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PROCEEDINGS BEFORE

**THE SUPREME COURT  
OF THE  
UNITED STATES**

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SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

CAPTION: SAUDI ARABIA, KING FAISAL SPECIALIST  
HOSPITAL, AND ROYSPEC, Petitioner v.  
SCOTT NELSON, ET UX.

CASE NO: 91-522

PLACE: Washington, D.C.

DATE: Monday, November 30, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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SAUDI ARABIA, KING FAISAL :  
SPECIALIST HOSPITAL AND ROYSPEC, :  
Petitioner :  
v. : No. 91-522  
SCOTT NELSON, ET UX. :  
- - - - -X

Washington, D.C.  
Monday, November 30, 1992

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:02 a.m.

APPEARANCES:

EVERETT C. JOHNSON, JR., ESQ., Washington, D.C.; on behalf  
of the Petitioner.

JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor  
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behalf of the United States, as amicus curiae  
supporting the Petitioner.

PAUL S. STEVENS, ESQ., Washington, D.C.; on behalf of the  
Respondents.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in number 91-522, Saudi Arabia, King  
5 Faisal Specialist Hospital and Royspec v. Scott Nelson.

6 Mr. Johnson.

7 ORAL ARGUMENT OF EVERETT C. JOHNSON, JR.

8 ON BEHALF OF THE PETITIONER

9 MR. JOHNSON: Mr. Chief Justice, and may it  
10 please the Court:

11 The question before the Court in this case is  
12 whether United States courts have jurisdiction to review  
13 respondent's allegations that while working for a  
14 government-owned hospital in Saudi Arabia, he was  
15 wrongfully arrested, imprisoned and tortured by agents of  
16 the Government of Saudi Arabia. The answer to this  
17 question must be no.

18 Nevertheless, the United States Court of Appeals  
19 for the Eleventh Circuit in this case held that clause 1  
20 in the commercial activity exception in the Foreign  
21 Sovereign Immunities Act conferred jurisdiction over  
22 respondent's claims. In so holding, the court of appeals  
23 made two distinct findings: first, that each and every  
24 cause of action in the complaint was based upon commercial  
25 activity; and second, that that commercial activity had

1 substantial contact with the United States.

2 We submit that the court of appeals should be  
3 reversed on both grounds. Nevertheless, reversal of the  
4 court of appeals on either ground requires dismissal of  
5 the complaint in this case.

6 The court of appeals held that a cause of action  
7 is based upon commercial activity when the acts complained  
8 of bear a jurisdictional nexus to that activity. That is  
9 to say, the acts complained of themselves need not be  
10 commercial. They must simply exist in some poorly defined  
11 proximity to some other activity of the foreign sovereign  
12 state which is commercial.

13 In so --

14 QUESTION: Do you deny that there was any  
15 commercial activity in this country by your client?

16 MR. JOHNSON: Your Honor, the recruitment  
17 activity in this country by the client, if the acts of its  
18 agent, HCA, are to be attributed to it, would be  
19 commercial activity. We think it lacks --

20 QUESTION: Just recruiting, hiring is a  
21 commercial activity.

22 MR. JOHNSON: Recruiting and hiring in this case  
23 is a commercial activity I believe, Your Honor. The  
24 legislative history of the act suggests that certain kinds  
25 of hiring may not be commercial activity. However, in

1 this case, we believe -- and I believe the district court  
2 found --

3 QUESTION: So, it's just as though the -- Saudi  
4 Arabia sent its own employees over here to recruit?

5 MR. JOHNSON: No, I think it's not that, Justice  
6 White. There is a question, which the Court would need to  
7 reach if it were to find that, in the abstract, the  
8 activity in the United States could reach the legal  
9 standard of substantial contact, whether or not the acts  
10 of HCA, which was the Cayman corporation which actually  
11 did the recruiting in the United States, could be  
12 automatically attributed to Saudi Arabia. The district  
13 court expressly reserved that question because it found  
14 that the contacts, even if attributed to Saudi Arabia --

15 QUESTION: So, what's your view on that, whether  
16 or not the acts of the -- of your agent can be attributed  
17 to the government?

18 MR. JOHNSON: I believe they should not be  
19 automatically attributed, Your Honor.

20 QUESTION: Well, how about in this case?

21 MR. JOHNSON: I believe they should not be  
22 attributed in this case, and let me elaborate on that if I  
23 may.

24 HCA, to be sure, entered into a contract with  
25 the Government of Saudi Arabia to recruit expatriate

1 personnel from the United States and around the world.  
2 However, the decisions with respect to the recruiting and  
3 the obligations to comply with U.S. law and all other laws  
4 were expressly reserved to HCA. We think this is the kind  
5 of circumstance where not only as a matter of substantive  
6 law should the acts of the agent not --

7 QUESTION: Well, was the contract signed in  
8 Miami?

9 MR. JOHNSON: Your Honor, I believe the --

10 QUESTION: The contract of employment?

11 MR. JOHNSON: The contract of employment Mr.  
12 Nelson alleges was signed in Florida, yes, sir.

13 QUESTION: Well, and who signed it for -- there  
14 just wasn't one signature, was there?

15 MR. JOHNSON: That's correct. It was signed --

16  
17 QUESTION: Who signed it?

18 MR. JOHNSON: It was signed on behalf of the  
19 hospital by a gentleman by the name of Donald LaFeu who  
20 was an employee of HCA.

21 QUESTION: So, did he -- and HCA had authority  
22 to sign that contract?

23 MR. JOHNSON: They did, Your Honor.

24 The Eleventh Circuit's construction of the based  
25 upon language is critical to this Court's determination.



1 We think the Eleventh Circuit's construction is wrong for  
2 two reasons. First, it ignores the plain language of the  
3 statute, and second, it obliterates the restrictive theory  
4 of foreign sovereign immunity which the statute was  
5 intended to codify.

6 In its common sense and most straightforward  
7 meaning, based upon refers to the gravamen or the  
8 foundation of the complaint. Thus, in the most common  
9 sense interpretation, the bases of a complaint are the  
10 acts complained of. It does not naturally or inherently  
11 inquire of a nexus or connection to other activity. The  
12 Eleventh Circuit's construction in this case,  
13 nevertheless, imports the nexus or connection inquiry into  
14 the based upon language. We think this is plainly  
15 inconsistent with the most common sense and  
16 straightforward, in fact, simple meaning of the phrase  
17 based upon.

18 To illustrate --

19 QUESTION: May I just ask this clarifying  
20 question? If there were a breach of contract, the  
21 contract having been entered into in the United States and  
22 the breach occurring in Saudi Arabia, would that -- an  
23 action based on that breach be based upon the contract or  
24 be based upon commercial activity in the United States  
25 within your view?

1 MR. JOHNSON: Justice Stevens, if I may break  
2 that into two parts. Assuming, of course, that the breach  
3 of contact -- contract was not based upon the same conduct  
4 in question here, it could be. Nevertheless, Saudi Arabia  
5 would still --

6 QUESTION: Well, say they didn't pay his salary.

7 MR. JOHNSON: That could be based upon  
8 commercial activity, yes, Justice Stevens. In this case,  
9 there still wouldn't be sufficient contact with the United  
10 States, the second part of the inquiry, to justify the  
11 exercise of jurisdiction over that breach. We would  
12 not --

13 QUESTION: Let me be sure I understand your  
14 answer. You're saying it would be based upon action, but  
15 there would be no jurisdiction because it was not -- it  
16 had no impact on the United States.

17 MR. JOHNSON: Yes. Not so much impact, because  
18 everyone concedes in this case it's a clause 1 case, which  
19 refers to substantial contact with the United States.

20 QUESTION: Is your position on that particular  
21 question the same as the United States', do you know?

22 MR. JOHNSON: I'm not sure the United States has  
23 taken a formal position on the substantial contact inquiry  
24 in this case because it is, properly understood, a much  
25 more fact-specific inquiry. I don't think they disagree

1 with us, but I'm not sure they have taken a formal  
2 position.

