record here,  
18 approximately four appointments a year was considered  
19 average.

20 That does not include appointments in the  
21 family court to represent parents and children in cases  
22 of dissolution and --

23 QUESTION: And your, your point is that if a  
24 non-resident lawyer could only handle three, that'd be  
25 unfair to those who handle four, and therefore you

1 should have the rule.

2 MS. HODGE: Actually it would be unfair if he  
3 took any lesser number of appointments. But it's our  
4 view that if a non-resident were admitted to active  
5 membership in the Virgin Islands bar what would actually  
6 happen is he would not be able to effectively take any,  
7 because he might --

8 QUESTION: And he might have to hire somebody  
9 else who then would take four by appointment and four by  
10 being hired, that's a total of eight, say, and that  
11 would be unfair to the other members of the bar because  
12 -- for what reason again?

13 MS. HODGE: The local lawyers, the Virgin  
14 Islands lawyer would then be a disadvantaged group.  
15 They would -- number one, they would probably take more  
16 appointments than they would have otherwise --

17 QUESTION: But they get paid for the four that  
18 the non-resident is willing to hire somebody to handle.

19 MS. HODGE: But in, in addition to having to  
20 take more, they would in effect be --

21 QUESTION: They'd take their four.

22 MS. HODGE: It seems to us, a second-class  
23 bar. The non-residents could come in only to handle the  
24 highly-paid cases. The resident bar would be the bar  
25 that would represent all the criminal defendants.

1           QUESTION: You don't want to go through our  
2 Civil War experience again.

3           MS. HODGE: We do not want to relive that  
4 experience. We very much want to keep a system in which  
5 there is an equitable distribution of the  
6 responsibility.

7           The very successful and affluent lawyer in the  
8 Virgin Islands comes to court and stands next to the  
9 beginner and takes his share of the appointments. And  
10 we think that --

11          QUESTION: But what if they let the  
12 non-residents in on condition, say, it's kind of  
13 inconvenient but you must take your four cases?

14          MS. HODGE: The District Court's decision  
15 below indicated that it was the opinion of the judge  
16 that if the rule were evenly applied to all that the  
17 non-residents would inevitably fail in their effort to  
18 comply, no matter how well intentioned they were.

19          QUESTION: Why don't you say, then you get  
20 disbarred if you fail?

21          MS. HODGE: Well, it would be possible to try  
22 the experience, but the difficulty would be --

23          QUESTION: Do you disbar them now if they  
24 don't take their four?

25          MS. HODGE: In the -- yes, they're excluded

1 from practice if they don't take their appointments.

2 QUESTION: And have there been such  
3 disbarments?

4 MS. HODGE: Yes. The problem would be that in  
5 the experimental period --

6 QUESTION: How many lawyers have been  
7 disbarred for that reason? Does the record tell us?

8 MS. HODGE: I don't know.

9 QUESTION: Is it -- is it --

10 MS. HODGE: It's not in the record.

11 QUESTION: It's not what?

12 MS. HODGE: It is not in the record, and I  
13 don't know.

14 QUESTION: I doubt if it happens very often,  
15 does it?

16 MS. HODGE: It doesn't happen very often  
17 because lawyers wouldn't have the nerve to refuse  
18 appointments.

19 To complete the thought, if we had an  
20 experimental period, and we said, we'll let the  
21 non-residents in, we'll say you must take your equal  
22 share of appointments like everyone else, and if you  
23 fail to appear on time we will disbar you, there will  
24 certainly be a risky period when criminal defendants who  
25 are relying on those persons who have been appointed who

1 are not there may have inadequate representation.

2 Their lawyer may not be there on time to make  
3 a bail motion for them, he may miss a witness who  
4 couldn't be found because he didn't interview the person  
5 in custody quickly enough.

6 So it's a risky experiment. And it's also  
7 risky for the courts, which as we've pointed out in our  
8 briefs are working with an extraordinary case load,  
9 disproportionate, we feel, to all other courts in a  
10 comparable situation.

11 And the court itself in that setting has said,  
12 as the jurist best able to examine the setting of this  
13 court, the setting in the Virgin Islands, the demand for  
14 judicial efficiency, I, the chief judge of the District  
15 Court say, it would be intolerable for me to try to keep  
16 this system working if I had to deal with non-residents  
17 who fail to appear, who didn't get their notice of  
18 hearings on time because the mail didn't reach them, or  
19 their pleading didn't get back to me.

20 And it, it seems to us quite difficult for  
21 this court, even in a conscientious effort to apply the  
22 principles of the cases that have been cited, to try to  
23 determine whether that rule is reasonable in the Virgin  
24 Islands.

25 QUESTION: Well, Ms. Hodge, the -- as I take

1 it, the Court of Appeals -- well, the Court of Appeals  
2 said, we disagree with appellant's assertion that the  
3 facts in this case dictate a different result than the  
4 result reached in Heebe.

5 Now, it didn't spell that out, but it must  
6 have disagreed with, with you and disagreed with the  
7 dissent who made the very points you're making.

8 MS. HODGE: I, I --

9 QUESTION: And that court perhaps knows more  
10 about -- I'm sure it doesn't know more about the Virgin  
11 Islands than you do, but it, it certainly knows more  
12 about the Virgin Islands than we do.

13 MS. HODGE: The Court of Appeals in its  
14 decision said it need not reach the facts, and when it  
15 said it took a different view of the facts I think it  
16 meant it took a different view of the significance of  
17 the factual dispute, because the opinion of the majority  
18 says, we need not even decide which of the two  
19 contradictory affidavits are correct.

