OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: BARCLAYS BANK, PLC, Petitioner v. FRANCHISE TAX BOARD OF CALIFORNIA and COLGATE-PALMOLIVE COMPANY, Petitioner, v. FRANCHISE TAX BOARD OF CALIFORNIA

CASE NO: No. 92-1384 and No. 92-1839

PLACE: Washington, D.C.

DATE: Monday, March 28, 1994

PAGES: 1-74

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - -X

BARCLAYS BANK, PLC, :

Petitioner :

v. : No. 92-1384

FRANCHISE TAX BOARD OF CALIFORNIA :

and : CONSOLIDATED

COLGATE-PALMOLIVE COMPANY, :

Petitioner, :

v. : No. 92-1839

FRANCHISE TAX BOARD OF CALIFORNIA :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Monday, March 28, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

JOANNE M. GARVEY, ESQ., San Francisco, California; on behalf of the Petitioner Barclays Bank.

JAMES P. KLEIER, ESQ., San Francisco, California; on behalf of the Petitioner Colgate-Palmolive Company.

DREW S. DAYS, III, Solicitor General, Department of

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondent.

TIMOTHY G. LADDISH, ESQ., Assistant Attorney General of California, Oakland, California, on behalf of the Respondent.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

C O N T E N T S

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 92-1384, Barclays Bank, PLC v. Franchise Tax Board of California, Number 92-1839, Colgate-Palmolive Company v. Franchise Tax Board.

Ms. Garvey.

ORAL ARGUMENT OF JOANNE M. GARVEY

ON BEHALF OF THE PETITIONER BARCLAYS BANK, PLC

MS. GARVEY: Mr. Chief Justice and may it please the Court:

At issue in this case, the Barclays case, is the constitutionality of worldwide combined reporting as applied to a foreign multinational enterprise. The United States and the nations of the world all use one method to divide international income for tax purposes -- the arm's length separating accounting method. That all nations have agreed to use one, and only one method, demonstrates the essential need for uniformity in this area.

For over 20 years, California has defied this international standard by applying a different and inconsistent method -- worldwide combined reporting. Whether or not this method is constitutional as applied to a domestic multinational corporation, it's patently unconstitutional when applied to a foreign-owned

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

corporation.

First, it prevents the Nation from speaking with one voice when regulating foreign commerce, second, it presents a substantial risk of international multiple taxation, and third, as applied by California, it has imposed discriminatory compliance burdens.

Now, the California supreme court circumvented these issues by creating a new test for avoiding dormant Commerce Clause analysis. Under the California supreme court's test, congressional silence replaces the traditional requirement of affirmative congressional action.

California's approach has no basis in Wardair or in any other case of this Court. Wardair looked at the negative implications from congressional enactment, not negative implications for no enactment at all.

The California method is practically unworkable as well. It is difficult enough to ascertain a congressional meaning from an act of legislation. Gleaning congressional meaning from congressional inaction is impossible.

The United States-United Kingdom treaty is a good illustration of the difficulties. The treaty, as finally ratified, contained no mention of State use of worldwide combined reporting. From the text, it is not

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

possible to discern any senatorial preference or dislike for the use of worldwide combined reporting.

Now, the legislative history of the courts that go to that, because for some reason to text is ambiguous, indicates a Senate preference for barring the States' use of worldwide combined reporting rather than any affirmative congressional policy to permit the States to use that method.

QUESTION: But a preference not strong enough to be reflected in the Senate's exercise of its power, because it didn't have enough votes for the supermajority necessary.

MS. GARVEY: That is correct, and as a result, Justice Rehnquist, this does not reflect any policy sufficient to take the case out of dormant Commerce Clause analysis, which is the State's argument, and moreover, at least some of the supporters of the reservation were concerned about the use of the treaty method rather than with any restriction on worldwide combined reporting to -- by the States as such, and in fact, both of the contracting parties, the United States and the United Kingdom, have made it clear in the past and before this Court that they do not think the treaty reserves the issue, so --

QUESTION: Nonetheless, it is clear from the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

history that you recited that Congress was certainly well aware of this problem and this debate, and did nothing.

MS. GARVEY: Well --

QUESTION: Although it surely could have.

MS. GARVEY: Senatorial awareness, of course -- because I don't think both Houses of Congress had addressed the issue -- senatorial awareness is not a substitution for this Court's off-affirmed principle that Congress must act affirmatively to remove the State act from scrutiny by this Court under the dormant Commerce Clause, and in fact, at best, the treaty situation is much like a filibuster in which the majority wasn't sufficient to break the filibuster over a particular provision, and so you had to delete that provision to move the rest of the legislation forward. That deletion would not, certainly, indicate congressional policy in favor of the opposite of the deleted provision.

QUESTION: There was in the Wardair case, as you mentioned, the use of the words, affirmatively acted, but the affirmative action was by nonaction, right, by failure to forbid the State taxes?

MS. GARVEY: Yes, but you had a prohibition. Actually, you did have an action which was a direct prohibition on the use of a portion of State taxes.

The Chicago convention contained an enactment in

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

which aviation fuel on -- State tax on aviation fuel on inbound flights was specifically prohibited. There was no mention in the text of that enactment, signed by 156 other nations, of anything to do with State tax on outgoing flights.

From that, plus the fact that the Court had the Federal Aviation Act, which extensively had legislated in the area of domestic aviation and would specifically permit this tax, this Court could start with a text from which to discern congressional policy. In this case, we still have no text.

Congress has not acted here, and this case should be analyzed under the dormant Commerce Clause, and this case presents a textbook example of a State tax that's violative of the dormant Commerce Clause.

Japan Line and Container provide the framework here for analysis, and the result falls on the Japan Line side of the leger. The dispositive factor is that Barclays is foreign. There are direct implications on United States foreign policy that were not present in Container, where a domestic enterprise was affected by a domestic tax.

Barclays should prevail under this Court's jurisprudence for at least four reasons. First, the clearest evidence of implication on United States foreign

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

policy, lacking in Container, is present here. Foreign nations are offended by the use of the California method. Their offense has led to retaliatory acts, and foreign nations have a long-recognized and proper interest in the well-being of their nationals and protection of their rights. The United States has acknowledged the validity of foreign reactions.

The second reason, even if the objective evidence of foreign policy implications were not present, application of the Container objective factors demonstrates that in the circumstances present here, foreign offense is inevitable.

First of all, foreign multinationals are exposed to a greater risk of double tax because, typically, more of their operations are in jurisdictions which have the primary right to tax that income that California includes in its tax base, and second, a foreign Government's own interests are affected.

Under the international practice, the home nation has the obligation to relieve double tax, and if a foreign nation has to relieve excess tax from the California system, the nation then has the Hobson's choice of relieving the tax and affecting its own revenues, or making its businesses less competitive by not relieving the tax.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

There is no framework --

QUESTION: Was that argument available to the taxpayer in Container Corporation?

MS. GARVEY: No, that argument was not available, Your Honor -- Mr. Chief Justice. I'm sorry, I couldn't tell where the question came from.

QUESTION: It's from over here.

MS. GARVEY: I'm sorry, Justice Kennedy. My apologies. No, that argument was not available --

QUESTION: Well, but were there not foreign affiliates in Container Corp.?

MS. GARVEY: That is correct.

QUESTION: And would not a foreign nation under your hypothesis have felt some duty to lesson the impact of the California tax on those foreign affiliates that were within its jurisdiction?

MS. GARVEY: No, because the obligation to relieve the tax flows back to the home country. In the Container case, that would have been the United States, and plus there was no obligation on a foreign affiliate, for example, doing business in Italy.

QUESTION: Well, to me when we say, obligation, that's simply hypothetical anyway.

MS. GARVEY: It's a hypothetical obligation, but it is part of the overall international practice in

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

which --

QUESTION: I still don't quite understand. If an English -- the English Government is concerned that one of its subsidiaries -- one of its corporations, which is a subsidiary of an American company, is paying too much tax in California, then wouldn't it have the same motive to give it some amelioratory treatment as it would in the case that you have posed?

MS. GARVEY: Right.

QUESTION: I don't see why it makes a difference that there is a parent in one case and a subsidiary in the other.

MS. GARVEY: Well, if I might try to see if I can answer that in this fashion, Justice Kennedy, first of all, in Container, the ultimate parent was the United Kingdom company -- I'm sorry, a United States company. The subsidiary could be a foreign subsidiary of any nation.