3 QUESTION: I read one footnote in their brief as  
4 suggesting there would be jurisdiction in the case I  
5 posed.

6 MR. JOHNSON: I'm sorry, Justice.

7 QUESTION: I say I read one footnote in their  
8 brief as seeming to me to suggest there would be  
9 jurisdiction in their view in the case I suggest.

10 MR. JOHNSON: Well, I think --

11 QUESTION: Do you disagree with that?

12 MR. JOHNSON: I -- well, it depends on the  
13 underlying facts. If we import the facts of this case,  
14 and that is, take the same level of activity in the United  
15 States which respondent refers to as his recruitment in  
16 the United States and the signing of the employment  
17 contract in the United States, yes, sir, that would not be  
18 enough contact with the United States in this case to  
19 justify jurisdiction.

20 QUESTION: Do you --

21 QUESTION: Even though it's based upon a  
22 commercial activity in the United States.

23 MR. JOHNSON: Well, of course, the in the United  
24 States is the question. The statute itself defines  
25 carried on in the United States to mean having contact

1 with the -- having substantial contact with the United  
2 States. And if substantial contact is to be given its  
3 plain meaning, that must mean more than trivial or minimum  
4 contact. So, in our view the contact in the United States  
5 has to be more than transitory or a precursor contact to  
6 the commercial activity.

7 QUESTION: Do you think commercial activity -- a  
8 commercial activity, such as a contract, the signing and  
9 performance of a contract, is divisible so that the  
10 signing of the contract is one commercial activity, the  
11 performance of the contract in Saudi Arabia is a separate  
12 commercial activity so that if you don't pay for the  
13 service in Saudi Arabia, that is, indeed, a commercial  
14 activity, but it's not a commercial activity in the United  
15 States within the meaning of the act? Is that the  
16 position you take?

17 MR. JOHNSON: That may be cutting too fine a  
18 point, Justice Scalia. I think our position is that the  
19 recruitment in the United States and the performance of  
20 the contract in Saudi Arabia are divisible. I'm not sure  
21 I would draw the line, as you've suggested, between the  
22 signing of the contract and the performance of the  
23 contract.

24 QUESTION: I think that's even a finer line.  
25 You're drawing the line between the recruitment and the

1 signing.

2 MR. JOHNSON: Well, I -- and I think these  
3 questions come together somewhat in this inquiry because  
4 the question is what is the cause of action based upon,  
5 and to be sure, the cause of action does not refer back to  
6 the recruitment activity. It refers about -- to alleged  
7 injuries -- pardon me -- occurring entirely in Saudi  
8 Arabia. So, I think the recruitment activity in the  
9 United States is insufficient.

10 QUESTION: Even with respect to recruitment, why  
11 isn't the -- why isn't -- at least as to the negligence  
12 cause of action here, why isn't that gravamen based upon  
13 the activity in the United States? The claim made is that  
14 your client failed to warn -- failed to warn -- that there  
15 was a danger in working in Saudi Arabia.

16 MR. JOHNSON: That's correct. The question, of  
17 course, has the same two components. And assuming for a  
18 moment out of the question whether or not that cause of  
19 action is based upon commercial activity, obviously, we  
20 contend that it is not. Even if the Court were to --

21 QUESTION: Wait. Why isn't it?

22 MR. JOHNSON: Well, because, Justice Scalia,  
23 it's just a different theory of recovery for the same  
24 conduct, and the statute is explicit in at least this one  
25 thing. It directs the court to inquire of the nature of

1 the conduct in question. The duty to warn cause of  
2 action, to be sure, adds another legal element and spins  
3 the theory of recovery somewhat differently. The conduct  
4 that he complains about is, nevertheless, exactly the  
5 same, and that's his allegations regarding the arrest and  
6 imprisonment in Saudi Arabia.

7 And we think the dispositive question for the  
8 based upon inquiry is not what is the plaintiff's theory  
9 of recovery or how clever has the drafter of the complaint  
10 been, but rather, what is the core conduct in question, in  
11 this case it being inherently sovereign conduct, arrest,  
12 and imprisonment, and allegations regarding torture. That  
13 -- there's no construction of commercial activity that  
14 reaches that --

15 QUESTION: Suppose Saudi Arabia were engaged in  
16 the business of recruiting workers for Qatar, and the same  
17 thing happened here, only it happened in Qatar, and a suit  
18 is brought in Florida claiming negligence in failing to  
19 warn the recruitee about Qatar sometimes engaging in this  
20 kind of a governmental activity. You still say there's no  
21 cause of action?

22 MR. JOHNSON: And Saudi Arabia, not Qatar, is  
23 the defendant in the lawsuit.

24 QUESTION: Yes, Saudi Arabia is the defendant.

25 MR. JOHNSON: Yes, that would not be commercial

1 activity, as we understand it, Your Honor, because the  
2 underlying conduct about which they complain, albeit  
3 couched as a negligence cause of action -- every injury  
4 has attendant to it a theoretical failure of a duty to  
5 warn if you can find a legal relationship with someone.  
6 We think, therefore, the Court ought to look to the  
7 underlying core conduct, in your hypothetical injury in  
8 Qatar. It's not different than the injury in Saudi Arabia  
9 and not commercial.

10 QUESTION: But the duty to warn arises out of  
11 different circumstances, doesn't it? I mean, it's much  
12 more logical to say that there's a duty to warn at the  
13 time of recruitment activity, which is in Florida, and tie  
14 that to the commercial activity of recruiting. It seems  
15 to me that comes over more plausibly than to say the  
16 activities -- or the injuries that the fellow suffered in  
17 Saudi Arabia arose out of commercial activity in the  
18 United States.

19 MR. JOHNSON: Your Honor, if I may just disagree  
20 with you slightly about where the recruiting activity  
21 occurred in this case. Respondents contend that it occurs  
22 in Saudi Arabia, but if we strip that allegation from its  
23 legal conclusion recruitment, we see that it, in fact,  
24 occurred almost entire -- rather, they contend it occurred  
25 in Florida, and it in fact occurred on the undisputed

1 facts of this case almost entirely in Saudi Arabia. In  
2 fact, it's undisputed here that he interviewed for the job  
3 in Saudi Arabia, that he was offered the job in Saudi  
4 Arabia, implicitly he accepted the job in Saudi Arabia.

5 QUESTION: But there was -- don't you admit  
6 there was any commercial activity amounting to recruitment  
7 in the United States?

8 MR. JOHNSON: We do not contest, for purposes of  
9 this appeal, his allegation that he saw a newspaper  
10 advertisement while in the United States. That's the  
11 entirety of the recruitment in the United States that he  
12 bases his allegation upon.

13 QUESTION: Well, do you also concede that that  
14 is commercial activity carried on in the United States,  
15 the placing of that newspaper advertisement?

16 MR. JOHNSON: Yes. Coming back to Justice  
17 White's earlier question, I don't concede that that  
18 conduct is attributable to Saudi Arabia for purposes of  
19 the substantial contact question, but yes, the recruitment  
20 itself in the United States is most likely commercial  
21 activity.

22 QUESTION: Going back to Justice Scalia's  
23 question, why don't you draw a distinction between a duty  
24 to warn about what a third party might do, on the one  
25 hand, and a duty to warn about what the person giving the



1 warning might do?

2 I thought you were basing your argument in this  
3 case on the fact that we simply do not -- tort law  
4 generally does not recognize a duty to warn of one's own  
5 malevolence, but tort law does recognize a duty to warn of  
6 risks that are beyond the control of the person giving the  
7 warning. And yet, you don't seem to accept that  
8 distinction.

9 MR. JOHNSON: Well, I think it's unnecessary for  
10 the Court to go that far in this case, Your Honor. As you  
11 say and as the United States aptly pointed out in this  
12 brief, the allegation of respondent here is nothing more  
13 than the allegation that an assailant has a duty to warn  
14 before he attacks. In that sense, the duty to warn and  
15 the assailant in that hypothetical are the same. In this  
16 case --

17 QUESTION: That's all you want us to recognize.

18 MR. JOHNSON: The Court doesn't need to go  
19 farther than that in this case. That's right.

20 Perhaps as illuminating as the plain language of  
21 the statute with respect to the Eleventh Circuit's  
22 construction is the restrictive theory of foreign  
23 sovereign immunity, which the statute was intended to  
24 codify, as this Court held most recently in its decision  
25 in *Weltover* last year.