20 We need not concern ourselves with whether  
21 travel to the islands is difficult, with whether  
22 telephone communications are adequate. We simply see  
23 ourselves as bound by the decision in Frazier, because  
24 the goals that the Virgin Islands has said it is trying  
25 to achieve are similar to the goals that were mentioned

1 by the states in Frazier and Piper.

2 So the Court of Appeals chose not to look at  
3 the facts. It specifically says in its decision, we  
4 need not consider these factual disputes, we don't think  
5 they're material. We're simply bound by the outcome in  
6 Frazier.

7 QUESTION: Now, where do you find that in the  
8 opinion --

9 MS. HODGE: At the very outset of the  
10 opinion.

11 QUESTION: All right.

12 MS. HODGE: At the very beginning of the  
13 majority opinion.

14 QUESTION: And by the way, while I've got you  
15 interrupted, you, you no longer urge, I take it, that,  
16 that, that the very exercise of supervisory power was  
17 wrong?

18 MS. HODGE: It is our contention that, while  
19 the Third Circuit has supervisory power over the Virgin  
20 Islands, that it was incorrect in exercising it to  
21 strike this rule.

22 QUESTION: Yes. But didn't you urge below  
23 that they shouldn't do it -- that, that they were -- had  
24 no power to do it on these supervisory grounds?

25 MS. HODGE: No, we conceded to the Third

1 Circuit that they had supervisory power over the Virgin  
2 Islands in our brief, but contended that it should be  
3 exercised with a great degree of deference toward the  
4 Virgin Islands as a territorial court, and also that our  
5 factual setting was so different from that which was  
6 before the Court in Frazier that it was not correct to  
7 apply the supervisory power to strike our rule, relying  
8 upon that precedent.

9 QUESTION: Following up on one of Justice  
10 White's earlier questions, I take it the Court of  
11 Appeals did not set aside any finding of fact by the  
12 District Court as being clearly erroneous?

13 MS. HODGE: That's correct. It did not.

14 QUESTION: It just said it was -- that the  
15 disagreement was not an issue of material fact, so the  
16 disagreement was just those facts were not material,  
17 they thought. Is that it?

18 MS. HODGE: It could be read to mean that the  
19 facts were not material, but since they were all the  
20 facts that had to do with access and availability,  
21 presumably the significance of that was to say, even if  
22 a lawyer will have problems of availability, that is not  
23 material to the question of whether the supervisory  
24 power should be used.

25 The, the points that were in dispute in the

1 two affidavits were how closely travel access to the  
2 Virgin Islands approximated travel in other locations,  
3 how good telephone service had become --

4 QUESTION: How far is Puerto Rico?

5 MS. HODGE: I'm sorry, sir.

6 QUESTION: How far away is Puerto Rico?

7 MS. HODGE: Puerto Rico is approximately 40  
8 miles from the closest part of the Virgin Islands.

9 QUESTION: Do you have any Puerto Rican  
10 attorneys admitted to your bar?

11 MS. HODGE: No, we don't.

12 QUESTION: None at all?

13 MS. HODGE: None at all. And it -- and it  
14 would not, in our view, be useful to too closely  
15 analogize Puerto Rico and the Virgin Islands to the  
16 states which have contiguous borders, because while  
17 there is a relatively short number of miles between us,  
18 Puerto Rico is within and we are without the United  
19 States customs zone.

20 So when one travels from the Virgin Islands to  
21 Puerto Rico, he crosses customs, he crosses immigration,  
22 he must establish his citizenship, he's subject to  
23 border searches, and of course he's entering a  
24 commonwealth in which the language of the majority is  
25 Spanish, the law schools teach the law in Spanish, the

1 laws are written in Spanish and the courts are conducted  
2 in Spanish except for the federal court.

3 So our proximity is --

4 QUESTION: Is there any parallel to the state  
5 of Alaska?

6 MS. HODGE: There is some parallel in the  
7 sense that Alaska is quite distant from the rest of the  
8 contiguous United States.

9 But there is also the distinction that Alaska  
10 has such a large land mass of its own that when it  
11 compares a residency requirement with -- with our  
12 setting they have many lawyers, as the court there has  
13 pointed out, within the state who live further from a  
14 particular courthouse than do lawyers residing, for  
15 example, in the state of Washington. We have no  
16 companion situation to that.

17 QUESTION: Ms. Hodge, do you still defend the  
18 durational aspect of the residence requirement, the  
19 one-year durational requirement?

20 MS. HODGE: The position we have taken is that  
21 the durational residency requirement can only stand if  
22 the simple residency requirement is first found to be  
23 valid.

24 And if the simple residency requirement is  
25 valid, then the durational residency requirement is

1 clearly subject to a different kind of attack. But we  
2 believe that these Petitioners do not have standing to  
3 make that challenge, if the simple residency requirement  
4 is sustained.

5 We have conceded to the Court of Appeals, and  
6 do again before this Court, that the durational  
7 residency requirement is certainly more difficult to  
8 defend and is not addressed at the same concerns that  
9 support the simple residency requirement.

10 I'd reserve any minutes that I may have, if  
11 there are no further questions.

12 QUESTION: Very well, Ms. Hodge. Mr.  
13 Hitchcock?

14 ORAL ARGUMENT OF CORNISH F. HITCHCOCK  
15 ON BEHALF OF THE RESPONDENTS

16 MR. HITCHCOCK: Mr. Chief Justice, and may it  
17 please the Court:

18 This case concerns the validity -- of certain  
19 residency requirements for members in the bar of the  
20 District Court of the Virgin Islands.

21 And before discussing why we believe this  
22 restrictions are invalid, I think it's useful to point  
23 out what non-residents would have to do as a practical  
24 matter to be licensed there.