The impact of the tax was actually in the United States, and so there was no interest, or no problem necessarily arising directly on the foreign subsidiary in that circumstance.

In this case, the foreign parent is the -- a United Kingdom corporation, and in fact one of the taxpayers is also a United Kingdom corporation, a second

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

level subsidiary, and so when the tax falls on the taxpayer here, ultimately the burden falls back into the United Kingdom group and the parent company, because it will be the United Kingdom, as the ultimate sovereign of the parent, that must decide whether to grant a credit to relieve the taxation on income earned abroad by either the domestic subsidiary, in this case a United Kingdom corporation, not the United States, so the argument was not available to --

QUESTION: May I ask you a question about --

MS. GARVEY: Yes, Justice Stevens.

QUESTION: Isn't the assumption, if you think this very complex system really works, that all that's being taxed is income earned in California, and that one looks at the other income only for the purpose of determining what share of the total is attributable to California?

MS. GARVEY: Justice Stevens, I would have to respectfully disagree. The California method puts all income of the worldwide group wherever earned, into a single pool, and then divides that income according to a formula ignoring geographic boundaries profitability and other nations and so forth.

QUESTION: Because you acknowledge you have a unitary business.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MS. GARVEY: Because of the unitary business principle that is accepted in the United States but has never been -- we are here to --

QUESTION: It is not challenged in this case.

MS. GARVEY: Right. Right. We are not conceding -- we are not arguing the fact that we are or are not unitary in this case. We have conceded that.

QUESTION: We have to assume you are for purposes of our decision.

MS. GARVEY: Exactly.

QUESTION: Right.

MS. GARVEY: Yes, so for purposes of this -- however, under the international standard, division of the income is done on an entirely different basis, but for purposes of the California methodology, it's a little difficult to say that anyone is simply measuring by a worldwide pool of income which requires worldwide information gathering even to begin to compute the tax to say that you're only taxing California income, but the problem -- the more --

QUESTION: Explain that to me. Now, I ask, putting aside for one moment the extreme burden of complying, assembling information, if one assumes that the system works as it is designed to work, and I don't know whether it does or not, then is it not true that you're

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

only taxing that proportion of the total which the business in California represents to the total?

MS. GARVEY: If the system worked as it were designed to work, and you were only taxing that fair amount, then the system -- yes, you would only be taxing California income. However --

QUESTION: And if that's true, then there's no danger of double taxation.

MS. GARVEY: However, there is a danger of a different kind of double taxation, but -- and you also must consider in these circumstances the implications on foreign policy, and you further have --

QUESTION: I'm just addressing --

MS. GARVEY: Yes.

QUESTION: -- the one argument of multiple taxation.

MS. GARVEY: Right. With respect --

QUESTION: And I must say I don't understand it.

MS. GARVEY: All right. With respect -- I'm not sure I do, either, Justice Stevens. It's a complex area.

With respect to the double taxation point, the difficulty you have is this. Under the international system, nations are granted the primary right to tax. That tax is based on geography, because the purpose of the system is essentially to resolve competing claims among

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

nations as to how you divide the tax base, because in a unitary business or in a worldwide group, you eventually end up with a base, and the question is internationally how do you divide it?

Because foreign nations are more likely to be doing business in jurisdictions that under the international standard, the international practice, have primary right to tax, it is more likely than not that a portion of the income which California claims is going to be included in the tax base that some other nation has the right also to tax, and in this case there was actual double taxation, but the problem essentially is, you have two competing and incompatible systems, and as a result, whether you have double tax on every -- on a day-to-day basis, you have the risk, because the two systems are inapposite and cannot be reconciled.

QUESTION: What is it that you mean by a jurisdiction having the primary right to tax?

MS. GARVEY: Under the international system, the international practice that we've referred to of arm's length, separate accounting, there are some basic rules. The first is that the nation -- the host country into which a foreign corporation comes in to do business has the right to tax that foreign corporation --

QUESTION: May I clarify what you -- when you're

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

talking about right, you say that nations in an international community agree that this is a fair way of doing things, but there is no right. There is no obligation to do it that way. You say under the international system --

MS. GARVEY: Under the international system which is represented in internal laws, a network of treaties, model treaties, and agreements by all of the nations that enter into treaties at all in the world, this is the one way they all agree to do it, so if a nation were to deviate from this methodology, they would essentially have to consider what effect it had on their other --

QUESTION: What retaliation might --

MS. GARVEY: Right.

QUESTION: -- but there is no treaty, there is no higher law that is being violated. You're bringing this case under the U.S. Constitution saying the Foreign Commerce Clause is a stopper, but there's no international law that would --

MS. GARVEY: Well, this --

QUESTION: -- stop California from doing this.

MS. GARVEY: This has actually attained the custom of nations, but there is no international jurisdiction or sovereign that could say to California or

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the United States you're in violation. However, there are treaty obligations, and the treaty obligations do provide a framework, and in fact --

QUESTION: But they're not binding on -- the United States has not subscribed to that particular treaty that would prevent California from taxing.

MS. GARVEY: It is true that the United States in its treaties has not specifically addressed --

QUESTION: Well, not --

MS. GARVEY: Has not -- has --

QUESTION: Not specifically or any other way, has it?

MS. GARVEY: That's correct. That is correct, because that is the point. They have not addressed the point. However, you have an international practice that is consistently applied, and the issue here under the Commerce Clause is whether the uniformity with that policy is essential.

QUESTION: Just before we get to uniformity, and before we leave the double taxation point --

MS. GARVEY: All right.

QUESTION: -- that Justice Stevens raised, I take it that the double taxation is caused by the juxtaposition of the two systems.

MS. GARVEY: That is absolutely correct --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: So that if everybody had the worldwide reporting system, there would be no double taxation.

MS. GARVEY: That is -- if the worldwide reporting system were all applied in the same fashion, the answer would be yes. If all nations of the world used this, the answer would clearly be yes, but the problem is, no nation of the world uses this, and so as a result, under the dormant Commerce Clause, the inquiry before the Court is whether or not uniformity is essential, and the Court has set forth tests as to whether that is essential.

One test, as here, where a State tax is at variance, is where it implicates foreign policy, and this case probably presents one of the clearest evidences of implication of foreign policy.

We have offense, we have the problems of the objective factors, we have the compliance burdens, and we have the longstanding difficulties in terms of trying to comply both with respect to the implications, but also with the stand-alone issues of burden, which is a discriminatory effect, and the double taxes we have just discussed.

Mr. Chief Justice, I would like to reserve the balance of my time.

QUESTION: Very well, Ms. Garvey.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Mr. Kleier, we'll hear from you.

ORAL ARGUMENT OF JAMES P. KLEIER

ON BEHALF OF THE PETITIONER COLGATE-PALMOLIVE COMPANY

MR. KLEIER: Mr. Chief Justice, and may it please the Court:

Today is the culmination of 11 years of national and international reaction to this Court's decision in the Container case. The immediate aftermath of that decision, including reactions from the Federal Government and foreign Governments, resulted in the formation of the President's Worldwide Unitary Taxation Working Group, and ultimately President Reagan's statement directing executive departments to act to end worldwide combination.

The case which provoked this Federal and international outcry was Container, a case which, like Colgate, involved a U.S.-based group engaged in foreign commerce. This reaction, as chronicled in the record in this case, demonstrates that the result in Container was wrong. However, it is not necessary for, and Colgate does not ask this Court to overrule Container. Indeed, Colgate asks only that this Court apply the doctrine set forth in Container to the record in this case. This record demonstrates that the failure of Container was a lack of proof of a consequence to worldwide --

QUESTION: Well, Mr. Kleier, you say that this

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

reaction demonstrates that the decision in Container was wrong. Would you care to spell that out?

MR. KLEIER: Yes, Chief Justice Rehnquist. What has happened since Container is not only evidence of a Federal policy opposed to the application of worldwide combination, and that is the primary evidence, I guess, that I would point to.

QUESTION: Well, you mean something that has developed since Container?

MR. KLEIER: Not entirely. Actually, the majority opinion in Container, the majority did have before it the 1982 submission in the Chicago Bridge and Iron Case. However --

QUESTION: And it rejected that.

MR. KLEIER: -- the opinion -- that's right. The opinion found there was no evidence that in 1983, at the time of the Container decision, that that brief represented the continuing position of the Federal Government, yet the subsequent developments, including President Reagan's statement and up to and including the Solicitor General's statement in this case --

QUESTION: Why should President Reagan's statement have anything to do with it?