1           The restrictive -- the primary characteristic,  
2       indeed, the only distinguishing characteristic, of the  
3       restrictive theory of foreign sovereign immunity is that  
4       it purports to distinguish between the kind of conduct  
5       which U.S. courts may adjudicate, commercial conduct or  
6       the public -- or private or commercial acts of a foreign  
7       sovereign, and that conduct which U.S. courts can never  
8       review, the inherently sovereign or public acts of a  
9       foreign sovereign.

10           And the trouble we have with the Eleventh  
11       Circuit's jurisdictional nexus test in this case is that  
12       it not only steps over that line, it erases that line  
13       because under the Eleventh Circuit's construction, there  
14       is no activity of any type which a U.S. court could not  
15       adjudicate so long as the plaintiff were willing to allege  
16       a sufficient connection with commercial activity. It is,  
17       therefore, a completely limitless construction of the  
18       based upon language which erases Congress' primary purpose  
19       in codifying the restrictive theory of foreign sovereign  
20       immunity, to distinguish between the types of conduct  
21       which can be adjudicated and the types of conduct which  
22       cannot.

23           I've struggled to find a hypothetical that was  
24       more indicative of the danger of that construction than  
25       the facts of this case. Candidly, there's hard to find

1 -- it's hard to find one. In this case, the allegations  
2 go to the very core, the very quintessential activity of a  
3 government, the right to exercise its police power, the  
4 right to arrest and to imprison, to decide when and under  
5 what circumstances a defendant shall be informed of the  
6 charges against him, to decide when and under what  
7 circumstances he shall be provided with a translator, to  
8 conduct the trial, and to generally govern the police  
9 power within its own territory.

10 Nevertheless, if the Eleventh Circuit --

11 QUESTION: May I ask on that point? Would the  
12 case be different if instead of the allegation being that  
13 law enforcement authorities had been used, they had  
14 alleged that the hospital had its own private police force  
15 in effect that could discipline people for whistle  
16 blowing? Would that be a different case?

17 MR. JOHNSON: It would not be a different case.

18 QUESTION: So, then the fact that you have law  
19 enforcement personnel involved really isn't a critical  
20 part of your --

21 MR. JOHNSON: Makes it an easier case I believe,  
22 but in your hypothetical, it would not be a different  
23 case. The agency or instrumentality, in this case the  
24 hospital, is defined as a foreign sovereign state in the  
25 Foreign Sovereign Immunities Act. Congress passed --

1 QUESTION: So, you don't draw a distinction  
2 between government-owned hospitals and government police  
3 forces.

4 MR. JOHNSON: I do not.

5 QUESTION: And you'd say, I assume, that if a  
6 private employer did the same thing and took one of its  
7 employees into the back room and had him beat up by some  
8 of the private employer's officers, that would not be a  
9 commercial activity.

10 MR. JOHNSON: It might be a commercially  
11 motivated activity, Justice Scalia.

12 QUESTION: But the nature of it is not  
13 commercial.

14 MR. JOHNSON: The nature of it is not  
15 commercial.

16 QUESTION: It has nothing to do with  
17 governmental. It doesn't matter whether you're a police  
18 force or not.

19 MR. JOHNSON: It has to be commercial to be  
20 jurisdictional in this case.

21 I'd like to --

22 QUESTION: Under that analysis, it seems to me  
23 you make irrelevant the injunction of the statute that  
24 purpose shall not be considered.

25 MR. JOHNSON: Justice Kennedy, I think just the

1 opposite. I think that in my response to Justice Scalia I  
2 was suggesting that the only difference that he's -- the  
3 only relationship to commercial activity that the question  
4 suggests when the hypothetical deals with a private actor,  
5 as opposed to a governmental actor, is that it implies a  
6 commercial purpose. And we agree fully that the purpose  
7 of the activity, whether sovereign or commercial, is  
8 utterly irrelevant.

9 We looked at the nature of the activity itself.  
10 Even if the sovereign state acted with a commercial  
11 purpose, which of course Saudi Arabia denies in this case,  
12 but even if that were to be true, the activity would  
13 become no more inherently commercial in its nature.

14 QUESTION: Well, suppose in Justice Stevens'  
15 hypothetical of the security guards beating up the  
16 employee, they did it in order to punish the employee for  
17 transgressions on the job and to teach other employees not  
18 to do that in the future. Is that not a commercial  
19 activity?

20 MR. JOHNSON: Your Honor, I think your  
21 hypothetical aptly defines their motivation, their  
22 purpose, but I think what the Court said in *Weltover* is  
23 that that's irrelevant, and we look at the nature of the  
24 conduct itself, not what motivates the conduct to  
25 determine whether the activity is commercial. To be sure,

1 that's a difficult inquiry. I think the Court recognized  
2 that in Weltover.

3 QUESTION: I take it your criterion in answering  
4 Justice Kennedy's question is that what's commercial or  
5 not depends on what is commercial in the United States.

6 MR. JOHNSON: That's correct, Justice Souter.  
7 That is our view.

8 Mr. Chief Justice, I'd like to reserve my  
9 remaining time.

10 QUESTION: Very well, Mr. Johnson.

11 Mr. Minear.

12 ORAL ARGUMENT OF JEFFREY P. MINEAR

13 ON BEHALF OF THE UNITED STATES

14 AS AMICUS CURIAE SUPPORTING THE PETITIONER

15 MR. MINEAR: Mr. Chief Justice, and may it  
16 please the Court:

17 The court of appeals has interpreted the  
18 commercial activity exception in a way that would  
19 dramatically curtail the sovereign immunity of not just  
20 Saudi Arabia, but the entire community of nations. We  
21 urge this Court to correct that error, an error that could  
22 prompt other nations to limit the United States' sovereign  
23 immunity in their courts.

24 Under the Foreign Sovereign Immunities Act,  
25 Saudi Arabia is immune from the respondents' claims unless

1 those claims are based upon a commercial activity carried  
2 on in the United States by the foreign state. The court  
3 of appeals mistakenly concluded that the based upon  
4 requirement was satisfied here because according to the  
5 complaint, Saudi Arabia recruited Mr. Nelson in the United  
6 States. He was mistreated abroad, and his mistreatment  
7 was causally related to his employment.

8 The problem with the court's reasoning is that  
9 Congress did not use that court's so-called nexus test in  
10 formulating the commercial activity exception. Congress  
11 said the suit must be based upon a commercial activity.  
12 In other words, the commercial activity must be the basis  
13 of foundation for the legal claim. In common law  
14 parlance, the complaint -- or the commercial activity must  
15 provide the gist or gravamen of the complaint.

16 Although recruitment activities can, in theory,  
17 qualify as a commercial activity, the Saudi recruitment  
18 activities alleged here do not provide a basis for the  
19 respondents' claims of intentional injury. The  
20 respondents do not contend that Scott Nelson was injured  
21 during the recruitment process in this country. Rather,  
22 they contend that the harm alleged here occurred 10 months  
23 later during his employment in Saudi Arabia. The  
24 respondents' intentional injury claims are explicitly  
25 based on the Saudis' noncommercial acts of arresting and

1 jailing Mr. Nelson in that country.

2 QUESTION: Mr. Minear, would you just clear up  
3 one thing to be sure I understand your position?

4 Supposing they hadn't paid him 10 months later, could he  
5 sue the government for that in the United States?

6 MR. MINEAR: Well, that claim would be based on  
7 the contract.

8 QUESTION: Right.

9 MR. MINEAR: And the contract here had a forum  
10 selection clause that provided that any dispute arising  
11 from this contract shall be subject to the jurisdiction of  
12 the Saudi courts only.