25 And I think it'll show that here, as in Piper,

1 Frazier, and Friedman, lawyers are not likely to seek  
2 membership unless they anticipate a regular and  
3 substantial practice in the Virgin Islands, and that  
4 these factors make it likely they will satisfy the  
5 professional obligations to the same extent as  
6 non-residents.

7 An applicant must take a two-day bar exam in  
8 the Virgin Islands in July, and even experienced lawyers  
9 must take it. There's no way of waiving in, as was the  
10 case in Friedman.

11 There's no review course, so a lawyer must  
12 travel to the Virgin Islands in order to study recent  
13 decisions, statutes, and become abreast of developments  
14 in the law.

15 QUESTION: I guess there's no question but  
16 what your clients are competent.

17 MR. HITCHCOCK: Yes. Our clients have taken  
18 and passed the bar examination, the character  
19 examination. They have done everything that is required  
20 of members of the bar except make the commitment to live  
21 there.

22 They are willing to -- they've done these  
23 things. They are willing to pay the \$600 a year in  
24 addition to bar membership obligations elsewhere. They  
25 have retained a partnership arrangement with an attorney

1 in the Virgin Islands, they've staffed the office, they  
2 have FAX machines, telephone machines.

3 And they also have clients who are willing to  
4 retain their services because of their particular  
5 expertise, which they do not believe they can obtain  
6 simply with island attorneys. Not that island attorneys  
7 are not competent, but it's a specialty, a synergy, that  
8 they think can be provided.

9 QUESTION: Are they willing to meet the pro  
10 bono requirements personally rather than through hired  
11 associates?

12 MR. HITCHCOCK: They will meet any obligations  
13 that are imposed on island residents in an even-handed  
14 and non-discriminatory manner.

15 And what I say by that, if there are  
16 exceptions that are made for island residents, they  
17 would like to have the same exceptions that are made  
18 there. And, and I think that is sufficient in this  
19 particular case.

20 QUESTION: Well, is a requirement of, of  
21 accepting four appointments a year non-discriminatory?

22 MR. HITCHCOCK: Let me answer that in this  
23 manner. Again, I think we have to parse it in terms of  
24 what Ms. Hodge said.

25 The four appointments are not all in the

1 District Court. As we pointed out in our brief, at note  
2 seven, there is at most one appointment a year in the  
3 District Court, and only the District Court has this  
4 no-substitutions preference.

5 The other three or so on an average occur in  
6 the territorial court, a trial court of limited  
7 jurisdiction, where there is not this type of practice.  
8 There may be generally four cases on an average, but  
9 lawyers in the Virgin Islands, in the territorial court,  
10 can send down an associate, can ask someone to  
11 substitute for them, and the system works.

12 It is only in the District Court that you have  
13 this preference. And to the extent, as Ms. Hodge  
14 indicated, there is flexibility in that system.

15 And that's one of the problems here. The  
16 briefs suggest that the no-substitutions practice is  
17 administered in a very rigid manner, that if one is  
18 recovering from open-heart surgery, or in depositions in  
19 the mainland, or traveling in Europe, that there are no  
20 exceptions made.

21 But I think Ms. Hodge's answer to your  
22 question earlier today, Justice Kennedy, suggested that  
23 it is more flexible and, to the extent there is  
24 exceptions made, the respondents may ask in appropriate  
25 circumstances.

1           But they're willing to do whatever is obliged,  
2 and as a practical matter, the no-substitutions practice  
3 applies only to the extent that they are called to act  
4 in District Court cases.

5           There are several factors that were alluded to  
6 in Ms. Hodge's argument that I would like to point out  
7 which suggest that this rule is not as carefully  
8 tailored to survive scrutiny under Piper or under  
9 Frazier.

10           First of all, as Justice Blackmun's question  
11 pointed out, the rule applies not simply to mainlanders  
12 but to lawyers in Puerto Rico who are only 40 miles  
13 away, and there are six airlines flying between Puerto  
14 Rico and the Virgin Islands on a daily basis. It's one  
15 of the best-served markets in terms of the frequency of  
16 flights.

17           QUESTION: (Inaudible) by declaring this rule  
18 unconstitutional on its face?

19           MR. HITCHCOCK: I think that it diminishes the  
20 argument. If there were less service I would still make  
21 the same --

22           QUESTION: I know, but that would just be  
23 arguing over breadth, which I'm not sure is applicable  
24 in cases like this.

25           MR. HITCHCOCK: Well, the court has indicated

1 in looking whether --

2 QUESTION: I mean, maybe as applied to some  
3 Puerto Rican it would be invalid, but I don't know that  
4 you've got much to do with that.

5 MR. HITCHCOCK: well, I think that the court  
6 has looked in privileges and immunities clause cases in  
7 terms of whether the restriction is over-inclusive or  
8 under-inclusive. And I think that as part of that  
9 analysis, it's, it's useful.

10 But I'd point out also, not only -- apart from  
11 Puerto Rico there are a number of other jurisdictions  
12 which have abolished this. Every state which is further  
13 away from the mainland than the Virgin Islands have done  
14 away with similar restrictions, as have every territory  
15 which are subject to the privileges and immunities  
16 clause, including Guam and the Northern Mariana Islands,  
17 which are on the other side of the international date  
18 line.

19 They are both subject to the same kind of --  
20 they both have the same kind of court system, a  
21 territorial court, a district court, and an appeal to a  
22 circuit court on the mainland. They are all subject --

23 QUESTION: Did Guam do it after this Court's  
24 Frazier decision?

25 MR. HITCHCOCK: The Superior Court of Guam

1 abolished its rule after Piper. The -- I believe that  
2 the -- the Superior Court of Guam is the territorial  
3 court, and unlike the Virgin Islands, it licenses  
4 lawyers separately.

