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IN THE SUPREME COURT OF THE UNITED STATES

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JPMORGAN CHASE BANK, :
Petitioner :
v. : No. 01-651
TRAFFIC STREAM (BVI) :
INFRASTRUCTURE LIMITED :
- - - - -X

Washington, D.C.
Wednesday, April 17, 2002

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

SARAH L. REID, ESQ., New York, New York; on behalf of the Petitioner.

JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

CRAIG J. ALBERT, ESQ., New York, New York; on behalf of the Respondent.

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

2 (11:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 01-651, JPMorgan Chase Bank v. Traffic
5 Stream.

6 Ms. Reid.

7 ORAL ARGUMENT OF SARAH L. REID

8 ON BEHALF OF THE PETITIONER

9 MS. REID: Mr. Chief Justice and may it please
10 the Court:

11 The alienage diversity statute provides that the
12 Federal courts have original jurisdiction in civil actions
13 between citizens of different States and citizens who are
14 subjects of a foreign State where the matter in
15 controversy exceeds \$75,000. The question presented today
16 is whether respondent, Traffic Stream (BVI) Infrastructure
17 Limited, a corporation incorporated under the laws of the
18 British Virgin Islands, qualifies as a subject of the
19 United Kingdom within the meaning of that statute.

20 Petitioner, JPMorgan Chase Bank, submits it clearly does.

21 It is well-settled that the term, citizens and
22 subjects, applies to corporations and not just natural
23 persons. It is also not controversial that a subject is
24 one who owes allegiance to and is under the protection of
25 a foreign State.

1 QUESTION: Is this a question of Federal law?

2 MS. REID: In terms of looking to the matter of
3 the subject?

4 QUESTION: In determining who is a citizen or
5 subject of a foreign State, or whether a corporation in
6 this instance is a citizen or subject? Is that a Federal
7 law question?

8 MS. REID: Yes, Your Honor, we would submit it
9 is in the first instance, but in saying that we must then
10 look at the nature of the relationship and look at the
11 foreign State which is asserting the sovereignty, and
12 certainly that is a matter that we should consider
13 carefully. In this case, the United Kingdom has clearly
14 expressed its sovereignty over respondent and over the
15 other residents and corporations of its overseas
16 territories.

17 QUESTION: When you say the United Kingdom has
18 expressed its sovereignty, Ms. Reid, do you mean that
19 you're looking at their statutes, or that their diplomatic
20 representatives have made a representation?

21 MS. REID: Both, both the fact that they have
22 intervened as an amicus in this and in other cases, but
23 also, particularly in the case of respondent, if one looks
24 at the BVI constitution enacted in 1976, it is enacted as
25 a result of the act of parliament and the order of

1 parliament, and it reserves expressly all power to the
2 Crown ultimately, and it is only from the Crown that the
3 law is then delegated to the elected legislative council.
4 Each member of whom must swear allegiance to the Crown and
5 to the Queen.

6 The United Kingdom reserves the right to review,
7 approve, and ultimately disapprove any statute that is
8 enacted in the British Virgin Islands, which is a right
9 that they do exercise. In this case, therefore, the
10 enabling or enacting statute which, under which respondent
11 is incorporated, is a direct result of the authority
12 granted from the Crown, so I would argue it is not just a
13 matter of the diplomatic relationship and the fact that
14 the United Kingdom is the external face for the British
15 Virgin Islands in terms of matters of defense and
16 international relations, but also the fact that all law is
17 derived ultimately from the Crown.

18 QUESTION: Ms. Reid, every corporation must be
19 formed under the law of some sovereign, and if that's
20 right, a corporation just can't generate itself.

21 Is there any corporation that is formed under
22 the law of some sovereign other than the United States not
23 included within 1332, or is this just a very simple case
24 where every foreign corporation of course is organized
25 under the law of some State, and therefore would qualify.

1 Does your case involve anything more than that?

2 MS. REID: I would say, Your Honor, in 99
3 percent of the cases, that you're right. I suppose it is
4 conceivable that you would have corporations organized by
5 someone who declares they are sovereign of some island
6 somewhere, but no one recognizes them as a sovereign, and
7 the United States would say, we know nothing of this
8 person, and know they can't be --

9 QUESTION: Then the United States would also say
10 that that's not a corporation.

11 MS. REID: Right, exactly.

12 QUESTION: So I think you could say in 100
13 percent of the cases if we acknowledge it as a
14 corporation, it will have been formed under the law of
15 some State.

16 MS. REID: I would agree, Your Honor.

17 QUESTION: And I suppose even as to natural
18 persons in this sort of eccentric island in the real
19 world, if we did not recognize their claim to individual
20 sovereignty or nationality, in the real world I assume
21 they would be subject to some other national sovereign and
22 they'd by that virtue, by virtue of that be swept up under
23 the term, citizen or subject, wouldn't they?