13 QUESTION: Well, assume you don't have a forum  
14 -- just assume you have a naked contract without a forum  
15 selection clause in it, and a breach 10 months after was  
16 signed in the United States by failing to pay in Saudi  
17 Arabia. In your view would the plaintiff be able to have  
18 jurisdiction over the --

19 MR. MINEAR: In that case, the question becomes  
20 one of substantial contacts.

21 QUESTION: Well, I understand. What's your  
22 answer to the question?

23 MR. MINEAR: And our answer would be that the  
24 contract alone would not be substantial contacts. Under  
25 this Court's reasoning in Burger King, the mere entry into



1 a contract in the United States is insufficient to  
2 establish minimum contacts. We believe substantial  
3 contacts must be at least that amount, and for that  
4 reason, we don't believe that simply the execution of the  
5 contract would allow the assertion of jurisdiction.

6 QUESTION: Even following extensive recruitment  
7 activity, you'd still say the same thing?

8 MR. MINEAR: At some point, this becomes a  
9 question of the extent of the contacts that the Saudi  
10 Government might have --

11 QUESTION: Well, say you've got enough contact  
12 to say that the commercial activity was in the United  
13 States, but then the breach is in Saudi Arabia by failing  
14 to pay.

15 MR. MINEAR: In that case, I think that it  
16 probably would qualify. We are not far removed from the  
17 Weltover situation in that case. As you recall, in  
18 Weltover, the contract was -- in that case, it was a bond  
19 agreement. The bond agreements were actually issued in  
20 Argentina, but the breach occurred in the United States,  
21 and the Court concluded that the breach of performance had  
22 direct effect in the United States.

23 QUESTION: Well, if you admit that the failure  
24 to pay would be sufficient for jurisdiction, then what if  
25 by tortious means they took the money back from him in

1 some way? They beat him up to get -- to extort money from  
2 him while he's employed. That -- there would not be  
3 jurisdiction then I take, because that would be a tort.

4 MR. MINEAR: Again, the question would be  
5 substantial contacts. If that occurred in the United  
6 States, this would be covered, of course, by the tort  
7 exception.

8 QUESTION: No, no. That's not my hypothetical.

9 MR. MINEAR: But if it occurred abroad, the  
10 question here would be substantial contacts. Also,  
11 commercial -- if I could step back --

12 QUESTION: My assumption is you have the same  
13 substantial contacts, and they're enough to support a suit  
14 for failure to pay the salary 10 months after the man goes  
15 to work in Saudi Arabia. My question then is, is it a  
16 different rule if a tort is committed in the course of the  
17 employment relationship that has exactly the same  
18 financial impact on him and on the United States?

19 MR. MINEAR: Yes. I misunderstood your  
20 question, and my answer there is that would not be a  
21 commercial activity in that situation. That is a tort  
22 that occurs overseas.

23 Now, in this case, the alleged recruitment  
24 activities in this country simply have no legal or factual  
25 bearing on respondents' right to relief, and we think

1 that's critical to the inquiry in this situation.

2 Now, the court of appeals decision is clearly  
3 contrary to the specific language of the commercial  
4 activity exception, and perhaps for that reason,  
5 respondents have changed their legal theory. The  
6 centerpiece of respondents' argument in the court of  
7 appeals was, quote, the detention and torture of Mr.  
8 Nelson were based upon his recruitment in the United  
9 States. This is the heading on page 11 of their brief in  
10 the court of appeals.

11 They now purport to base their claims on the  
12 Saudis' operation of the entire hospital enterprise. The  
13 respondents' new theory, which we do not believe was  
14 argued below, also fails to satisfy the based upon  
15 requirement. As this Court indicated in *Weltover*, the  
16 focus must be on the particular commercial conduct,  
17 transaction, or act that provides the basis for the claim.  
18 The respondents' complaint does not seek damages because  
19 the Saudis operate a hospital, nor does it seek to enjoin  
20 any hospital policy with respect to employees or employee  
21 discipline. The request for relief here is explicitly  
22 based on allegations that Saudi officials committed  
23 certain specific acts of battery, wrongful arrest, and  
24 imprisonment.

25 QUESTION: Well, Mr. Minear, they also claim a

1 breach of a duty to warn at the time of recruitment.

2 MR. MINEAR: Well, as we explain in our brief,  
3 the negligence claims may stand on a somewhat different  
4 footing. The negligence claims here are rather opaque,  
5 but they might be read to allege the Saudi Arabian  
6 Government, when recruiting in the United States, violated  
7 some recognized duty that is generally applicable to all  
8 recruiters in the United States. And we would agree that  
9 if Saudi Arabia conducts recruitment activities in the  
10 United States, it is subject to the same rules, the same  
11 Federal and State law based obligations, that govern the  
12 nonsovereign recruiters.

13 QUESTION: Although the Government argues  
14 differently under the Federal Tort Claims Act. I mean, if  
15 there's a suit saying the Government is immune for the  
16 tort committed by a coworker in the Federal Government,  
17 you couldn't sue the Government for failing to warn that  
18 your coworker may be dangerous.

19 MR. MINEAR: I'm sure you'd not be able to, and  
20 I think the --

21 QUESTION: Why is this any different?

22 MR. MINEAR: It might not be different. I think  
23 much depends on what specifically is alleged in the  
24 complaint. This complaint -- it appears that all the  
25 respondents are saying is that the assailant here had a

1 duty to warn before they struck us. In that case, if that  
2 is what the complaint says, then that puts this case on  
3 all fours with Shearer.

4 QUESTION: But do you think the duty to warn  
5 referred to a duty to warn of anything but the activities,  
6 i.e., the potentially tortious activities of the Arabian  
7 Government itself?

8 MR. MINEAR: Well, the duty to warn -- it's not  
9 clear, first of all, whether there is any such duty to  
10 warn.

11 QUESTION: Well, let's assume just for the sake  
12 of argument there is. Isn't the complaint simply that  
13 there was a failure to warn of what you, the Arabian  
14 Government, might do if you got mad?

15 MR. MINEAR: That's right. That's what the  
16 complaint seems to say in this case now, but --

17 QUESTION: Well, does that fall within any  
18 recognized category of tort?

19 MR. MINEAR: I would think not, but again --

20 QUESTION: So, why --

21 MR. MINEAR: -- the respondents should have an  
22 opportunity to make that argument, we believe.

23 QUESTION: It seems to me you're bending over  
24 backwards to give them an opportunity to make an argument  
25 that doesn't seem to be very plausible.

1                   MR. MINEAR: Well, ultimately our position here  
2 is based not on the merits of this individual claim, but  
3 rather, we're concerned with the broader principle, and  
4 that is the question of what we mean by based upon a  
5 commercial activity in the United States.

6                   The difficulty here is the result might seem  
7 harsh in this individual case, but it accords with the  
8 reasonable and reciprocal expectations of sovereign  
9 nations with respect to the exercise of their police  
10 powers within their own borders. For example, the United  
11 States would vigorously object to being sued in a Saudi  
12 court by a Saudi citizen seeking damages based on his  
13 arrest in this country regardless of the reason for his  
14 arrest or his treatment while in jail. Sovereign nations  
15 have always been immune from these types of lawsuits, and  
16 nothing in the commercial activity exception alters that  
17 rule.

18                   Our view is, in this case, that even if you  
19 could characterize the arresting and jailing of Mr. Nelson  
20 as commercial practices, those practices do not have  
21 substantial contact with the United States in any event.  
22 Not only do the alleged Saudi practices regulate employee  
23 conduct taking place wholly in a Saudi-owned work place in  
24 Saudi Arabia, but Mr. Nelson's employment contract  
25 specifically stated -- and as I alluded to before, and I

1 quote now -- in the case of any dispute arising from this  
2 contract, the Saudi courts, authorities, or commissions  
3 only will have jurisdiction. Thus, the contract that Mr.  
4 Nelson signed clearly envisioned that any -- that U.S.  
5 courts would not have jurisdiction to hear any dispute  
6 arising from his employment relationship. And this  
7 dispute here, even if couched in tort terms, is really no  
8 different.

9 Unless there are further questions --

10 QUESTION: Mr. Minear, when we judge whether or  
11 not an activity is commercial in nature, do we look to the  
12 standards and practices of the international business  
13 community, or is it to what is a commercial activity here  
14 in the United States?