5 QUESTION: So that would be the relevant court  
6 for our -- for purposes of our inquiry?

7 MR. HITCHCOCK: Well, as well as the District  
8 Court of Guam, which is similar, it's an Article I  
9 court.

10 But the District Court of Guam, whose rule we  
11 quote in our brief, does not have this restriction. The  
12 District Court of Guam simply says that anyone can be a  
13 member if they're a member of the Guam territorial bar.

14 But if you want to practice there, you need to  
15 have an active lawyer on the island who will be  
16 available, not simply as a mail drop but to handle the  
17 cases in a full manner.

18 And your question, Mr. Chief Justice, points  
19 to one of the things that I want to emphasize here. The  
20 District Court of the Virgin Islands is a hybrid court.  
21 It is not simply a federal district court, and these  
22 rules do not simply affect people who want to try  
23 federal cases.

24 Because it acts as the equivalent of a state  
25 supreme court, or the highest territorial court, it

1 excludes lawyers from doing everything else that lawyers  
2 do without litigating.

3 QUESTION: I'd like to get back, if I could,  
4 to my question about Guam. I'm not sure you fully  
5 understood it.

6 MR. HITCHCOCK: Okay.

7 QUESTION: In the Superior Court they do have  
8 a restriction, or they did have similar to that imposed  
9 by the Virgin Islands?

10 MR. HITCHCOCK: The Superior Court of Guam  
11 did. The Superior Court of Guam abolished that  
12 restriction after Piper, because the Superior Court of  
13 Guam, like the District Court here, is subject to the  
14 privileges and immunities clause, under the Organic  
15 Act.

16 QUESTION: So it's a fair inference the  
17 Superior Court did it not because it wanted to but  
18 because it thought it was required to by the decisions  
19 of this Court.

20 MR. HITCHCOCK: It believed that it was bound  
21 by the decision of this Court, as did every other state  
22 court which had such a restriction, and every other  
23 territorial court which had such a restriction, even  
24 those that are considerably further away from the  
25 mainland than are the Virgin Islands.

1           The Virgin -- all that the Third Circuit did  
2 here was to bring the Virgin Islands in line with every  
3 other jurisdiction that is subject to the privileges and  
4 immunities clause.

5           QUESTION: Of course, it may have been more  
6 cost-free for the courts of Guam to do it. I don't know  
7 that a lot of lawyers are clamoring to practice in  
8 Guam. I would think that the Virgin Islands is a much  
9 more amenable place to practice.

10          MR. HITCHCOCK: Well, that may depend on one's  
11 perspective. I mean, it might be -- there are a number  
12 of reasons why one may seek membership in Guam, and I  
13 understand, Justice Scalia, that there are mainland  
14 lawyers who have been licensed in the Guam bar.

15          Pacific rim is a fast-growing territory.  
16 There may be a number of practical reasons for lawyers  
17 to be licensed there to handle business. They may have  
18 --

19          QUESTION: My only point is I'm not sure the  
20 disincentives are equivalent in the Guam courts and the  
21 Virgin Islands courts. The language difficulties may,  
22 may not be equivalent.

23          QUESTION: Guam is further away.

24          MR. HITCHCOCK: Guam is further away, but  
25 again neither the Superior Court nor the District Court

1 see the need for these restrictions. And in terms of  
2 language difficulties --

3 QUESTION: Is that fair to say the Superior  
4 Court doesn't see the need for these restrictions, when  
5 they had them but changed them only in response to our  
6 Piper decision?

7 MR. HITCHCOCK: Well --

8 QUESTION: Is that an accurate statement?

9 MR. HITCHCOCK: I would clarify the statement,  
10 Mr. Chief Justice --

11 QUESTION: Yes, I think you should.

12 MR. HITCHCOCK: That they believe themselves  
13 bound. I'm not aware of any difficulties that they've  
14 had, which would suggest that reversion to the  
15 appropriate -- the former system would be appropriate.

16 But in response to the questions also of  
17 Justice Marshall and Justice Scalia, English is spoken  
18 in the Virgin Islands. It is the language. It is  
19 unlike Puerto Rico, where English is required to be used  
20 in the District Court but Spanish is required to be used  
21 in the territorial court, the, the Supreme Court of  
22 Puerto Rico.

23 The difference is here -- I think if anything  
24 the differences are cutting more in our favor here than  
25 in Pacific territories. But --

1 QUESTION: Excuse me. English is not required  
2 to be used in the territorial courts, but Spanish may be  
3 used if litigants want to use it. Isn't that right?

4 MR. HITCHCOCK: In, in, in Puerto Rico?

5 QUESTION: No, in the Virgin Islands.

6 MR. HITCHCOCK: Oh, no -- I know that English  
7 is the only language which is used -- Spanish is the  
8 official language in the Puerto Rico court system. But  
9 English by statute, in 28 USC, is the official language  
10 in federal courts in Puerto Rico.

11 I am aware that English is the only language  
12 used in the territorial and the district court in the  
13 Virgin Islands. I don't -- I'm not sure whether there  
14 is a statutory requirement.

15 I mean, the simple point is that the language  
16 -- the English language is in use there, even though it  
17 is not -- you've got to be bilingual in Puerto Rico.

18 QUESTION: I must have misunderstood Ms.  
19 Hodge. I thought she said something different.

20 MR. HITCHCOCK: No. One must be bilingual in  
21 Puerto Rico, but English is the only language that -- I  
22 mean, there may be translators if somebody speaks only  
23 Spanish, but English is the language of record in the  
24 territorial and the District Court of the Virgin  
25 Islands.