MR. KLEIER: Well, to be more direct, I guess, the submission of the Solicitor General in this case --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Why should the Solicitor General's statement have anything to do with it, other than advising us of the position the Federal Government takes, but surely that's not conclusive.

MR. KLEIER: It certainly is not conclusive, and indeed, that was set forth in Container.

What I'm suggesting is that the record in this case chronicles a series of pieces of evidence of what the policy is and of that interference, and certainly the Solicitor General's submission in this case, President Reagan's statement, those are all pieces of evidence.

QUESTION: And you draw from these various pieces, as you describe them, the conclusion that Container was wrong?

MR. KLEIER: That the result in Container was wrong, yes, Your -- yes, Chief Justice Rehnquist, because Container did not have before it evidence that the Chicago Bridge and Iron case represented the continuing position of the Federal Government, and furthermore, Container did not have before it evidence that there is a purpose to U.S. foreign policy that is -- that worldwide combination interferes with.

Other than simply the danger of retaliation, there is a purpose, a key element of U.S. foreign policy other than keeping foreign nations happy, and that is to

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

ensure competitive balance for U.S. business in trade with foreign countries. This objective, and that it is an objective of U.S. foreign policy, is set forth again, evidenced by statements in the record, but more importantly, that objective is at the very heart of the purpose of the Foreign Commerce Clause.

To paraphrase Alexander Hamilton in the Federalist Number 22, no nation acquainted with the nature of our political associations would be unwise enough to enter into stipulations with the United States while they found from experience that they might enjoy every advantage they desired in our markets without granting us any return.

QUESTION: Well, if it's at the very heart of the Foreign Commerce Clause, one would think you wouldn't need statements by President Reagan or a brief from the Solicitor General to confirm it.

MR. KLEIER: Certainly that -- first you have to determine that the interest is at the heart of the Commerce Clause, then, what the Court requires further is some indication that there is interference by California's method with that purpose of the Commerce Clause, and that is what is supplied beginning with the statement in the Chicago Bridge and Iron case.

As a result of the principle of competitive

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

balance for U.S.-based foreign commerce, which has existed as long as the Federal Government has existed, worldwide combined reporting should not be applied to either Container or to Barclays.

In addition to this violation of a clear Federal directive, the Container court expressly acknowledged the lack of evidence of that doctrine in the Container opinion, and had to see -- basically could not determine whether the Chicago Bridge and Iron submission still represented its position. The Solicitor General's submission here, as well as the other statements, indicate that it does.

The Solicitor General's brief does not indicate that application of worldwide combined reporting to Colgate and Barclays in this case is now somehow suddenly consistent with Federal policy. Instead, the Solicitor suggests that a result adverse to Colgate and Barclays is appropriate --

QUESTION: May I just clarify one thing? When you refer to Federal policy -- earlier you talked about the position of the Federal Government. Are you actually saying the position of the executive branch of the Federal Government?

MR. KLEIER: Yes, Justice Stevens. This Court has certainly recognized that some aspects of foreign

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

policy are not properly, or very well-conducted at the pace and in the public forum that Congress provides, and as a result that the executive must have some authority in the foreign policy arena, and that is what we're talking about in this case.

QUESTION: Commerce is in fact entrusted to Congress, foreign commerce is.

MR. KLEIER: The Commerce Clause certainly entrusts the power to regulate commerce to Congress. Nonetheless, this Court has recognized that entrusting that power to Congress has to keep the States out of certain areas, and as evidence of what areas the State should be kept out of, this Court has historically looked to indications from the Executive Branch of whether a particular area is one that the States should not interfere in, even in the absence of congressional regulation.

QUESTION: Well, whatever the rule should be for determining the foreign policy position of the United States -- and this case itself shows that that's a very difficult determination to make -- once this Court has spoken, as we did in Container, it seems to me then that there is a special obligation on the Congress to act affirmatively if it wishes to change our assessment of that policy --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. KLEIER: Well, certainly --

QUESTION: And we said as much in a domestic context in the Quill case.

MR. KLEIER: Well, certainly Congress could act to change the policy, but there are certainly areas, very sensitive areas, that this Court has recognized Congress isn't very good at getting involved in, and particularly the foreign commerce area is one of these.

QUESTION: Well, don't you think they might be a little bit better after we've decided the issue?

(Laughter.)

MR. KLEIER: You would hope that that might provide some incentive to act. Nonetheless, because of the sensitive nature and competing interests at stake, with respect to foreign commerce, that has been a particular area that has demanded special scrutiny. It is something that this Court has recognized that it is particularly difficult for Congress to act.

QUESTION: Does this case involve the tax on foreign commerce?

MR. KLEIER: It certainly in -- this Court found in Container that a situation involving a U.S. parent corporation with foreign subsidiaries is foreign commerce, and as a result, it does involve a tax on foreign commerce.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: I thought the tax was on California operations of subsidiaries of foreign entities.

MR. KLEIER: Well, certainly the structure that California uses is to attribute income to the California -- I'm sorry, the U.S. parent, in Colgate's case. Being a U.S. parent with foreign subsidiaries is to use worldwide income to measure what they are going to attribute to Colgate for purposes of the California tax. whether it really is income earned by the U.S. parent or the foreign subsidiaries, that economic determination basically --

QUESTION: Foreign commerce is a base from which the tax is calculated, but theoretically at least -- and one always has to be skeptical -- theoretically the tax is on domestic business.

MR. KLEIER: Certainly -- I don't know about theoretically, but in terms of the California statute it is. Economically, there certainly is a serious question as to whether or not it is on the California business. That is certainly the way that California attempts to justify jurisdictionally the imposition of its tax, because they would have no due process right to tax the income if they acknowledge that it was income of the foreign subsidiaries.

QUESTION: Going back to Justice Kennedy's

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

question, in the aftermath of Container, would you agree that there is at least one point on which Congress does have a particular competence, and that is the capacity in effect to change a tax rule without raising the kinds of problems of retrospectivity and refund that would be the case if we saw things your way?

Congress really could do a much better job of, as it were, adjusting the balance, than we could, could it not?

MR. KLEIER: Justice Souter, the problem, I guess, is Congress getting to that point, because it does involve questions of how foreign commerce is taxed, and that being an area where Congress has particular difficulty to even substantively get to the question where the remedy is.

QUESTION: But if it gets to it, it can do a better job of it, or at least a somewhat less fiscally messy job of it than we can do, in effect by turning tail so soon after Container.

MR. KLEIER: In terms of -- I'm not sure if I fully understand the question.

QUESTION: I'm saying that if Congress sees it your way, the tax is going to be changed on a purely prospective basis. If we were to look -- if we were to accept your argument, there would be a serious question

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

about refund, California reliance, and so on, is that not the case?

MR. KLEIER: Well, certainly there are issues with respect to the refund in this case, and I submit that those same issues would exist in the event that Congress was to come to the table.

The problem is that by the time Congress acts with respect to this question, there are going to have been a number of years that elapse where California has intruded in an area of foreign commerce, basically has interfered with an area where uniformity is essential, and contrary to a Federal directive.

QUESTION: Well, but --

MR. KLEIER: By the time that exists -- I'm sorry.

QUESTION: But it's acting -- so far as Congress may be concerned, at least in the case of a domestic corporation, it may feel there is no need for any action because the Container Corporation says there is no violation of the Commerce Clause.

MR. KLEIER: The Container case certainly said that based on the facts before it at the time.

QUESTION: You say, Mr. Kleier, that Congress has a great deal of difficulty getting to foreign commerce questions. Do you mean anything more by that than they

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

simply don't agree when they do get to them?

MR. KLEIER: Certainly not at all. I mean, certainly the diversity of Congress adds to the difficulty in terms of the pace and the sensitivity with which Congress can deal with those questions, and that --

QUESTION: Well, but you could say that about any branch of the law, where something came up in Congress and Congress proved unable to enact any law because there were so many different opinions on the subject, and we don't generally say well, that means Congress has kind of defaulted so somebody else is going to step in.

MR. KLEIER: Well, certainly in most areas there is no -- that's right -- overriding interest that simply the fact of disagreement should have any effect, but when foreign commerce and foreign nations are involved, and the equality of U.S. business doing this in foreign countries, it is a particularly sensitive area where --

QUESTION: Why is that an overriding interest compared to crime, health care reform -- any number of other things that might be before Congress where there might not be any agreement?