15 MR. MINEAR: I think Weltover indicates that we  
16 should look to the commercial activities as Congress  
17 understood them at the time it enacted the FSIA. There is  
18 a statement in Weltover that suggests that that is -- that  
19 Congress relied heavily on the meaning of commercial  
20 activity when it adopted the restrictive theory of  
21 sovereign immunity in 1976.

22 QUESTION: You mean we look to what is  
23 commercial activity in 1976?

24 MR. MINEAR: Well, what Congress would have  
25 envisioned at that time.

1 Thank you, Mr. Chief Justice.

2 QUESTION: Thank you, Mr. Minear.

3 Mr. Stevens, we'll hear from you.

4 ORAL ARGUMENT OF PAUL S. STEVENS

5 ON BEHALF OF THE RESPONDENTS

6 MR. STEVENS: Mr. Chief Justice, and may it  
7 please the Court:

8 This is a case about jurisdiction over a  
9 hospital, not a police department. The question presented  
10 is this. May a hospital owned by a foreign government  
11 come to the United States for its work force, recruit and  
12 hire a United States citizen to perform a specific job  
13 overseas, beat and torture him for the proper performance  
14 of his responsibilities, and then claim immunity for its  
15 actions in the U.S. courts?

16 We say it cannot. Our argument deals with the  
17 hospital. It consists of two main points. First, there  
18 are, as the Court knows, three separate defendants in this  
19 case, and there are, in effect, three separate complaints.  
20 Where this hospital is concerned, petitioner's motion to  
21 dismiss the facial challenge that they have mounted to  
22 subject matter jurisdiction requires that a court focus on  
23 the factual allegations in the complaint concerning the  
24 conduct of the hospital.

25 QUESTION: Mr. Stevens, you say there are three



1 defendants. Saudi Arabia, the government, was named also  
2 as a defendant by you, was it not?

3 MR. STEVENS: Yes, it was.

4 QUESTION: And you want it retained in the case?

5 MR. STEVENS: Chief Justice Rehnquist, there are  
6 eight causes of action stated against Saudi Arabia. The  
7 United States, as amicus, has said that at least one of  
8 those, the negligence count, should survive the  
9 jurisdictional test. We believe that Saudi Arabia can be  
10 answerable as an alter ego of the hospital, as its  
11 principal, as the person exercising control over all  
12 aspects of its operations.

13 But there are, in the complaint in counts III  
14 through VII, alternative theories of liability that are  
15 stated against the Kingdom of Saudi Arabia, international  
16 law theories that, frankly in our view, cannot withstand  
17 analysis following the Court's decision in the Amerada  
18 Hess case. This complaint was filed prior to that  
19 decision.

20 What we are advancing in this argument today is  
21 the core proposition of jurisdiction over the hospital and  
22 the subsidiary proposition that there is jurisdiction over  
23 Saudi Arabia as its owner and Royspec as its agent in the  
24 United States.

25 QUESTION: So, you do want Saudi Arabia, the

1 state, retained as a defendant because you contend it's  
2 the alter ego of the hospital.

3 MR. STEVENS: That is correct, Mr. Chief  
4 Justice.

5 QUESTION: So, when you say you're just talking  
6 about a hospital, you're actually talking about something  
7 more. You are talking about a sovereign government, the  
8 Government of Saudi Arabia.

9 MR. STEVENS: In its capacity as the owner and  
10 operator of a hospital enterprise, that is correct.

11 But the core proposition, the core issue --

12 QUESTION: Suppose the recruiter for Saudi  
13 Arabia in this country affirmatively misrepresented  
14 certain critical facts that would obtain during his work  
15 in Saudi Arabia. Would you say that Saudi Arabia would  
16 -- would there be jurisdiction over Saudi Arabia on a  
17 misrepresentation claim?

18 MR. STEVENS: First, Your Honor, we do believe  
19 it's unquestionable that the principal will be answerable  
20 for the acts of its agent and that there will be  
21 jurisdiction extended for those acts even if they're not  
22 performed directly in the United States. On this basis,  
23 the hospital and Saudi Arabia as its owner are answerable  
24 for jurisdictional purposes at least for the actions of  
25 the Hospital Corporation of America, and if HCA had done

1 something beyond the scope of its authority as an agent  
2 that was wrongful, you would apply simple agency analysis  
3 for purposes of liability, but the jurisdictional question  
4 would remain to be applied and addressed under the  
5 statute.

6 QUESTION: Mr. Stevens, suppose the hospital  
7 supervisors had someone that they had hired beat up  
8 because he was dating the hospital president's daughter.  
9 Would that be a commercial activity?

10 MR. STEVENS: Justice Scalia, our view is that  
11 there is a very short menu that the Foreign Sovereign  
12 Immunities Act provides. Things are either commercial or  
13 they are sovereign. There is not a third, private type of  
14 action which falls somewhere between the two.

15 Insofar as the hospital is concerned, the  
16 activity that you described would be commercial for  
17 jurisdictional purposes under the statute. Now --

18 QUESTION: It would?

19 MR. STEVENS: It may be an odd sense of the term  
20 commercial.

21 QUESTION: It certainly is.

22 MR. STEVENS: But it certainly could not be  
23 considered governmental or sovereign or uniquely public in  
24 nature.

25 QUESTION: So, any tort committed against him by

1 his employer is commercial.

2 MR. STEVENS: Well, the torts that we have  
3 alleged in the complaint against the hospital -- and this  
4 is the key point --

5 QUESTION: No. I'm still within my  
6 hypothetical. The way you answered that hypothetical, a  
7 tort is committed against him unrelated to his employment  
8 except that it is by his employer; you say that's a  
9 commercial activity.

10 MR. STEVENS: For purposes of a jurisdictional  
11 analysis under the statute, it cannot be uniquely  
12 governmental. Therefore, it would be commercial.

13 QUESTION: I don't see the world as being  
14 divided into commerce and government. It's divided into  
15 commerce and noncommerce. That's what the act says. The  
16 act doesn't create a dichotomy between commercial and  
17 governmental. It creates a dichotomy between commercial  
18 and noncommercial.

19 MR. STEVENS: The question under the act in our  
20 view is the outward form of the conduct. Would the  
21 hospital in that instance be operating in some uniquely  
22 governmental capacity as the regulator of --

23 QUESTION: That isn't the question. The  
24 question is whether it is acting in a commercial capacity,  
25 not whether it is acting in a governmental or

1 nongovernmental, whether it's acting in a commercial  
2 capacity. And you say so long as you're doing something  
3 to your employer -- employee, you are always acting in a  
4 commercial capacity. That's your position.

5 MR. STEVENS: That is our position.

6 The statute in our view subjects the hospital to  
7 the jurisdiction of the United States based upon its  
8 conduct, commercial conduct, whether performed here or  
9 abroad so long as that conduct has substantial contact  
10 with the United States.

11 QUESTION: What is that substantial conduct that  
12 you rely on here? The advertisement in the newspaper and  
13 the signing of the contract?

14 MR. STEVENS: The complaint alleges, in a  
15 portion titled, Factual Allegations Against King Faisal  
16 Specialist Hospital, a course of dealing in the United  
17 States that goes well beyond the specific advertisement  
18 that was issued in the U.S. media or the specific  
19 recruitment of Scott Nelson.

20 But the most fundamental conduct here, Justice  
21 O'Connor, is that the petitioners came to the United  
22 States to ask Mr. Nelson to do a specific job for them,  
23 induced him through a rather extensive course of dealing  
24 to come to Saudi Arabia to do that job, and once he was  
25 there, beat and tortured him precisely for doing that job

1 that they had recruited and hired him to do.

2 Now, when Mr. Nelson and the hospital entered  
3 into an agreement here in the United States, there were  
4 some specific aspects of that agreement that bear upon the  
5 substantial contact requirement. First of all, the  
6 agreement identified Mr. Nelson as an expatriate employee  
7 of the hospital. It identified Fort Lauderdale, Florida  
8 as his U.S. point of origin and the point to which he  
9 would be returned. It required him to surrender his  
10 United States passport to the hospital, but it also  
11 obligated the hospital to return him to the United States  
12 following the termination of his services. In other  
13 words, this hospital said, Mr. Nelson, if you quit, if you  
14 perform poorly, or if you break the rules of the hospital,  
15 we will send you home.