1 I'd like to discuss the Piper case, which I  
2 believe provides the framework for analyzing it, this  
3 particular case, and although the Third Circuit decided  
4 this case in an exercise of its supervisory authority,  
5 we believe that the case can properly be addressed  
6 either under Piper or under the supervisory authority.

7 QUESTION: Well, do you -- are you defending  
8 the, not only the result but the approach of the Court  
9 of Appeals?

10 MR. HITCHCOCK: We are, Justice White. We  
11 believe that the Third Circuit --

12 QUESTION: You think the facts are just  
13 irrelevant?

14 MR. HITCHCOCK: It's not that the facts are  
15 irrelevant, it's that the facts as a matter of law have  
16 been addressed by those two decisions. And I want to  
17 point out --

18 QUESTION: Well, I know, but do you think --  
19 you, you apparently agree then that the differences in  
20 views about transportation and communications need, need  
21 not be decided in resolving this case?

22 MR. HITCHCOCK: I don't think they have to be  
23 decided because I think --

24 QUESTION: Why not?

25 MR. HITCHCOCK: As a matter of law under Piper

1 they were addressed. And let me say specifically the  
2 point of that decision that I'm relying upon.

3 The argument was made in Piper that this rule  
4 will allow not only lawyers from Vermont or Maine, but  
5 lawyers from across the country. And the Court, this  
6 Court, considered that point, and considered, as we read  
7 the decision, the possibility of limiting it just to an  
8 adjacent jurisdiction as Your Honors --

9 QUESTION: Well, to put it another way, do you  
10 think that the availability of communications and  
11 transportation is a relevant consideration in things  
12 like this or not?

13 MR. HITCHCOCK: I think that under Piper that  
14 question is foreclosed, where the Court said --

15 QUESTION: So it wouldn't make any difference  
16 in this case as far as you're concerned if the only way  
17 to get to the Virgin Islands from the United States was  
18 in a rowboat?

19 MR. HITCHCOCK: As a matter of law after Piper  
20 that would be our answer. And, and I would follow that  
21 up, if the trail --

22 QUESTION: Pretty peculiar --

23 MR. HITCHCOCK: Excuse me?

24 QUESTION: Is that -- is that a fair reading  
25 of Piper?

1 MR. HITCHCOCK: I think -- the reading of  
2 Piper that is pertinent is where the Court said that if  
3 a lawyer lives at a great distance from the licensing  
4 jurisdiction, that is not a basis for excluding the  
5 lawyer from being licensed. It may be a basis for  
6 requiring local counsel.

7 QUESTION: Well, that may be so. So by --  
8 that doesn't say that, if he lives a great distance and,  
9 and there's no way of his getting here inside of a week,  
10 that's irrelevant. It didn't say that.

11 MR. HITCHCOCK: It didn't say that explicitly,  
12 but I think the reasoning here -- and, and if I may, I,  
13 I would like to point to the record, what we have in the  
14 record here is really nothing as substantive as, or  
15 solid as, Ms. Hodge suggested.

16 The evidence on --

17 QUESTION: So you say, you say this evidence  
18 is relevant, it's just that it -- it isn't meaningful  
19 enough?

20 MR. HITCHCOCK: It's a two-part answer. First  
21 of all, I think it's foreclosed under the analysis about  
22 distance in Piper.

23 But secondly, even if it is relevant in this  
24 instance, the respondent -- the Petitioners have not  
25 provided enough evidence to sustain their burden under

1 the privileges and immunities clause.

2 QUESTION: Well, the Court of Appeals didn't  
3 decide that.

4 MR. HITCHCOCK: The Court of Appeals --

5 QUESTION: They just put the evidence aside.

6 MR. HITCHCOCK: I, I don't think that's really  
7 an accurate characterization.

8 I think the Court of Appeals considered the  
9 arguments, and they didn't find that they were  
10 sufficient in this particular case, and the Court of  
11 Appeals, as your earlier question to Ms. Hodge  
12 indicated, travels to the Virgin Islands twice a year.

13 The judges sit down there every December and  
14 April, they're familiar --

15 QUESTION: Well, but that doesn't entitle a  
16 court of appeals to redo facts found by the District  
17 Court, or to decide the thing without any factual  
18 findings.

19 MR. HITCHCOCK: I would answer the question  
20 this way, Mr. Chief Justice.

21 There were no findings here. This case was  
22 submitted on cross motions for summary judgment. The,  
23 the affidavits which the Petitioners --

24 QUESTION: Well, let me follow the procedural  
25 aspect one more time. Cross motions for summary

1 judgment, the District Court granted the --

2 MR. HITCHCOCK: Petitioners.

3 QUESTION: The Petitioners. And the Court of  
4 Appeals reversed, in effect said, your client should  
5 have gotten summary judgment.

6 MR. HITCHCOCK: Correct.

7 QUESTION: So that means that the affidavits  
8 favorable to the Petitioners have to be considered as  
9 true.

10 MR. HITCHCOCK: They have to be considered as  
11 true --

12 QUESTION: Okay.

13 MR. HITCHCOCK: But in terms --

14 QUESTION: Then the Court of Appeals had no  
15 business finding any facts at all, if it's -- on cross  
16 motions for summary judgment, each one is a question of  
17 law.

18 MR. HITCHCOCK: That's correct. But let's  
19 look at the facts that were put forward, because they  
20 really were not facts, as such. They were really  
21 impressions.

22 In the affidavit filed by Mr. Barnard, there  
23 are two sentences, two sentences in the entire affidavit  
24 about air service. And what they said was the air  
25 service has improved over the last several years -- I'm

1 sorry, that was the phone service.

2 But that reservations may be unavailable for  
3 commercial flights for protracted periods of time.  
4 There were several sentences on phone service where they  
5 say substantially improved, but it's significantly less  
6 reliable than that normally expected in continental  
7 United States.