24 MS. REID: I would agree.

25 QUESTION: Yes.

1 QUESTION: Let's assume -- and I'm not sure that
2 this is an actual proposition of international law, that a
3 subject of a sovereign has a special duty to obey the laws
4 of that sovereign. A United States citizen in China has a
5 special obligation to obey the laws of the United States
6 that a British subject does not. Does this corporation
7 have a special obligation to obey the laws of Great
8 Britain in any greater degree than it has the obligation
9 to obey the laws of any other sovereign to whom it might
10 become --

11 MS. REID: Yes, Your Honor.

12 QUESTION: -- subject?

13 MS. REID: An analogy, though, not completely
14 perfect, but it -- you know, JPMorgan Chase is a
15 corporation organized under the laws of the State of New
16 York. It obviously has to follow the laws of the State of
17 New York, but it also has obligations that it has to
18 follow under our Federal law.

19 QUESTION: Yes.

20 MS. REID: Similarly, a corporation set up under
21 the laws of applicable overseas territories in the first
22 in stance, of course, must follow the laws of their
23 legislative district, but they must also abide by agreed-
24 upon laws and conventions of the United Kingdom, and that
25 is specifically an issue in the Caribbean, where there are

1 certain financial disclosure, which is mandated in part
2 through the relationship, constitutional relationship
3 between the United Kingdom --

4 QUESTION: Where can we document the proposition
5 that you've just stated? What do I look to?

6 MS. REID: To a certain extent, the treaty,
7 that -- for example the Narcotics Enforcement Treaty.
8 There are also the United Kingdom -- the one I'm thinking
9 of is their recent overruling on the homosexuality, which
10 we cited only to a newspaper article in our brief, will
11 demonstrate that.

12 The best sites are the web sites for the BVI and
13 for the United Kingdom, which detail the relationship
14 between these two entities, also the white paper we cited
15 to Your Honor written in, I believe, 1999, goes into great
16 detail about the relationships between the overseas
17 territories and the United Kingdom, what the authority and
18 sovereignty the United Kingdom has --

19 QUESTION: No more established authority like
20 Blackstone, or --

21 MS. REID: Not that we have cited to Your Honor,
22 though in many ways there are parliamentary debates that
23 you can access concerning -- which are referenced in the
24 white papers -- concerning the relationships between the
25 overseas territories and the Queen, which were quite

1 reminiscent of the debates before the American Revolution
2 in terms of virtual representation and --

3 QUESTION: If we were dealing with a private
4 individual rather than a corporation, do you think there
5 could be a stateless person who wouldn't fit under this
6 statute?

7 MS. REID: In very, very rare instances, and
8 those instances are where the individual had either
9 renounced their citizenship, which has on occasion
10 occurred, or where they have been, you know, exiled, and
11 have not yet acquired citizenship somewhere else, and we
12 would submit that the cases cited by the Matimak Court
13 deal with those kinds of statelessness.

14 QUESTION: Suppose that kind of person that
15 Justice O'Connor and you just discussed, a true stateless
16 person, is temporarily in a port of Australia, San
17 Francisco, or Monterey, Mexico, can it be said
18 consistently with the statute here in question that they
19 are at least temporarily subject to the laws of Australia
20 while they are there, because they're stateless and they
21 have no other higher obligation, so they're then
22 subject --

23 MS. REID: No. I would submit that what subject
24 to you must mean is that you have an allegiance to a
25 sovereign, and the sovereign in turn has an obligation to

1 you, including protection.

2 QUESTION: It's not subject to. The phrase is
3 subject of, isn't it?

4 MS. REID: Yes, of a --

5 QUESTION: Everybody living in a country is
6 subject to the laws of that country, and presumably to the
7 Government of that country, but they are not necessarily a
8 subject of that country.

9 MS. REID: That is true, Your Honor.

10 QUESTION: So there can be stateless persons who
11 are not within the clause.

12 MS. REID: Yes.

13 QUESTION: And the reason you take that
14 position, I take it, is that the impetus for the
15 constitutional grant was in effect to keep countries from
16 getting mad, rather than for purposes of extending
17 jurisdiction as such to everyone who one might want to sue
18 in a Federal court.

19 MS. REID: Right. I mean, we have argued that
20 there were two impetuses. One is the prevention of
21 foreign entanglements by providing a neutral Federal
22 forum, and the other was the promotion of commerce.

23 QUESTION: I must say, I didn't understand what
24 you mean by foreign entanglements. Are you talking about
25 the foreign entanglements that George Washington warned us

1 against?

2 MS. REID: The --

3 QUESTION: I mean, like alliances with France,
4 or things like that? What --

5 MS. REID: No. The foreign entanglements, when
6 one looks back at the Framers' discussion, seem to
7 envision that if the British debt could not be collected
8 we might find ourselves back in another war.