16 Now, our view is that when the hospital entered  
17 into that agreement and mutual understanding with Mr.  
18 Nelson, it assumed an obligation to exercise care and  
19 diligence as an employer for Mr. Nelson's safe passage  
20 during his --

21 QUESTION: You wouldn't be making any different  
22 argument, would you, if Mr. Nelson didn't perform his job  
23 over there? And let's assume -- let's just concede that  
24 he didn't perform well, but -- and rather than just send  
25 him home, they put him in the jug and beat him. You would

1 still be making the same argument, wouldn't you?

2 MR. STEVENS: Precisely, we would.

3 QUESTION: Yes. So, it's just sort of beside  
4 the point that he really did his job well.

5 MR. STEVENS: Well, but the point, Justice  
6 White, is the United States contacts bracket this entire  
7 employment relationship. It's not simply that they came  
8 here. It's that they said he would be sent back, and they  
9 assumed a duty during the time that he was gone to  
10 exercise due care and diligence. Now if --

11 QUESTION: But the statute doesn't say bracketed  
12 by commercial activity in the United States. It says  
13 based on. Isn't there a difference between bracketing and  
14 basing?

15 MR. STEVENS: I was addressing my remarks,  
16 Justice Scalia, to the substantial contact requirement.  
17 The statute does not say --

18 QUESTION: The two are the same. I mean, the  
19 commercial activity has to be a commercial activity  
20 carried on in the United -- it means commercial activity  
21 carried on by such state and having substantial contact  
22 with the United States.

23 MR. STEVENS: That is correct, Your Honor.

24 Our point is that the duty that the hospital  
25 assumed was one that extended from the time it was --

1 first employed Mr. Nelson here in the United States,  
2 through his tour of duty there, until he was returned to  
3 this country, and that this, as an obligation reflected  
4 directly in their employment contract, gives the Court a  
5 sense of the substantial contacts that the duty and the  
6 activities of the hospital vis-a-vis Mr. Nelson had with  
7 this country.

8 QUESTION: Well, I don't --

9 QUESTION: But you seem to be making up for what  
10 may be a shortcoming in the jurisdictional aspects by  
11 spinning a very elaborate tort theory that kind of  
12 subsumes everything. I mean, that would be an easy way to  
13 get around the limitations contained in the Foreign  
14 Sovereign Immunities Act, to develop a very elaborate tort  
15 theory that perhaps would turn out to be not supported by  
16 the cases at all.

17 You say the Government of Saudi Arabia assumed a  
18 duty to kind of look after him from the time he left this  
19 country until the time he was returned. Well, I really  
20 think you have to stretch quite a bit to get that out of  
21 these facts.

22 MR. STEVENS: Mr. Chief Justice, this was Mr.  
23 Nelson's employer. It is commonplace in our law that an  
24 employer assumes a duty to prevent injury to his employee,  
25 a duty of diligence and care, ordinary care at least, for



1 the well-being of the employee. Now, if there is such a  
2 duty in our law --

3 QUESTION: But not to prevent injury at the  
4 hands of the employer.

5 MR. STEVENS: I would say, Mr. Chief Justice, to  
6 prevent foreseeable injury at the hands of anyone, to the  
7 extent that the employer can exercise ordinary care for  
8 that purpose.

9 QUESTION: Well, you mean, when I leave the  
10 premises of, say, the store that I work at and walk home  
11 at night, my employer has a duty to see that nobody mugs  
12 me on the way home?

13 MR. STEVENS: Well, if your employer knows that  
14 there is a dangerous criminal lurking outside the  
15 entranceway, it may issue some kind of warning that you  
16 should take care.

17 But more fundamentally, we're not talking about  
18 the negligence question, because if there is such a duty,  
19 however it may be defined, then certainly there's an  
20 obligation on an employer not to cause injury. But the  
21 allegations of the complaint say that's precisely what  
22 this hospital did. It intentionally caused Mr. Nelson  
23 grievous injury, false imprisonment, and battery.

24 QUESTION: But that doesn't depend on any duty  
25 of care. That's a tort by virtue of an intentional

1 assault. It doesn't depend on any rather elaborate duty.  
2 But that took place in Saudi Arabia.

3 MR. STEVENS: You're correct that it does not  
4 depend, in the way that we think about these things, on  
5 the articulation of a duty, but in our view, both in terms  
6 of the nature of the commercial activity and its  
7 substantial contact with the United States, you cannot  
8 look at these torts, these intentional torts, in isolation  
9 and rip them out of this commercial context. These were,  
10 after all, actions taken by the hospital as alleged in the  
11 complaint, the truth of the allegations which petitioners  
12 admit, by the hospital as an employer against its employee  
13 precisely for the performance of his job responsibilities.

14 QUESTION: In other words, you want us to look  
15 at the purpose of the act.

16 MR. STEVENS: Justice Souter, I think that the  
17 purpose of the act here, why it may be that this employer  
18 beat Mr. Nelson, that purpose is reflected in the  
19 complaint, but that an employer intentionally injures an  
20 employee in whatever association it may be, on the work  
21 place, in connection with the performance of his jobs,  
22 however that happens, is an action that any private  
23 hospital employer could have done. And it's not made less  
24 commercial just because it is so horrendous.

25 QUESTION: What's that got to do with the answer

1 to my question? The answer to my question is yes. You  
2 want us to look at the purpose of the act.

3 MR. STEVENS: It is a commercial activity.

4 QUESTION: And that gives you a problem under  
5 the statute, doesn't it?

6 MR. STEVENS: Your Honor, I don't believe so.  
7 The statute talks about commercial activities. It talks  
8 about a course of conduct --

9 QUESTION: And it makes a distinction  
10 between --

11 MR. STEVENS: -- or a particular transaction or  
12 an act.

13 QUESTION: Excuse me. Doesn't it make a  
14 distinction between the activity and the motivation for  
15 the activity?

16 MR. STEVENS: It does, Your Honor.

17 QUESTION: Okay, and you want us basically to  
18 disregard that distinction.

19 MR. STEVENS: No, I'm not arguing that.

20 QUESTION: Would your claim -- would you have a  
21 cause of action, even on your own theory, if they beat him  
22 up because he had fraudulently misrepresented his  
23 credentials? No.

24 MR. STEVENS: Justice Souter, it's not a  
25 question about whether there is a cause of action.

1 QUESTION: No, but isn't the answer to my  
2 question no? You wouldn't have a cause of action in that  
3 case.

4 MR. STEVENS: You would not have a cause of  
5 action, but you might have jurisdiction.

6 QUESTION: But the fact is you wouldn't have a  
7 cause of action, and the only distinction between that  
8 case and this one and the only reason that there might be  
9 on your theory jurisdiction in one case and not in the  
10 other is by looking to the motivation for the act, and  
11 that is exactly what the statute tells us we can't do.

12 MR. STEVENS: The proposition is narrow and  
13 simple, and it is that torts committed by an employer in  
14 the context of an employment relationship are commercial,  
15 just as they would be if the employer breached a contract.

16 QUESTION: In other words, you don't have to  
17 look to the motivation to the act. You're now saying if  
18 the tort feisor is an employer and the victim is an  
19 employee, that's all you need to know.

20 MR. STEVENS: That -- we know more in this case,  
21 but that is all that you would need to know for our  
22 jurisdiction analysis.

23 QUESTION: On the theory that you're now  
24 espousing, that's all you need to know.

25 MR. STEVENS: Correct.

1           QUESTION: Good. Well, you have to change your  
2 answer to him. I mean, you answered me before that if  
3 they beat him up because he was dating the president's  
4 daughter, that was still a commercial act, and I assume if  
5 they beat him up because he made a misrepresentation in  
6 his employment application, that's an easier question  
7 even. You'd say you'd still have a cause of action under  
8 this act. You'd say that's a commercial activity, no?