MR. KLEIER: Because of what was recognized in the Constitution as the need for particular Federal attention to the area of commerce, and going beyond that, this Court has not always limited that to --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: So the Constitution gave Congress the power to regulate, and whatever we say, am I right, that we are not -- we would not be the final arbiter. The last word is for Congress in this area.

MR. KLEIER: Certainly, whatever this Court were to say, Congress could enact a statute to the contrary, and that would control.

QUESTION: One of the major themes running through the briefs on your side is the international community and the international custom, and yet I don't know of any other country in the world where a question like this would be referred to a Court as the decision-maker. It would be a legislative judgment.

MR. KLEIER: It certainly, in terms of the method, if the method were not to affect foreign commerce and foreign relations, then indeed it could be handled purely internally.

In this area, as in a number of other areas, when foreign commerce and foreign nations become involved, this Court has generally treated that as an area that warrants more sensitivity, and where the executive sometimes must be able to act as opposed to Congress, and if there is sufficient evidence of that executive action, and a State law which is inconsistent with that executive action, this Court will invalidate the State law, and that

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

certainly isn't just in the area of taxation, although most of those cases have been tax cases. Certainly, not entirely.

For example, in the Zschernig v. Miller case, this Court invalidated Oregon's inheritance scheme to the extent that it prohibited East German nationals from inheriting --

QUESTION: Mr. Kleier, if Congress were to disapprove in the future State taxation of foreign international corporations such as the petitioner in the prior case, but not for domestic multinationals such as your client, would you be back here arguing a constitutional violation under equal protection?

MR. KLEIER: Certainly not under -- under both equal protection and the Commerce Clause, and indeed, that issue has been raised in this very case. There are two elements --

QUESTION: Excuse me, what is your answer?

MR. KLEIER: Yes. The answer is, I guess we would be back by saying that --

QUESTION: You don't think Congress can do that?

MR. KLEIER: I'm sorry?

QUESTION: You don't think Congress can treat the two differently?

MR. KLEIER: I think that there would be an

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

issue as to whether Congress could treat the two differently.

The way -- what we believe controls is the Commerce Clause, and that in fact even under the Commerce Clause the two can't be treated differently, but in that case only if Congress doesn't override that result, that is correct, so we certainly have not raised the equal protection argument the same way as the Commerce Clause argument.

QUESTION: And you don't think that the mere fact that the domestic company is here which normally gives primary tax authority to the country in which the parent is formed would justify some difference in treatment --

MR. KLEIER: Certainly not --

QUESTION: -- even legislatively.

MR. KLEIER: Not simply because it is a U.S. company that is before the Court. To the extent this Court has spoken at all on the subject, it has indicated that protected forms of commerce, there should be no discrimination under the Commerce Clause between different protected forms of commerce, although the only time the Court has expressly taken up the issue, it involved two different forms of interstate commerce in the Boston Stock Exchange case.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

With respect to this case, to treat a U.S.-based company differently simply on the basis that it is a U.S. entity, even though it is engaged in foreign commerce and is going to compete with foreign businesses in the exact same markets, would undercut the purpose of the Commerce Clause to actually see that U.S.-based businesses play on a level playing field, and as a result, the purpose of the Commerce Clause would warrant no discrimination.

QUESTION: Well, don't you think the Quill opinion has some bearing on the situation?

MR. KLEIER: In what respect, I'm sorry?

QUESTION: Stare decisis. The Court has dealt with this very statute in California.

MR. KLEIER: Certainly, in terms of -- that's exactly right, and in the Quill opinion, however, there was no demonstration of a sufficiently different and changed state of affairs.

Here, the reaction to the Container case, all the way up through the Solicitor General's submission in this case, demonstrate that indeed what was missing, the evidence that was missing both of a purpose of U.S. foreign policy to see that U.S. businesses are treated on an equal playing field, and then additionally, of a clear Federal directive, neither of those existed in Container,

and in fact, with respect to stare decisis, we are asking that the doctrine of Container be applied, but we are asking that it be applied to the facts that are before the Court here.

We certainly take the position that a Federal policy which is motivated by the Government's desire to ensure competitive equality between U.S.-based and foreign-based groups is at the very heart of the Federal interests that are protected by the Commerce Clause.

A Federal directive which furthers competitive balance has to be part of the Government's one voice in international trade. As Mr. Hamilton implied in the Federalist Papers, foreign Governments simply will not take seriously efforts by the President to eliminate unequal treatment of U.S.-based businesses in foreign markets, as, for example, in the recent trade negotiations with Japan, if those foreign Governments see that the President is powerless to prevent the United States' own States from putting U.S.-based businesses at a disadvantage in foreign commerce.

QUESTION: I thought Mr. Hamilton was arguing that in support of giving Congress the power to regulate foreign commerce, I take it.

MR. KLEIER: Well, he certainly was explaining the need for Federal regulation of commerce, and

ultimately that power was given to Congress, but what he was explaining was the need to keep the States out, and it is that need to keep the States out where this Court has sometimes looked not only to congressional statutes, but to sometimes less formal directives in the area of foreign policy and foreign commerce which are not evidenced in any statute or in any treaty.

With respect to the Solicitor General's suggestion that it is not present policy which controls, and instead it is only some historical policy, the impact of a tax on foreign commerce is certainly not felt at the time a tax is accrued. It is, indeed, when a tax is collected and levied that the impact in international trade is felt.

In Colgate's case, the tax is not collected or anywhere close to collected in 1970 to 1973, the year that the tax accrues. California must first determine under State law administratively whether it wishes to apply that method to Colgate, and indeed, the tax is ultimately paid in 1982, and the final administrative action that California takes is its denial of Colgate's claim for refund in 1984.

That is the action that causes the interference with international trade, and that is the action which Colgate is here contesting today. As a result, it is

certainly not some historical inquiry that the Court should be undertaking, and in addition, there certainly is no precedent in this Court's decision for such an approach.

In Itel, Container, and Japan Line, in none of those is there some historical inquiry limited to particular years, and indeed, for the President, in conducting foreign affairs, to say I'm sorry, but I can't do anything about what happened last year -- I can't do anything to fix it today -- would simply gut the notion of executive -- any executive authority in the area of foreign policy and foreign commerce, and if there are no further questions, I would like to reserve the rest of my time for Ms. Garvey's rebuttal.

QUESTION: Very well, Mr. Kleier.

General Days, we'll hear from you.

ORAL ARGUMENT OF DREW S. DAYS, III

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE RESPONDENT

GENERAL DAYS: Thank you, Mr. Chief Justice, and may it please the Court:

In the view of the United States, petitioners have not sustained their burden of showing that the taxes at issue in this case were unconstitutional, whether their claims are viewed from the perspective of California law

as it exists today, or from the perspective of a legal situation that existed during the tax years at issue.

QUESTION: General Days, do you take the position that the California tax is perfectly valid today as applied to Barclays?

GENERAL DAYS: Yes, we do. Our position is that insofar as the issue presented in this case is the ability of the Federal Government to achieve uniformity in foreign affairs or speak with one voice, that what California has done as of September 10, 1993, to change its law and provide corporations like Barclays with an option, an election to adopt water's edge --

QUESTION: How about September 9th?

GENERAL DAYS: September 9th?

QUESTION: Before they adopted it.

GENERAL DAYS: Before they adopted it, we have not taken a position in this case as to whether it would satisfy the standards that we've set out.

QUESTION: Well, I'm asking you what your position is as of September 9th and before they adopted this change.

GENERAL DAYS: I would say --

QUESTION: But not going back to the tax year in question.

GENERAL DAYS: Yes. I would say, Your Honor,

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

that the same analysis that we've utilized with respect to the tax years at issue in our brief is the one that should be applied here.

What we have on September 9th, 1993, is a situation where California has changed its law in 1986 to provide a water's edge election, and so it seems to us that for the Court to determine whether there was a violation between 1986 and September 9th, 1993, would depend upon whether during that period the United States felt that it could not speak with one voice, or that there was a need for Federal uniformity.

QUESTION: Well, if the 1970 California tax were still in operation, the tax that Barclays objects to, if it were still in operation, what then would be your position as to its validity?

GENERAL DAYS: Our position would be that during the period from 1980 through 1986, there were expressions of concern by the Federal Government -- that is, by the executive branch -- with respect to the California taxing scheme. Thereafter, there was a change in the policy and what we saw as our history indicates in our brief, a movement on the part of the executive branch to seek legislation, and then a pulling back in response to California's change in its law.