8 The bar association president's affidavit said  
9 not one word about airline service, and simply described  
10 the telecommunications systems as erratic, impaired by  
11 static, echoes, transmission gaps.

12 QUESTION: But when you talk about the phone  
13 service, did anybody talk about the phone service  
14 between St. Croix and St. John and St. Thomas?

15 MR. HITCHCOCK: That was not --

16 QUESTION: It is not among the best.

17 MR. HITCHCOCK: That was not specifically  
18 addressed.

19 But I would point in response to, I guess,  
20 initially Justice White's question and the Chief  
21 Justice's question, the affidavits -- I think the Court  
22 of Appeals could find that the affidavits here are not  
23 enough to justify an award of summary judgment much less  
24 to deny the summary judgment motion that the Respondents  
25 filed and forced the issue to trial.

1                   And while we're on the --

2                   QUESTION: But to say the -- you have to say  
3 the affidavits raise, raise no triable issue of fact and  
4 that your clients were entitled to judgment as a matter  
5 of law, to do what the Third Circuit did.

6                   MR. HITCHCOCK: Correct. But while we're on  
7 the area of the adequacy of service, I think it's  
8 important here not simply to focus on the District  
9 Court's opinion in this case, but to go back a few years  
10 to the case we cited, Tradewinds v. Citibank, where the  
11 same exact issue was at issue, was involved.

12                   The issue -- the legal issue there was whether  
13 a national bank could be sued only in jurisdiction where  
14 it was chartered, or whether it could be sued anywhere  
15 where it had a branch office.

16                   And the District Court, the same district  
17 judge who presided over this case, decided that it was  
18 perfectly permissible to let the company be sued in the  
19 Virgin Islands, and it cited tremendous advances in  
20 terms of airline service, in terms of  
21 telecommunications, and in terms of data processing.

22                   It simply cannot be said on this record, and  
23 if one looks at the judicial pronouncements previously,  
24 that the service is good enough to permit mainland  
25 clients to come down to the Virgin Islands and be sued,

1 that the phone service is good enough to let them come  
2 down, but there is simply not enough room on the plane  
3 for mainland lawyers to come down, or the phones don't  
4 work if it's a mainland lawyer who wants to call down to  
5 the islands.

6 And I'd put something else in terms of the  
7 adequacy of service. This rule does not prohibit Virgin  
8 Islands lawyers from engaging in practice on the  
9 mainland.

10 They can litigate cases or represent clients  
11 in New York or Virginia or Louisiana or New Hampshire,  
12 and the rule would seem to assume that objective  
13 criteria, such as the availability of airline seats, the  
14 adequacy of telecommunications, work sufficiently well  
15 that they will get back and they can communicate if they  
16 need to.

17 QUESTION: What that -- those problems are  
18 problems for the mainland jurisdictions to consider. I,  
19 I suppose if we had before us a case where Maine tried  
20 to exclude from practice lawyers who were admitted only  
21 in the Virgin Islands, then, then we might have to  
22 confront that problem.

23 I guess the state of Maine could well come in  
24 and say, in light of the terrible plane service and  
25 telecommunications with the Virgin Islands, though we're

1 willing to let people here from all other states and  
2 territories, not from the Virgin Islands.

3 MR. HITCHCOCK: It works both ways, Justice  
4 Scalia, for this reason. I mean, to the extent that the  
5 justification is based on the idea that you need to be  
6 able to handle cases directly in the Virgin Islands, and  
7 you need to communicate directly, the rule assumes that  
8 anyone who is practicing in Maine will be able to  
9 satisfy his or her professional obligations in the  
10 Virgin Islands as well, that one can travel to the  
11 mainland and still come back if one needs to.

12 And our point is that there's simply no reason  
13 for assuming that only Virgin Islands lawyers will be  
14 conscientious and come back to do their duties, but not  
15 mainland lawyers who want to divide their practice --  
16 well, it is a concern not simply of Maine but also of  
17 the Virgin Islands as well, again to the extent that  
18 it's premised on the idea about adequacy of, of seats  
19 and the like.

20 QUESTION: (Inaudible) addressed to the air  
21 and communications services?

22 MR. HITCHCOCK: There was, Justice White. Mr.  
23 De Vos, who is one of the respondents here, submitted a  
24 rather detailed affidavit based upon his travel to the  
25 Virgin Islands on a regular basis for 20 months.

1 He put in objective evidence showing that  
2 there are four airlines providing jet service to the  
3 Virgin Islands from the mainland.

4 QUESTION: So I take it you think the District  
5 Court was certainly out of bounds in, in making these  
6 factual observations without a trial?

7 MR. HITCHCOCK: I think the District Court was  
8 not allowed to make these findings -- they're not  
9 findings -- these observations when the overwhelming  
10 weight of the evidence --

11 QUESTION: I know, but it was on a summary  
12 judgment. And there were -- certainly the affidavits  
13 posed triable issues of fact.

14 MR. HITCHCOCK: I think under this Court's  
15 decisions in Anderson v. Liberty Lobby and Celotex that  
16 -- v. Catrett -- that it's not enough simply for an  
17 opposing party to put in an affidavit saying, service is  
18 erratic, or airline service is booked during some time  
19 of the year, when there is --

20 QUESTION: But even if it was, there was a  
21 counter-affidavit that denied it.

22 MR. HITCHCOCK: There was a counter-affidavit  
23 that is much more detailed, that spells out how many  
24 flights there are, that spells out there were nine  
25 flights a day during the high season, five or six --

1 QUESTION: But again, that isn't what the  
2 Third Circuit went off on at all, the Anderson or  
3 Celotex or something like that that one party's  
4 affidavits in support of the motion were adequate, the  
5 others weren't. The Third Circuit just treated it as if  
6 it were finding facts.