9           MR. STEVENS: Justice Scalia, there may not be a  
10 cause of action. It may be that the complaint could be  
11 dismissed.

12           QUESTION: I'm not talking about cause of  
13 action. Is it -- as far as jurisdiction under this act is  
14 concerned, is that a commercial activity, beating him up  
15 because he made a misstatement on his application form?  
16 Is that a commercial act?

17           MR. STEVENS: We would say that it provides the  
18 jurisdictional basis under the statute, yes, that it's a  
19 commercial activity.

20           QUESTION: It is a commercial activity. And so  
21 -- and if somebody just walked -- his employer came in and  
22 shot him in the head, that's a commercial activity. Isn't  
23 that your theory?

24           MR. STEVENS: Torts -- as the employer against  
25 the employee, it would be a commercial activity in our

1 view.

2 QUESTION: That isn't a commercial activity in  
3 the United States, is it?

4 MR. STEVENS: Well, the issue of substantial  
5 contact is one, Justice White, that is not subject to the  
6 limitations as to nature and purpose that the analysis of  
7 whether an act is commercial in nature is subject to.

8 QUESTION: Well, do you -- I thought the statute  
9 said -- I thought you -- I thought your theory was that  
10 your suit was based on a commercial activity that occurred  
11 in the United States.

12 MR. STEVENS: Our theory is that the action is  
13 based upon commercial conduct, transactions or acts that  
14 have substantial contact with the United States, and  
15 nothing more is required in the statute by the express  
16 terms of the statute.

17 QUESTION: And -- but -- and you say the --  
18 running a hospital is a commercial activity, and it has  
19 substantial contacts with the United States. Is that your  
20 theory?

21 MR. STEVENS: The conduct upon which this case  
22 is based performed by this hospital --

23 QUESTION: Yes.

24 MR. STEVENS: -- is commercial and has such  
25 substantial contact.

1 QUESTION: And what are the substantial contacts  
2 with the United States?

3 MR. STEVENS: There was an unbroken course of  
4 dealing with respect to Mr. Nelson.

5 QUESTION: So, rather than start with a  
6 commercial activity and going up the line, you start with  
7 the commercial activity of running a hospital and coming  
8 back down to -- you have to trace it. Your substantial  
9 contact has to be traced to the recruitment. Is that it?

10 MR. STEVENS: Well, to the activity.

11 QUESTION: And the signing of the contract?

12 MR. STEVENS: The recruitment, the signing of  
13 the contract, the definition of the job responsibilities,  
14 and all of those activities that occurred here in the  
15 United States that led to Mr. Nelson's accepting his  
16 employment and performing those responsibilities in Saudi  
17 Arabia.

18 QUESTION: Well, of course, he -- part of his  
19 recruitment went on in Saudi Arabia.

20 MR. STEVENS: He was interviewed in Saudi  
21 Arabia, Justice White. Petitioners have given the Court  
22 three different versions of this.

23 QUESTION: I suppose he didn't ask any question  
24 at all about what his duties would be?

25 MR. STEVENS: I'm certain that he did, but they

1 were finely defined in the employment agreement, in the  
2 job description, and in the advertisement that was -- that  
3 he first responded to.

4 On the specific point of what happened in Saudi  
5 Arabia, petitioners have given in three different  
6 submissions three different versions. On page 3 of their  
7 petition for the writ of certiorari, they say that Mr.  
8 Nelson was interviewed in Saudi Arabia, and then he was  
9 offered and accepted the job in the United States. In  
10 their brief on the merits at page 3, they say he was  
11 interviewed for and offered the job in Saudi Arabia, and  
12 then came back to the United States and accepted.  
13 Finally, on page 18 of their reply brief, they say he was  
14 interviewed for, offered the job, and accepted it in Saudi  
15 Arabia.

16 The fact is the Court must accept the  
17 allegations of the complaint against the hospital as true.

18 QUESTION: They're just getting more and more  
19 complete as they went on.

20 (Laughter.)

21 MR. STEVENS: The allegations in the complaint  
22 as true, and what does the complaint say. That's the key  
23 issue here, taking them as true.

24 First, it says that the hospital conducted a  
25 regular part of its business activities in the United



1 States, and this consisted of advertising for, recruiting,  
2 employing, orienting, and training its employees.

3 Secondly, that in November 1983, the hospital  
4 published an ad for a specific hospital job. Thereafter  
5 it recruited Mr. Nelson to take the job. It entered into  
6 an employment agreement with him concerning the job, and  
7 it arranged for his transportation to Saudi Arabia to  
8 begin work, all here in the United States.

9 It further alleges that Mr. Nelson was required  
10 by that job to monitor the physical plant of the hospital  
11 to ensure the safety of patients and staff.

12 It further states that in March of 1984, Mr.  
13 Nelson discovered safety problems at the hospital. He  
14 reported them to hospital officials, as his job required  
15 him to do. He subsequently reported them to a Saudi  
16 Arabian investigating commission that was investigating  
17 the hospital.

18 And finally, that the hospital, as a direct  
19 result of his reporting these safety problems, had him  
20 beaten and tortured by persons acting at its direction and  
21 subject to its control. As a result, Mr. Nelson is  
22 permanently disabled.

23 These are the allegations in the complaint that  
24 are to be accepted as true. These are the allegations  
25 that define the jurisdictional issue with respect to both

1 the commercial nature of the activities and the  
2 substantial contact with the United States.

3 Now, in our view it doesn't make any difference  
4 that this particular employer chose to retaliate against  
5 its employee by detention and torture rather than by  
6 firing him and sending him home. Certainly if the  
7 hospital had breached the employment contract with Mr.  
8 Nelson, that act would be commercial, and beating and  
9 torture can't be less commercial just because they're so  
10 much more extreme.

11 QUESTION: Mr. Stevens, you said earlier I think  
12 in response to a question from Justice Scalia that you  
13 thought the act divided conduct into governmental and  
14 commercial. Is that correct?

15 MR. STEVENS: Yes, sir.

16 QUESTION: Do you rely on any of our decisions  
17 for that proposition or on some specific part of the  
18 statutory language?

19 MR. STEVENS: Well, I believe that the Court's  
20 decision in the Dunhill case, which recently in the  
21 Weltover opinion this Court has said has authoritative  
22 explanation of the restrictive theory of sovereign  
23 immunity, can be looked to to establish what is  
24 essentially the dichotomy here.

25 QUESTION: Well, Dunhill was not an

1 interpretation of the FSIA, was it?

2 MR. STEVENS: It was not, Mr. Chief Justice. It  
3 was handed down shortly before the act went into law and  
4 has been said by this Court to be an authoritative gloss  
5 at least on the purposes the act was intended to serve and  
6 the nature of the restrictive theory of sovereign  
7 immunity.

8 QUESTION: You mean a gloss in advance.

9 (Laughter.)

10 MR. STEVENS: An advanced gloss. That is  
11 correct, Justice White.

12 QUESTION: I suppose it's doubtless true that  
13 when you have a Foreign Sovereign Immunities Act case in  
14 front of you, if you say -- if you come to the conclusion  
15 that the act was not a commercial act, then for purposes  
16 of that statute, the act must be treated as an act of  
17 government.

18 MR. STEVENS: Precisely.

19 QUESTION: But in making the inquiry of whether  
20 it's a commercial act or not, I don't think you approach  
21 it with the mental attitude that everything in the world  
22 has to be either a commercial act or a governmental act.  
23 I think everything in the world is either a commercial act  
24 or not a commercial act, like shooting somebody in the  
25 head, for instance. I don't care if that's done in the

1 course of a contract or not. That seems to me not a  
2 commercial act. It may not be a governmental act either,  
3 but it's a commercial act -- it's not a commercial act.  
4 And if it's not a commercial act and the suit at hand is a  
5 Foreign Sovereign Immunities Act suit, having determined  
6 it's not a commercial act, it's an act of government.

7 MR. STEVENS: Well, we approach it in much the  
8 same way, and it is a conundrum that this dichotomy places  
9 one in, a dilemma, so to speak, and I would acknowledge  
10 that. But our consideration is very straightforward.