We have not gone through a thorough analysis of

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

that period, because as we've suggested to the Court, the issue presented by this case is whether American foreign policy during the tax year in question was in fact such that California's practice was unconstitutional under the Foreign Commerce Clause.

QUESTION: Well, would it be constitutional, consistent with our foreign policy interests, for California today to reinstate the worldwide reporting statute that it seeks to apply to Barclays?

GENERAL DAYS: I think, Justice Kennedy, that what would be necessary is an evaluation of the principles that have been set out by this Court in Japan Line and Container Corporation.

I think we have to start from the proposition that California has been using a method that this Court upheld in Container Corporation. It's not a situation where California is trying to tax income that is not justifiably taxed by the State of California. In fact, this Court has said that California's method is really a benchmark insofar as taxing schemes, apportionment schemes are concerned.

QUESTION: But I take it you cannot say with assurance that under my hypothetical case the statute would be consistent with our foreign policy interests.

GENERAL DAYS: That is correct. We are very

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

clear, looking at the record as to the tax year in question, and think that during that period what the record reflects is a preference on the part of the United States, on the part of the executive branch, but not a policy. To the extent that there's reliance on the U.S. --

QUESTION: So our analysis should just turn on when the executive branch has spoken, and with what clarity, and that's what turns the tide?

GENERAL DAYS: Not at all, Justice O'Connor. The suggestion that briefs filed by the executive branch, or, indeed, executive branch pronouncements, determine the constitutional issue before the Court, is not an argument that we're making.

What we see the situation presented as being is a case where we know that the Federal Government has foreign affairs concerns, we have a State taxing in a way that this Court has said is constitutional, and so the question is, what does the Court look to in the absence of an explicit statement by Congress through statute, or by way of a treaty?

We think that under those circumstances it's appropriate for the Court to look at what the executive branch has done, what was executive branch policy during that period.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Sort of a Teague rule for the Commerce Clause?

(Laughter.)

GENERAL DAYS: Well, not quite, Your Honor. It's really a question of taking that as evidence, and to the extent that there's been citation to briefs filed in this case and in other cases expressing the views of the United States, as we've argued in our brief, it's important for the Court to look at not the briefs as an indication of American foreign policy or executive branch policy, but to look at them only to the extent that they reflect foreign policy determinations that have been made elsewhere, and in this case we are suggesting that whatever briefs may have been filed subsequently, they did not focus on the tax years at issue.

If one focuses on those tax years, as I've indicated, we see a preference but not a policy, a willingness on the part of the executive branch to allow States, except in the context of the U.K.-U.S. tax convention originally, to tax foreign nationals using the worldwide combined reporting method, and therefore we think that that is the correct representation.

But to return to my other point -- it's a point raised, I think, by Justice Souter's question -- what does the Court do under these circumstances? It seems to us,

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

however the Court resolves this issue, and with regard to whatever years, that this is really a third party claim on the part of Barclays.

What we ultimately are boiling this case down to is whether what California was doing prevented the Federal Government from speaking with one voice or achieving uniformity. We think that with the change made by California in September of last year, whatever retaliatory concerns that might have been raised for the entire Federal Government, certainly for the executive branch, have been removed, and therefore this is not a situation where we have a discriminatory tax.

Justice Stevens, you're exactly correct on the whole question of what's being taxed.

QUESTION: What about Vermont's tax that we reviewed in the Mobil case? What about all the other States? Does the fact that California changes its policy govern the entire Nation?

GENERAL DAYS: It is something that the Court has to take into consideration in determining objective considerations, whether what California or Vermont is doing violates the Foreign Commerce Clause, but failing a clear answer with respect to those objective inquiries, it is our position that one place to look is to the executive branch, and what we are saying not as a matter of history,

but speaking about the contemporaneous relationship of the United States Government with our trading partners that what California has done has removed whatever tension might have been presented at an earlier point by what California was doing.

This is also not a situation where there is anything to be served by paying California's taxes back to Barclays in the form of a refund. Backward-looking relief is infeasible under these circumstances.

To the extent that what California has done to impair the Federal Government's relations in the foreign affairs area, that has already been accomplished. Requiring California to refund money under those circumstances --

QUESTION: You in effect --

GENERAL DAYS: -- it seems to us would be inappropriate.

QUESTION: I'm sorry. You in effect are arguing that we should look at this the same way Congress would look at it, aren't you? Because I think you're saying that because the retaliatory effect is less with respect to an event subsequent to the tax years in question, that simply should color our judgment with respect to the tax years in question. Whatever that is, I don't suppose that's a statement of legal principle, is it?

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

GENERAL DAYS: Certainly, this Court has never explicitly held -- may I complete the answer? -- explicitly held this, but we think that looking at this Court's decisions with respect to refunds of taxes, this Court has held that refunds were required when it was a matter of discrimination, where the tax went beyond merely what was legitimate within the taxing jurisdiction, or where the parties taxed were immune from taxation.

We think that this particular situation is unique, and therefore are suggesting that the Court adopt a unique remedy.

QUESTION: Thank you, General Days.

GENERAL DAYS: Thank you very much.

QUESTION: Mr. Laddish, we'll hear from you.

ORAL ARGUMENT OF TIMOTHY G. LADDISH

ON BEHALF OF THE RESPONDENT

MR. LADDISH: Thank you. Mr. Chief Justice, and may it please the Court:

It's extremely helpful for the Solicitor General to point out a fatal flaw in the taxpayers' approach, but I'm afraid we must point out that both the taxpayers and the executive branch have lost sight of two of the bright stars of Commerce Clause navigation. First, that the Constitution gives the power to regulate commerce to Congress, not to executive branch letters or policy

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

statements or anything of the like.

And second, that there must be a clear line of demarcation maintained between a dormant Commerce Clause analysis and a nondormant Commerce Clause analysis, and confusion results from the taxpayers' brief in this area. Well, what is dormant? Well, just a grizzly bear is dormant when it's hibernating, Congress is dormant as to a Commerce Clause issue when it is not making decisions on that issue informing United States law.

What is not dormant? Well, if the bear's out of the den, down at the stream choosing which fish to swat up on the shore and which fish to let go by, that bear is not dormant as to any of those fish. Similarly, if Congress, informing the commerce law of the United States, is choosing which tax practice to prohibit and which tax practice to let go by, then Congress is not dormant as to any of those tax issues that are under congressional scrutiny.

QUESTION: Well, under your theory, I guess, or maybe it's the theory adopted by the court below that you're supporting, if Congress has a bill before it to deal with the issue of State taxation and for whatever reason doesn't pass it, then that's congressional action.

MR. LADDISH: No --

QUESTION: That's it. There we are.

MR. LADDISH: No, Justice O'Connor, we would not take that position. That is not the position this Court has ever taken and we would not take that position. What we do -- what we do rely upon is this Court's Wardair decision. And I should label this. We're talking nondormant Commerce Clause here, where the one voice has spoken.

The Wardair Court in the Wardair decision makes it clear that permission, congressional permission, the one voice can speak in terms of congressional acquiescence that is implied in congressional actions. If, indeed, such implied permission exists, then the one voice has spoken through the congressional actions and no dormant Commerce Clause analysis is required or necessary. That is the holding in the Wardair case and that clearly falls on the nondormant side.

Now, here it's claimed that the California Supreme Court held something different. Well, actually, if you look at page A-27 of the appendix to the petition, where the California Supreme Court holds that the Federal Government has affirmatively acted rather than remain silent and has acquiesced in the taxes in this case, that's --

QUESTION: May I ask you a sort of basic question --

MR. LADDISH: Certainly.

QUESTION: -- Mr. Laddish. Supposing we didn't have all this history. None of this had happened, Congress had never considered, nobody had talked about it, a purely dormant Commerce Clause issue -- you argue it's a nondormant. If it were a dormant Commerce Clause issue 100 percent pure and simple, would the tax be constitutional or unconstitutional?

MR. LADDISH: The tax would be constitutional. And would you like me to go into that aspect at this point?

QUESTION: I would think that that's part of your case.

MR. LADDISH: Certainly.

QUESTION: You don't argue that very much.

MR. LADDISH: Well, I plan to, Your Honor. If I might, I could get -- I'll be getting back there.