9 QUESTION: We don't want to make them mad.

10 MS. REID: We didn't want to make them mad.

11 QUESTION: Okay.

12 MS. REID: That, I think, was the entanglement
13 that they were worried about.

14 QUESTION: It's a strange term for it, then.

15 MS. REID: And just briefly on the issue of the
16 promotion of commerce, I wanted to make the point that
17 JPMorgan Chase Bank and the financial market, you know,
18 considered the Matimak decisions as ones who have
19 potentially very deleterious effects on international
20 commerce.

21 QUESTION: Well, why? Aren't New York courts --
22 this is not a question of saying for our corporation you
23 can't enter U.S. court. They can enter a New York State
24 court, and those courts are pretty savvy about commercial
25 matters, are they not?

1 MS. REID: Absolutely, and I practice before
2 them frequently, but the perception on the part of
3 foreign -- foreigners is that the Federal system is one in
4 which procedures are uniform across the country, and a --
5 with predictability, perhaps, that is more a matter of
6 perception than of reality.

7 QUESTION: I know Alabamans who are afraid of
8 New York courts.

9 (Laughter.)

10 MS. REID: And vice versa.

11 QUESTION: But it is a little different from
12 what it was in the days of the post revolution, when the
13 British creditor said State courts are simply going to let
14 them collect on their debts.

15 MS. REID: That's true. In this particular
16 case, the reason in large part that it was decided to go
17 into Federal courts is simply because we wanted to get as
18 speed a resolution as possible, and the State court system
19 has interlocutory appeals, which is just the way the
20 system works, and -- but it does often lead to additional
21 delay and we had noteholders who were insistent that we
22 try and get our collateral back as soon as possible.

23 QUESTION: Anyway, you -- I think no one has
24 suggested a dynamic interpretation of 1332, so that if the
25 original rationale is not as strong today as it was then,

1 that somehow the meaning of 1332 would change.

2 MS. REID: No. I think it's -- the -- clearly
3 the United Kingdom at this point is, I guess one could say
4 at best, annoyed by this continuing refusal to recognize
5 their sovereignty over these types of entities, and the
6 fact is that you know, they have submitted an amicus brief
7 here, several other amicus briefs, two diplomatic notes,
8 so that the fear of the Framers of having an entanglement
9 of some sort with an ally is still, I think, valid today.

10 QUESTION: No other circuit has followed the
11 Second Circuit, have they?

12 MS. REID: No. The Third Circuit has split
13 explicitly. The Fourth and the Seventh Circuit have also
14 disagreed, though not -- they didn't discuss Matimak, and
15 one of them was earlier than Matimak, but no, there is no
16 other circuit that has followed this rule.

17 If the --

18 QUESTION: You wish to reserve the rest of your
19 time?

20 MS. REID: Yes, Mr. Chief Justice.

21 QUESTION: Thank you, Ms. Reid.

22 Mr. Minear, we'll hear from you.

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ORAL ARGUMENT OF JEFFREY P. MINEAR
ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
SUPPORTING THE PETITIONER

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

The United States submits that corporations
organized under the United Kingdom overseas territories
are citizens or subjects of a foreign State for purposes
of alienage diversity jurisdiction. We reach that
conclusion based on the plain language of 1332. Section
1332's operative term, subject, describes a personal
entity that is amenable to foreign authority in the sense
that it owes allegiance to that foreign State and is
entitled to the protection of that foreign State. That
term quite clearly embraces a corporation created by a
foreign State. This Court recognized that principle in
Steamship Company v. Tugman 120 years ago.

The crucial issue in this case is whether the
United Kingdom exercises sufficient sovereign authority
over the British Virgin Islands such that citizens and
corporations can be said to be subject to the United
Kingdom's rules, and we think the answer to that is
clearly yes. The United States expressly recognizes the
United Kingdom's sovereignty over the British Virgin
Islands. We do so through treaties such as the Consulate

1 Convention that we have with the United Kingdom. We also
2 recognize it through our diplomatic relations with the
3 United Kingdom. Now, we fully support the United
4 Kingdom's claim here of sovereignty over the British
5 Virgin Islands.

6 In addition, if the Court needs to look further,
7 and we think it does not, it's clear from the British
8 Virgin Islands' constitution that the United Kingdom has
9 retained its sovereignty over the British Virgin Islands.
10 That constitution expressly states that the United Kingdom
11 reserves full power to exercise and pass laws for the good
12 government, order, and peace of the British Virgin
13 Islands.

14 We think the language of section 1332
15 conclusively resolves this case, but if the Court needs to
16 look further still, then we think the policies that
17 underlie section 1332 further buttress the conclusion that
18 we reach.