7 MR. HITCHCOCK: I think the Third Circuit was  
8 faithfully applying this Court's decisions in Piper and  
9 Frazier that a lawyer's great distance from the  
10 jurisdiction is not an adequate basis for saying that  
11 the lawyer is not fit to practice law, is not fit to be  
12 licensed there.

13 And to the extent that the Petitioners tried  
14 to say, things are different here, things are so bad  
15 down here that we can't be held to the same standard,  
16 the Court of Appeals was justified in saying, they  
17 haven't raised a triable issue, they haven't put forward  
18 anything to suggest why they are different or why they  
19 should be unique.

20 QUESTION: But then that's got to be on the  
21 basis that communications difficulties, transportation  
22 difficulties, simply don't matter, as you say under  
23 Piper.

24 MR. HITCHCOCK: I think they don't matter  
25 under Piper, and I think in the ultimate, if things were

1 really as bad as the Petitioners are saying, I think the  
2 place to be making that argument is not before this  
3 Court but across the street in Congress in terms of  
4 determining the extent to which the Virgin Islands  
5 should be held to the same standards as the mainland.

6 And that's important for this reason. The  
7 inclusion of the privileges and immunities clause in the  
8 Organic Act was a deliberate step that Congress took in  
9 1968.

10 Up to that point, the privileges and  
11 immunities clause didn't apply. There would be no  
12 question that this sort of restriction would be valid.  
13 But after 1968, Congress extended this provision, and we  
14 think it's significant for this reason.

15 Several cases from this Court, *Mullaney v.*  
16 *Anderson* in 1952, and other cases involving the Alaska  
17 territory, regarded the presence or absence of the  
18 privileges and Immunities clause as important, because  
19 it indicates Congress' judgment about how isolated a  
20 territory is, how much discretion and latitude a  
21 territorial judgment should have in being able to decide  
22 whether to favor its own residents.

23 There may be good reasons for a territory to  
24 decide, we want to favor our local residents, or give  
25 preferences to people who move here, because it's kind

1 of rugged, because we want to give people a chance to  
2 move in or an incentive to move in, to stay, to populate  
3 the territory, and to develop the territory if one day  
4 it might come forward and be ready for state -- for  
5 statehood.

6 But the Court found in Mullaney that it was  
7 significant that Congress had enacted the privileges and  
8 immunities clause with respect to Alaska, and it brought  
9 Alaska into line with the practice in other states.  
10 That was, as I recall, Fisherman's case, such as Toomer  
11 against Witsell.

12 And I think that that fact helps to put this  
13 case into the proper perspective. Congress, which has  
14 plenary authority in this area under Article IV, Section  
15 3, looked at this issue about to what extent the Virgin  
16 Islands ought to be similar to the other territories in  
17 the mainland, and it decided in 1968 in the amendments  
18 to the act that the Virgin Islands are ready. The 1968  
19 is a home rule statute.

20 It gives the Virgin Islands the right to elect  
21 a territorial governor and lieutenant governor, as they  
22 had previously been able to elect a territorial  
23 legislature, and it extended constitutional provisions  
24 to the Virgin Islands consistent with their status as a  
25 territory, and by that I mean consistent with the fact

1 that citizens of territories don't vote in national  
2 elections.

3 In our view, it reflects Congress' judgment  
4 that with political rights come political  
5 responsibilities, including the responsibility of  
6 treating citizens on a non-discriminatory basis,  
7 citizens of other states.

8 I think it's useful to point out as well that  
9 this type of residency restriction is not simply limited  
10 to the legal profession or to lawyers. As the amicus  
11 brief filed by Mr. Hoffman and Ms. Weatherly indicate,  
12 there are a number of other similar rules on the books  
13 affecting a number of other professions.

14 Podiatrists, electricians, plumbers,  
15 architects, engineers, land surveyors, and taxicab  
16 drivers, all are subject to residency requirements if  
17 they seek to practice their profession in the Virgin  
18 Islands. And we submit that that also casts doubt on  
19 the, the argument that this rule is specifically and  
20 narrowly tailored to deal with a specific concern.

21 I wanted to respond also to one point that  
22 Justice Stephens made earlier on in terms of the  
23 question to Ms. Hodge about are lawyers disbarred.

24 The opinion issued in the District Court  
25 indicates, suggests perhaps more accurately, that

1 lawyers who refuse to take their share of cases may be  
2 excluded from practicing in District Court, but it does  
3 not suggest they may be totally disbarred and forbidden  
4 from engaging in any kind of office practice or practice  
5 that does not involve litigation.

6 In this case, the Petition -- the Respondents  
7 are willing to do whatever is obliged of any other  
8 resident requirement -- of any other residents of the  
9 Virgin Islands, and we submit that the case --

10 QUESTION: With respect to your response to  
11 the question I asked, Ms. Hodge said though there have  
12 been lawyers disbarred for this reason.

13 MR. HITCHCOCK: I'm not sure what she meant by  
14 this -- the first thing she said was they were excluded  
15 from practice. I don't know whether that --

16 QUESTION: I see. You say she meant, might  
17 have meant just to say excluded from trial practice in  
18 the District Court.

19 MR. HITCHCOCK: Excluded from District Court  
20 practice as opposed to practicing in the territorial  
21 court where there's not the --

22 QUESTION: And I gather your client would  
23 probably be delighted to be excluded from that, if he  
24 doesn't want to take these cases.

25 QUESTION: But this rule not only applies to

1 people who want to go to court, but it applies to  
2 anybody who just wants to practice law in the Virgin  
3 Islands, doesn't it?