With the Wardair decision -- which, by the way, explicitly did not rely upon the Federal Aviation Act. There's a statement in the Court's decision saying it's not doing that -- the U.S.-U.K. treaty in this case provides a perfect opportunity for this Court to apply the Wardair analysis.

In fact, it's a better opportunity than Wardair itself, because in the U.S.-U.K. treaty the Court need not

assume that the State tax issue was before Congress when Congress made the action. In the U.S.-U.K. treaty, the treaty came to the Senate with a direct ban on the States' use of worldwide combined reporting contained in the treaty. As long as that ban remained in the treaty, the treaty could not obtain the constitutionally required two-thirds vote for Senate approval.

With that ban on the States' use of worldwide combined reporting in the treaty, the treaty died, and it could only be resurrected when Congress, the Senate did something, as one Justice pointed out. They did something by putting in a reservation to that treaty which removed the ban as to the States' use of worldwide combined reporting, kept it as to the national government.

The treaty then went back for renegotiation with the United Kingdom, and with some concessions that the United States had to give in order to get U.K. approval, the treaty then came back to the Senate, was approved, and was ratified with no ban as to the States' use of worldwide combined reporting, but a ban as to the Federal Government.

It's admitted that there could be no clearer situation for the Wardair analysis, to find an unmistakable implication in the law that the States had been permitted to use worldwide combined reporting. In

terms of the grizzly bear, the Congress had chosen to swat the national fish and let the State fish go by, and after considerable scrutiny.

QUESTION: You're relying on what's, in effect, a negative implication from action which Congress took.

MR. LADDISH: Yes.

QUESTION: You say that's the same thing as Wardair.

MR. LADDISH: Yes, in those terms, Mr. Chief Justice; that's what they used.

The U.S.-U.K. Treaty --

QUESTION: What negative implication is there from the action that Congress -- what action did Congress take in the normal sense of congressional action?

MR. LADDISH: In the same sense that in Wardair they found an implication -- I should say you found an implication -- in that the national government of a Federal system was the sole member of that system that was -- that had a limitation put upon it. And from that, the Court in Wardair drew an implication that the States within that Federal system would not have the same implication, and --

QUESTION: But there were allied provisions that did contain a limitation, and it's just a straightforward application of an old maxim of interpretation, inclusio

unius. But, you know --

MR. LADDISH: Well --

QUESTION: -- The explicit inclusion of one thing implies the exclusion of another. What is included here that implies the exclusion of the other?

MR. LADDISH: Well, I mean, it's the same principle as in Wardair, but also it's the culmination of decades of congressional acquiescence in the other treaties.

QUESTION: Well, but that's quite different.

MR. LADDISH: We also have --

QUESTION: I mean just mere congressional inaction is quite different from a situation in which the maxim inclusio unius is applicable.

MR. LADDISH: I don't -- I'm afraid I don't understand any distinction between what the Court did in Wardair and what the U.S.-U.K. treaty was. They have the same sort of application of the limitation --I'm just talking right now from the terms of the treaty, without looking at all the history. It's clear from the history, as the Solicitor General has pointed out, that going into the treaty and through all the negotiations and finally in the final renegotiations and the signing of the treaty --

QUESTION: Never mind the history; give me the text.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. LADDISH: Oh, the text.

QUESTION: Yes.

MR. LADDISH: Yes. The text is -- as it came out and was approved by the Senate, the text was "this limitation applies to the national government," and there's no mention of the States in that particular text. The States are mentioned in the treaty, that States are subjected to other limitations. Just as in Wardair, in separate treaties or separate agreements, the States were subjected to certain limitations and not others. Here we have one document with a synergistic combination of both of the types of implications from Wardair.

Adding to that, you have the implication of through the history of these bilateral treaties where the international model treaty of the OECD would restrict the States, as well as the national government, to the arms-length approach, thus barring them from using the unitary business approach, particularly as to branches of the corporations.

In all the treaties, in dozens and dozens -- in every United States bilateral income tax treaty through the years, the Federal Government has been subjected to an arms-length limitation and the States have not been subjected to that limitation. Certainly, the issue was on the table as to these treaties because there are these

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

model foreign treaties that would have subjected the States.

And, in fact, in a considerable number of these treaties which are set forth on page 17 of the Alaska brief in support of our position, there are a significant number of these treaties where the political subdivision of the other States of the other Nation were subjected to this arms-length restriction, and still the States of the United States were not.

So I submit that the indications, certainly in the Wardair treaty with the history, but forget the history, look to the language of the U.S.-U.K. treaty and to the other dozens and dozens of United States treaties. The common feature in all of those -- and if this is the international standard, I'm perfectly happy to live with it -- is that the national governments are restricted to the use of the arms-length approach. The State governments are not, and thus can use the unitary business approach with its formulary apportionment of income, one form of which is worldwide combined reporting.

So under Wardair, and under the Itel Containers case from 1993, if the standard is put in Itel, the most rational inference to be drawn from the body of law, from the treaties themselves, Federal law, is that the States are impliedly permitted to use worldwide combined

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

reporting.

QUESTION: Does the record tell us at all what the difference in money would be if California were collecting based on the arms-length method as opposed to the worldwide combined --

MR. LADDISH: What the record shows is that -- as to the differences in the amounts between the returns that were filed and the assessments as to tax amounts, for Barclays Bank International it was $1,678; for Barclays Bank of California, for example, it was $152,470. That was approximately 12 percent and 28 percent, respectively, difference between the systems.

But I would like to point out --

QUESTION: Does the system that California uses impact particularly because California has high property values or perhaps high wages or something, and these are part of the formula --

MR. LADDISH: Well, I should point out -- there's an assumption -- and I was going to wait until I got to my dormant Commerce Clause analysis, but I think there's an assumption we have to dispel here that somehow we collect excess taxes and we cost the taxpayers the inordinate amount of money to comply with our wild scheme of taxation.

First, I'd point out that this Court, in

Container, which is consistent with this Court's doctrine through 70 years of Court procedure, has held that this is a proper and fair method of taxation, that it is a method of taxation that fairly apportions income to the taxing jurisdiction with a reasonable sense of how income is generated, and that -- and this is the word from Container -- it avoids the basic theoretical weaknesses of arms-length separate accounting, such as giving the taxpayer the chance for manipulations through tax havens and this sort of thing.

Through the arms-length method, the Federal Government -- and this is on much congressional discussion and everything else -- the Federal Government is having a terrible time trying to use the arms-length method, trying to catch up with taxpayers and enforce the Federal tax. The States' approach of worldwide combined reporting, all the taxpayer needs to provide, basically, is the California and worldwide respectively property, payroll, and sales, and the worldwide net income.

Any business is going to keep track of those things, no matter how many countries they're in. That's the sort of thing they keep track of for their own taxpayers, for any filings they might have to make with the United States SEC if they're going to be selling any shares of stock in the United States. These -- this is

information that they will have.

And as the court of appeal below has held in Barclays, the California system provides for a user-friendly system of reasonable approximations where the Franchise Tax Board is to look at the financial records of the corporation and work from there, if at all possible, open to any time that the taxpayer wants to come in with its actual refiguring under the exact technical determinations of the system, if they don't want to use the reasonable approximations.

QUESTION: But, I had thought -- you indicate that they have these figures, every company has them. Wasn't there a finding that it would cost something in the range of $5 million --

MR. LADDISH: $2 million and $5 million --

QUESTION: To establish this system, and then substantial sums in order to maintain it.

MR. LADDISH: They -- that was a --

QUESTION: Are you saying that it's not burdensome because there's this approximation option?

MR. LADDISH: Exactly, Your Honor, and that's what the California Court of Appeal has held is a reasonable system, and that --

QUESTION: But if the approximation option were not available, this would be a substantial burden on the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

taxpayer from the standpoint of accounting costs, would it not?

MR. LADDISH: As the testimony indicates, it would be a substantial burden whether it was foreign parented or domestic parented, yes, Your Honor.

QUESTION: Well, but that doesn't quite square with your argument that everybody has these figures and it's easy to give the figures.

MR. LADDISH: Well, it's that if they were going to do -- everybody has those figures in their financial accounting records which, as the court of appeal has held, the board of franchise -- the Franchise Tax Board has to consider those in applying the reasonable approximations approach. If the taxpayer says it's going to cost us too much to go set up -- and this is what the $2 million, $5 million things -- assessments were -- set up separate books in every county or every nation, every subdiv -- subsidiary is going to have a separate set of books for California taxes.