11 QUESTION: I suppose perhaps the question is  
12 whether piracy is commerce.

13 MR. STEVENS: Well, the law has resolved that  
14 question, Justice Stevens. It could be a form of commerce  
15 by those people who are engaging in it, I suppose.

16 The point is that this was an action taken by a  
17 hospital, an employer, in the context of an employment  
18 relationship, and it really doesn't matter why the act was  
19 taken.

20 If you look to the experience of the U.S.  
21 marketplace, you certainly can see all sorts of cases that  
22 go off on the issue of the wrongful discharge of an  
23 employee, retaliatory actions taken against an employee by  
24 an employer, whistle blower statutes that are now the  
25 modern craze, I suppose, to address these kinds of wrongs.

1 Nowhere is it suggested to me in our jurisprudence that  
2 just because these acts were terrible, wrongful,  
3 injurious, tortious, that they are less commercial for  
4 that reason.

5 And consider the signal that such a conclusion  
6 would send. If a foreign sovereign running a commercial  
7 enterprise wishes to breach a contract, well, it shouldn't  
8 fire the employee and stand ready to answer in damages.  
9 It should have the employee done away with, because then  
10 it has removed any possibility that it will have to answer  
11 for its actions in the U.S. courts since doing away with  
12 an employee can't be a commercial act.

13 QUESTION: It's not clear to me the extent to  
14 which you base your complaint on a breach of the contract  
15 itself. We've been talking about tort. The contract  
16 provides certain remedies, certain provisions for  
17 discipline of the employee, one of which is not beating.  
18 It's just warning, suspension without pay, et cetera. Did  
19 you frame a cause of action based around a breach of that  
20 provision of the contract? Or do you have any contract  
21 breaches in your complaint here?

22 MR. STEVENS: We have no causes of action in  
23 contract. I suppose you could say --

24 QUESTION: Why is that?

25 MR. STEVENS: It is because of the way that

1 counsel in the original proceeding wrote the complaint,  
2 Justice Kennedy. I would be happy to --

3 QUESTION: Do you at least use the contract or  
4 may you use the contract as setting forth the duties of  
5 the employer, which then gives rise to a tort cause of  
6 action? Is that your theory?

7 MR. STEVENS: Well, our theory with respect to  
8 the contract is that it is impossible to understand either  
9 the commercial nature of the activity or the  
10 substantiality of the contact with the United States  
11 without looking to the agreement. Implied by the  
12 agreement are duties that were undertaken by the employer  
13 that underscore both the liability on the negligence  
14 claim, but the nature of the commercial contact --  
15 commercial activity and the contact.

16 You could, I suppose, make a quasi-contractual  
17 argument that an employer is obligated by a contract not  
18 to torture its employee, but you can also, under our  
19 jurisprudence, make an independent and perhaps more  
20 compelling tort claim, and that's what we have done.

21 QUESTION: So, your theory is that by setting  
22 forth terms of discipline in the contract, that at least  
23 establishes that discipline was within the realm of  
24 commercial activity and that the employer exceeded  
25 permissible discipline and committed a tort in this

1 instance. Is that --

2 MR. STEVENS: That is precisely what we are  
3 arguing with respect to that portion of the contract.

4 QUESTION: As to your claim of failure to warn  
5 at the time of recruitment that a foreign government might  
6 take the action that it took here, what do you -- what law  
7 do you base that on? Can you give us any citations for  
8 the substantive law creating such a duty to warn?

9 MR. STEVENS: The --

10 QUESTION: I didn't find any in your brief.

11 MR. STEVENS: It would be the common law of  
12 Florida with respect to the obligations of an employer or  
13 recruiter active in Florida.

14 QUESTION: Can you give us a citation?

15 MR. STEVENS: Justice O'Connor, I cannot, and  
16 the theory of liability may be one that would break some  
17 ground in the Florida courts.

18 QUESTION: A new theory.

19 MR. STEVENS: Well, I think the obligations of a  
20 recruiter or employer to warn of job-related dangers is  
21 not a new theory. I mean, there are risks inherent in  
22 employment which may not be foreseeable to the employee,  
23 but which, if reasonably foreseen by the employer, have to  
24 be pointed out, and there are certainly many cases that  
25 hold that.

1                   With respect to the application of this  
2 principle in the context of recruitment and the activities  
3 of a foreign government-owned hospital and its employment  
4 practices or a foreign police operation and its peculiar  
5 practices, it would break new ground insofar as that is  
6 concerned.

7                   If the Court has no further questions, I'll  
8 conclude my argument.

9                   QUESTION: Thank you, Mr. Stevens.

10                  Mr. Johnson, you have 2 minutes remaining.

11                  REBUTTAL ARGUMENT OF EVERETT C. JOHNSON, JR.

12                                 ON BEHALF OF THE PETITIONER

13                  QUESTION: Mr. Johnson, while you're getting  
14 ready, it seems to me shooting somebody in the head, I  
15 suggested to your opponent, is not a commercial activity.  
16 What about fixing prices, violating the Sherman Act?  
17 That's a violation of law too. Is that a commercial  
18 activity?

19                  MR. JOHNSON: The lower courts who have  
20 addressed that in the OPEC cases, Your Honor, have tended  
21 to treat that either alternatively as an act of state in  
22 advance of the jurisdictional grounds or to treat it as  
23 international agreements regarding the exploitation of  
24 natural resources.

25                  QUESTION: That's not what I asked. Is that a



1 commercial activity in your --

2 MR. JOHNSON: In my view, if it's a conspiracy  
3 between nations, it is not a commercial activity, Justice  
4 Scalia.

5 QUESTION: Never mind whether it's between  
6 nations or not. By a private party, by anybody else, is  
7 price fixing in violation of the Sherman Act a commercial  
8 activity?

9 MR. JOHNSON: Well, by a private party, it would  
10 be in violation of -- a commercial activity and the  
11 character of the conduct --

12 QUESTION: It would be a commercial activity.

13 MR. JOHNSON: Yes, sir.

14 QUESTION: What about burning down your  
15 competitor's store?

16 MR. JOHNSON: In my view that would not be a  
17 commercial activity.

18 QUESTION: So, it lies -- the line between  
19 commercial and noncommercial lies somewhere between the  
20 Sherman Act and arson.

21 MR. JOHNSON: It lies entirely in the nature of  
22 the conduct, yes, Justice Scalia.

23 Two very brief points, Your Honor.

24 First, Mr. Stevens says that this is an action  
25 against the hospital. If it is, it doesn't help them.

1 The Foreign Sovereign Immunities Act has expressly made  
2 this hospital and all other agencies and instrumentalities  
3 of foreign sovereigns -- foreign sovereign states for  
4 purposes of the act. They are presumptively immune. They  
5 are only amenable to jurisdiction of U.S. courts when they  
6 engage in commercial activity. Their conduct, which is  
7 not commercial, is nevertheless immune.

8 Respondent seeks somewhat to have this both ways  
9 by alleging that this is an action against the hospital,  
10 which they allege is an inherently commercial enterprise,  
11 but that the hospital is the alter ego of Saudi Arabia and  
12 therefore is, in essence, the Government of Saudi Arabia.  
13 Why it's irrelevant to our purpose is because the hospital  
14 enjoys its own immunity. There is an inconsistency in  
15 this position.

16 QUESTION: I suppose the hospital is a  
17 commercial activity. You deny that there's substantial  
18 contacts with the United States.

19 MR. JOHNSON: I think it is not a commercial  
20 activity qua the operation of the hospital, Justice White.  
21 It has to do with the nature of what this hospital does in  
22 Saudi Arabia, and it's our view that the hospital had no  
23 contact at all with the United States. The only contact  
24 is through its American agent.

25 Thank you, Mr. Chief Justice.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
2 Stevens.

3 The case is submitted.

4 (Whereupon, at 11:03 a.m., the case in the  
5 above-entitled matter was submitted.)

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## 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:* Saudi Arabia, King Faisal Specialist Hospital, and Royspec, Petitioner v. Scott Nelson, et ux  
Case No. 91-522

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

BY *Lou M. May*

(REPORTER)