4 MR. HITCHCOCK: That is correct. The  
5 residence requirement applies to anybody who wants to  
6 write wills, draft contracts, offer opinion letters --

7 QUESTION: Or to offer services from the  
8 continental United States to residents of Puerto Rico,  
9 or residents of Virgin Islands.

10 MR. HITCHCOCK: Anyway, yes. And that, I  
11 think, is another reason -- most of the -- most of the  
12 focus here is on litigation concerns, but the rule is  
13 much more exclusionary.

14 In fact, it's more exclusionary than the rule  
15 in Piper which said simply that you have to live in the  
16 state on the day you're admitted. And it's also more  
17 restrictive than the rule in Frazier which said that  
18 non-residents can open an in-state office. And that's  
19 all they need. The respondents here have done those  
20 sorts of things, but they are still being denied a  
21 license.

22 If the Court has no further questions, we  
23 would ask that the judgment of the Third Circuit be  
24 affirmed.

25 QUESTION: Thank you, Mr. Hitchcock. Ms.

1 Hodge, you have three minutes remaining.

2 REBUTTAL ARGUMENT OF MARIA TANKENSON HODGE

3 MS. HODGE: Thank you. The reason that the  
4 Virgin Islands rule of residence is broadly applicable,  
5 not only to litigators, is that all lawyers who practice  
6 in the Virgin Islands are by definition litigators,  
7 since all lawyers take their share of appointments and  
8 therefore, whether they might have fashioned themselves  
9 a specialty that didn't include any litigation or not,  
10 in fact we all are litigators, at least part time.

11 Our rule is criticized as being somehow  
12 broader than the rule at issue in Piper because it  
13 applies and requires not only that you live in the  
14 jurisdiction at the time you're admitted but that you  
15 continue to live there throughout the duration of your  
16 active practice.

17 But it's my understanding that in the former  
18 opinions the states have been criticized for having  
19 rules that only require you to be a resident at the time  
20 of your admission and allowed you to then surrender your  
21 residency but keep your active practice.

22 In the Virgin Islands, once admitted, if you  
23 move away from the territory you become an inactive  
24 member of the bar. You do not remain active because the  
25 court holds the view that you cannot fulfill your

1 responsibilities to the court to be present when needed,  
2 to remain informed on Virgin Islands law, and to fulfill  
3 your responsibilities if you don't live in the  
4 territory.

5           It is not the case, and we've made this point  
6 before but I felt the need to repeat it in response to  
7 the argument, that the Virgin Islands contends that  
8 applicants for admission before you are not, or at least  
9 were not at the time they passed the Virgin Islands bar,  
10 competent lawyers.

11           But in terms of competency there is a concern  
12 of the Virgin Islands that wasn't mentioned in earlier  
13 arguments, and that is that unlike the law of New  
14 Hampshire or the law of Virginia or the law of  
15 Louisiana, our law is not readily disseminated across  
16 the United States.

17           The decisions of the courts of the Virgin  
18 Islands for the most part, for at least a year and a  
19 half, are available only in the District Court  
20 libraries, and photocopies, so the resident bar that has  
21 to go to the District Court library and use an index  
22 system to do their research on current decisions.

23           The same is true of statutes passed by the  
24 Virgin Islands legislature. None of the major  
25 publication systems of legal research include Virgin

1 Islands reference materials.

2 We're not in Westlaw, we're not in LEXIS,  
3 we're simply just not available across the country. And  
4 the view of a nationwide bar that can readily cross the  
5 boundaries of the state and provide specialized service  
6 to clients may be a very good view.

7 But it does not necessarily apply to a small  
8 territory whose laws are unique to itself. We're not,  
9 as you know, covered by every federal statute. We're  
10 not even covered by every provision of the  
11 Constitution.

12 QUESTION: Don't you think that you and your  
13 opponent have different views of the facts with respect  
14 to communications and --

15 MS. HODGE: Yes. Quite different views.

16 QUESTION: And did the -- did the -- and those  
17 different views were reflected in the counter-affidavits  
18 that were filed --

19 MS. HODGE: Yes, they were.

20 QUESTION: Well, what -- how come it wasn't at  
21 trial then?

22 MS. HODGE: The District Court, I think, in,  
23 in candor, felt that it knew the facts so well that it  
24 was in a position to, in effect, take judicial notice of  
25 the correct version of the facts.

1 QUESTION: Well, that's a strange way of  
2 proceeding for summary judgment --

3 MS. HODGE: I quite agree, and it was  
4 suggested before the Court of Appeals that perhaps the  
5 more correct remedy would be to remand for a trial to  
6 decide the factual disputes.

7 The Court of Appeals declined to do that and  
8 simply held --

9 QUESTION: Well, the Court of Appeals just  
10 didn't seem to think they, it made much difference.

11 MS. HODGE: The Court of Appeals evidently  
12 shared Mr. Hitchcock's view that once Frazier was  
13 decided it need not concern itself with the special  
14 difficulties associated with practicing in a  
15 jurisdiction, that those concerns of the Virgin Islands  
16 had been eliminated from legitimate consideration by the  
17 Court's decision.

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
19 Hodge. The case is submitted.

20 (Whereupon, at 1:44 o'clock p.m., the case in  
21 the above-entitled matter was submitted.)

22  
23  
24  
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 87-1939 - GEOFFREY W. BARNARD, ETC., Petitioner V. SUSAN ESPOSITO  
THORSTENN, ET AL.; and

NO. 87-2008 - VIRGIN ISLANDS BAR ASSOCIATION, Petitioner V. SUSAN  
ESPOSITO THORSTENN, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

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