The Franchise Tax Board has never required that. We've looked at our requirements and we say, yes, that would be a substantial burden upon you, so you may use reasonable accounting. And in this particular case there is absolutely no evidence on the record that Barclays Bank was deprived of any benefit or of any injury at all

through the California system. They claim risks, but as this Court in Complete Auto Transit indicates, just a claiming of a risk of discrimination is not enough; you have to show there's some injury, and they have not done that.

I would like to mention the taxpayers and the executive branch approach to the dormant Commerce Clause, where they would give determinative weight, under varying circumstances, depending on which person you're listening to, to the bind -- to Federal pronouncements under -- as a binding Federal one voice Commerce Clause policy that could somehow preempt the States. But this would -- this is not truly a dormant Commerce Clause analysis, because in a dormant context you cannot have such a binding Federal policy.

It's -- a very similar argument was rejected by this Court in the Wardair case where the executive branch, the Solicitor General argued that a resolution of ICAO, which is an international body, expressed the international policy which the executive branch joined in, that should be determinative in that case. And this Court looked at that resolution and said, well, this is a -- this is a common aspiration that's being voiced here of the body, but this Court rejected any policy significance for this resolution because it had no force of law.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Executive branch pronouncement must have the force of law before it can possibly preempt the States' power to tax, which this Court most recently in Oregon v. ACF held that this -- the power to tax is central to State sovereignty.

The Constitution provides a very carefully crafted system of Federalism with the States having certain protections within that Federal system. By giving the power to control or to regulate commerce to Congress and by setting forth procedural rules like the two-thirds vote required for Senate approval of any treaty, the Constitution has forged a balance between the national need for a capability of imposing a uniform commerce policy on the States and the need under Federalism for the States to have a voice, through their elected representatives, in the formation of any such policy.

In contrast --

QUESTION: What do you say, Mr. Laddish, to the difficulty of Congress' enacting legislation in this area?

MR. LADDISH: Well, the Constitution gives that job to Congress, Justice Scalia, and I think Congress has certainly -- I'll -- let me shift now to dormant Commerce Clause analysis, because I think we've just -- we have to get there.

The Congress is given the power to regulate

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

foreign commerce, and the -- Container has established that in a dormant, truly dormant one voice situation, the question is is uniformity of the State tax practice with the Federal tax practice essential. And we submit that this question as to whether the basic Commerce Clause interests require uniformity of the State and Federal tax practices is a question -- one this Court has testing, and should look at under current circumstances.

This is because we view this Court in a dormant one voice situation where the one voice has not spoken, as a sort of one voice police that can do what Congress might do if Congress had a full chance to do it.

QUESTION: But may I interrupt you --

MR. LADDISH: Certainly.

QUESTION: You say that Congress has not spoken. If you assume there can only be one voice and only one policy with this kind of tax, Federal policy is quite different from California's policy.

MR. LADDISH: I --

QUESTION: Isn't that, by hypothesis, a demonstration that there are two voices out there?

MR. LADDISH: I --

QUESTION: One says to use one kind of accounting, the other says use the other.

MR. LADDISH: I -- it depends on what you say

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the one voice is. We say that in Commerce Clause area, Congress is the branch that has the one voice. There can be no binding policy by any other -- any other branch of the policy --

QUESTION: Are you suggesting that any State tax on foreign commerce or had a severe impact on foreign commerce would be valid as long as Congress has not spoken?

MR. LADDISH: No, Your Honor, but I think if the Court looks to the facts --

QUESTION: Why isn't there a violation of the one voice policy if Congress has spoken in a limited area and says when we're talking about Federal taxes, this is our voice, none of this kind of stuff.

MR. LADDISH: That's our basic argument.

QUESTION: And the State has a different policy, why isn't that two voices?

MR. LADDISH: Well, if Congress has spoken and said --

QUESTION: But, they have. They've said we -- the Federal Government will not impose this kind of tax.

MR. LADDISH: Oh, I'm sorry. And that -- well, I will have to rely upon this Court's ruling in Container that that, by itself, is not Congress voicing the one voice of the Commerce Clause. The Court in Container

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

specifically disclaimed any significance of that in its determination of the one voice issue.

Congress had to choose some method of taxation for Federal purposes, but that does mean that Congress --

QUESTION: Well, they did more than that; they disabled themselves from using another.

MR. LADDISH: Yes, they did, just as -- as in the treaties, they disabled themselves from using the unitary business approach, but enabled the States to do so.

QUESTION: They didn't enable them. They just left those alone.

MR. LADDISH: But when Congress acts in a -- well, that -- I'm giving our argument and you may be giving your views.

QUESTION: The thing -- I'm puzzled. It seems to me you keep vacillating between dormant and nondormant and I've been trying to get the picture in my mind of a 100 percent pure dormant Commerce Clause analysis, where --

MR. LADDISH: Well, that's what I -- let's assume --

QUESTION: And it seems to me that --

MR. LADDISH: I mean, to do that, we must assume, arguendo, that Congress has not spoken.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Right.

MR. LADDISH: To permit or prevent.

QUESTION: This particular issue.

MR. LADDISH: This particular issue, that's right.

QUESTION: But they have spoken to the international world generally that one aspect of American policy is the Federal Government will not impose this kind of tax.

MR. LADDISH: Um --

QUESTION: But you say that doesn't count as a voice.

MR. LADDISH: Actually, what Congress has said in the statutes -- the statutes would permit Congress to use a formulary system very, very similar to what California's doing. The tax -- the tax treaties with the foreign governments have limited the Federal Nation, but when they've done that they've made clear -- they've been very careful to leave the State out of it.

QUESTION: Well, that's --

MR. LADDISH: So if you look at the Federal tax statute, it is very broad and permits many types of approaches. But in this situation where we're assuming now that Congress hasn't acted to prevent or permit, you have the long legislative history before Congress that the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

issue has been presented to Congress many many times in a highly visible fashion, sometimes by the administration, to ban or prevent or restrict the States' use of worldwide combined reporting.

It's come with much expressions of -- the foreign complaints that are being voiced to the Court today have been voiced and directed at Congress and quoted by Congress.

QUESTION: Let me try the one voice concern again. I want to be sure I understand your position. It's not only one voice with California and the United States Government. There are 50 States out there.

MR. LADDISH: That's correct.

QUESTION: You would not contend, would you, that all 50 States must apply this unitary business approach?

MR. LADDISH: No. And in a dormant situation, all we're looking at is whether -- whether --

QUESTION: Well, if half the States can use --

MR. LADDISH: -- Uniformity is essential.

QUESTION: If half the States can use the other kind of accounting and California -- how can that be one voice?

MR. LADDISH: What -- the point I'm trying to get to is that if Congress has indicated that not

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

acquiescence, not a permission that would completely give the States all rights under the Commerce Clause to do, you know, worldwide combined reporting, even if it might violate discrimination or anything else -- I'm not talking about that. If Congress has indicated that through it's inaction -- here we are talking about inaction.

QUESTION: You're back -- you're back to nondormant. It seems to me --

MR. LADDISH: No, no, no, no. I'm talking about dormant. They -- when they have indicated inact -- through their inaction that the uniformity is not essential, it would usurp Congress' role as the regulator of commerce under the Constitution for this Court to step in and impose its own notions of what might be uniform or might be required for uniformity in a case where Congress has shown through the decades and all of this, you know, congressional activity, that uniformity is not essential.

QUESTION: Well, I'm trying to hypothesize a case and I can't seem to get you to address it.

MR. LADDISH: I'm sorry.

QUESTION: In which Congress had been totally silent. Nobody had ever spoken to Congress and the executive never said anything about this.

MR. LADDISH: Got it.

QUESTION: But the English company comes in and

says we're entitled to have a rule of law that is the same, under the one voice principle, throughout the United States.

MR. LADDISH: Yes, all right..

QUESTION: Is your argument that the one voice principle does not apply at all, or when 50 States use 50 different programs that's still one voice?

MR. LADDISH: I -- what I say is that the Court needs to look at what the situation is. If that were the situation, the Court needs to apply the standards of one voice as this Court has developed them, as --

QUESTION: And would you lose that or would you win?

MR. LADDISH: No, we would win, Your Honor.

QUESTION: And do you win because the one voice rule doesn't apply or because there's only --

MR. LADDISH: Because --

QUESTION: -- One voice even though 50 States all act differently?

MR. LADDISH: What -- we would win because it has not been established by the taxpayers that uniformity is essential, and that there are --

QUESTION: Well, then you're saying they don't need one voice.

MR. LADDISH: And that the use of worldwide

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

combined reporting, they have not shown that it implicates foreign affairs in the manner in which the Container case looked at such a situation. What --

QUESTION: How will you ever -- how will you ever be defeated on a one voice theory, then, when Congress has not acted?

MR. LADDISH: Well, in our situation, we --

QUESTION: Because if it hasn't acted you're going to say the one voice is that each State can do what it will.

MR. LADDISH: No, no, I have not -- I have not meant to say that. If I have, I would retract it. The Court has to apply the standards that it did in Container, look to the foreign complaints that are being made, determine whether it's truly implicating foreign affairs or not.

If the Court here looks at the complaints that are made in this case by the foreign governments, what the Court will hear is a complete rehash of the arguments which this Court flatly rejected in Container. I mean, the foreign governments simply will not agree with this Court, or let on that they agree that this Court has held that worldwide combined reporting is proper and fair, and that it apportions income in a fair manner. As in Allied Signal this Court recognized that it does a better job of

apportioning values between parts of a unitary business than arms-length separate accounting does.

What you're hearing from the foreign governments is just the same complaints you heard in Container. And it's -- I submit that this Court has given the foreign governments a chance to come up with something new and they have not. So -- but that, in another context, perhaps foreign governments could provide, and the taxpayers could argue, that there is a true implication of foreign affairs.

Here if the foreign governments were really arguing what their real interests are, what they would be telling this Court is we want California to be bound to the same arms-length approach that the States are -- or that the Federal Government is, because the Federal Government cannot possibly administer that tax and our taxpayers can find ways of manipulating their books to get around it. We would be hearing we like to provide tax havens to our taxpayers.

And so if the California method is taken away -- the ability to impose worldwide combined reporting is taken away from the States, we won't have to worry about that anymore and the tax havens can continue to be just as effective as they are with the Federal Government. No matter how hard the Federal Government tries to enforce

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

arms-length separate accounting, what it is doing is gradually getting as close as possible to a global formulary apportionment of income, as can be done under the treaties that restrict it to arms length.

So the Federal -- the foreign governments' complaints really are just a rehash of what this Court has already rejected in Container. And the United Kingdom, of course, has put a retaliatory statute on its books, and it will brandish that statute for dramatic effect whenever it feels that it's appropriate, and yet it hasn't ever implemented that statute.

And, of course, the reason is clear. The Federal Government has testified before Congress that implementation of that statute by the United Kingdom would be a direct violation of the U.S.-U.K. treaty which the U.K. bargained for and signed onto knowing that it had been unsuccessful in its attempts to have the States barred from using worldwide combined reporting.

I'd like to point out that as to our arguments on the executive branch -- excuse me, as to -- back now to the nondormant side, the executive branch actions have confirmed that Congress has acquiesced in the States' use of worldwide combined reporting. No matter what their statements might be -- they might well be jawboning as the Solicitor General says -- they executive branch's actual

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

statements -- or, excuse me, actual actions show -- like when they drafted their own model income tax treaty, they made it very clear that the national government would be subjected to the arms-length restrictions, but the States would not.

When the foreign model treaties are drafted by the OECD, why the Federal Government -- the executive branch has entered formal reservations to those treaties. When after the U.S.-U.K. treaty, the other foreign governments wanted the executive branch to negotiate the same sort of ban on the States' use of worldwide combined reporting as it had in the U.S.-U.K. treaty, the executive branch pointed to the actions of the Senate and said, no, we will not do that; it would not be successful in the Congress.

The executive branch, when it has wanted to change the States' use of worldwide combined reporting, has not tried to issue its own Federal -- clear Federal directive prohibiting the States' use. It has, instead, gone to Congress and asked for Congress to change the rule as it applies now permitting the States.

The issue has been fought through in the U.S.-U.K. treaty and the issue has been on the table in dozens and dozens of other income tax treaties, bilateral treaties. The State of California, by using worldwide

combined reporting, is only doing what these treaties permit the States to do, and nothing that the executive branch or the foreign governments or the taxpayers can say or do can negate this congressional acquiescence in the State tax.

I might point out that the 1993 California legislation, as the Solicitor General pointed out, is the culmination of a campaign by the executive branch for the States to adopt a compromise solution, the water's edge approach, which contains both worldwide combined reporting elements and separate accounting elements. And since that tax law has been inserted in 1993, which amended a 1986 statute, the United Kingdom has withdrawn its threats of retaliation for the moment and has recognized -- at least impliedly recognized that such retaliation would not be justifiable at this point.

So in the dormant Commerce Clause context --

QUESTION: Mr. Laddish, may I take it, then, that you're answering the question that General Days did not answer. That is, that you'd say you can go back tomorrow and do what you have been doing for years, and it would not be offensive to the Federal Constitution?

MR. LADDISH: That is correct. Politically, would that happen? Probably not. But what we're dealing with is a political question that should be submitted to

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Congress, that has been submitted to Congress. Congress has acted to permit the States' use of worldwide combined reporting. Even if it has not -- if it's assumed that Congress has not, Congress has at least indicated that uniformity of the State tax practice, in a dormant Commerce Clause context with the Federal tax practice, is not essential, which should end this Court's -- any of this Court's considerations under a dormant Commerce Clause context.

I would -- thank you very much.

QUESTION: Thank you, Mr. Laddish.

Ms. Garvey you have 4 minutes remaining.

REBUTTAL ARGUMENT OF JOANNE M. GARVEY

ON BEHALF OF THE PETITIONER BARCLAYS BANK

MS. GARVEY: Thank you, Chief Justice.

United States has sought, from the very beginning, to resolve this problem of States' use of an inconsistent method in only one way; have the States' respect the international practice by receding to a tax base that is confined to the United States tax jurisdiction. And so the United States has appeared six times in this case, four times in support of Barclays, beginning in the California trial court, and now twice on the other side.

But even though the current administration now

supports California, its position, as explicated by the Solicitor General and in its briefs, actually continues to underscore the reasons why this Court should rule in Barclays favor.

First, the current administration did not support California until California changed its law to bring it into ostensible conformity with international practice. And, in fact, as the California legislative committee reports acknowledge, the change in the law was requested by the administration to avoid retaliation, which shows the clear causal connection between utilization of this State tax to divide international income and the problems and the implications on United States foreign policy.

And the Solicitor General also mentioned, but the brief clearly brings out, that the United States continues to supports Barclays on very significant points. California's Wardair analysis is inapplicable in the eyes of the United States. And, second, under the applicable dormant Commerce Clause analysis, worldwide combined reporting is unconstitutional when it is incompatible with the international practice, and it is incompatible.

So when all is said and done, the current administration's difference with Barclays is a tiny issue. Now, they say there were not sufficiently clear Federal

executive pronouncements to make the tax unconstitutional by the year of tax accrual, which is actually 1978. Respectfully, that is legally and factually incorrect.

The Federal executive does not have to issue a clear Federal directive for the tax to be unconstitutional. This position ignores the very presumptive need for uniformity that underlines -- that underlies the dormant foreign Commerce Clause issue, because it is uniformity that is issue and it is the need to comply to prevent exactly what has happened here.

With respect to the 1994 legislation, that is not before this Court. Prospective only solution does not solve past constitutional violation. The taxpayer is entitled to be put in the position it would have been had the tax been collected constitutionally.

And finally, the United States is factually incorrect because there were clear Federal executive pronouncements -- if that is the test, and we do not contend that it is; we believe it is the implication on foreign policy that is the test, and the inherent problems caused by the variation. But in any event, in the year 1975 the United States executive signed a treaty with the United Kingdom that would have banned this, and what could be a clearer indication of Federal executive policy, a policy that was consistently followed and has not been

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

deviated even by the President --

QUESTION: Was the treaty ever ratified, Ms. Garvey?

MS. GARVEY: No.

QUESTION: Thank you.

MS. GARVEY: Thank you.

(Whereupon, at 2:29 p.m., the case in the above-entitled matter was submitted.)

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

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:

BARCLAYS BANK, PLC, Petitioner v. FRANCHISE TAX BOARD OF CALIFORNIA and COLGATE-PALMOLIVE COMPANY, Petitioner, v. FRANCHISE TAX BOARD OF CALIFORNIA

CASE NO.: 92-1384 and 92-1839

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

BY Ann Marie Federico

(REPORTER)