19 QUESTION: Mr. Minear, what if the -- say, the
20 U.K. takes one position and makes a representation, but
21 the State Department, our State Department disagrees.

22 MR. MINEAR: The --

23 (Slide.)

24 QUESTION: Then what sort of an action should
25 our courts take?

1 MR. MINEAR: We think that you should defer on
2 the United States views on these matters. As far as
3 disagreements between the United Kingdom and the United
4 States, that's a matter for the State Department to deal
5 with, but this Court's own decisions, cases such as Jones
6 v. The United States, which is at 137 U.S. 202, explicitly
7 state that questions of sovereignty are political
8 questions that are entrusted to the political branches.

9 QUESTION: Well then, if you were to submit the
10 views of the State Department in a case like that, no
11 matter what else there is in the record, we should accept
12 the views of the State Department?

13 MR. MINEAR: Your cases suggest that that is the
14 result that would follow.

15 QUESTION: Yes, but do you have a position --

16 MR. MINEAR: Yes, we do. To answer pointedly,
17 yes, we do believe that you should defer to the United
18 States views, because oftentimes on the question -- let me
19 distinguish here that the question of subject is, of
20 course, the meaning of that term is a legal question that
21 this Court would interpret according to its normal
22 practices, but the question of whether a foreign entity is
23 a foreign State is a question that is properly entrusted
24 to the political branches.

25 We believe that the Second Circuit's decision

1 stands alone here because it is quite plainly wrong. The
2 Third Circuit has expressly rejected it, and the Fourth
3 Circuit and the Seventh Circuit have not followed it.
4 Under these circumstances, we think it is appropriate for
5 the Court to reverse the decision below and remand the
6 case for further proceedings.

7 QUESTION: Can you comment on the stateless
8 person problem, not a legal person?

9 MR. MINEAR: But an individual. Yes, we can
10 conceive that there can be such a thing as a stateless
11 person, and we cannot believe that section 1332 by its
12 plain language would reach a person who is not a citizen
13 or a subject of a foreign State. Pure alienage is not
14 sufficient. Nevertheless, the class of stateless persons
15 is vanishingly small, and as was pointed out in the
16 earlier discussion, the idea of a stateless corporation is
17 an oxymoron, as Judge Altimari had stated.

18 QUESTION: But there are some U.S. citizens who
19 don't have access to the Federal court because they're not
20 a citizen of any State. Let's take a U.S. citizen who is
21 residing in Switzerland.

22 MR. MINEAR: That is correct. That is correct,
23 and again, we think the courts have consistently answered
24 these questions by adherence to the plain language of the
25 jurisdictional provisions. For instance, for many years,

1 until Congress dealt with the issue, citizens of the
2 District of Columbia were not entitled to ordinary
3 diversity jurisdiction, but these are matters that we
4 think are best resolved by looking closely at the language
5 that Congress has provided in the jurisdictional
6 provisions.

7 If there are no further questions, thank you.

8 QUESTION: Thank you, Mr. Minear.

9 Mr. Albert, we'll hear from you.

10 ORAL ARGUMENT OF CRAIG J. ALBERT

11 ON BEHALF OF THE RESPONDENT

12 MR. ALBERT: Mr. Chief Justice, and may it
13 please the Court:

14 There are two statutes at issue here, both of
15 which have plain language. Section 1332 of title 28 says
16 that diversity jurisdiction extends only to citizens or
17 citizens and subjects, and it does not extend to all
18 aliens. The British Nationality Act of 1981 defines those
19 persons whom the United Kingdom of Great Britain and
20 Northern Ireland views as its citizens or subjects, and
21 natural persons who are living within the British
22 Dependent Territories do not fall within the category of
23 being British Citizens.

24 There is a special class, a subclass that is
25 delegated to those people. They are British Dependent

1 Territory citizens, or British Overseas Territories
2 citizens, and this is an important distinction, because
3 they do not have the full measure of rights that any
4 English citizen would have.

5 QUESTION: You're now relying on English law, I
6 take it.

7 MR. ALBERT: I'm referring to English law, yes.

8 QUESTION: Yes. I think that creates some
9 difficulty for United States courts, particularly when the
10 U.K. is making representations here as to one point, then
11 you tell us we have to read English law, which we're much
12 less familiar with, of course, than American law.

13 MR. ALBERT: Yes, Mr. Chief Justice. Under Rule
14 44.1 of the Federal Rules of Civil Procedure, a court can
15 look to any source for finding where --

16 QUESTION: I realize that. It's not that we're
17 somehow disqualified from it, but it makes it a much more
18 difficult inquiry.

19 MR. ALBERT: It would be a much more difficult
20 inquiry had the United Kingdom actually cited to any
21 statute or any case ever decided in any English court
22 anywhere on the subject, but it is --

23 QUESTION: Well, Mr. Albert, even if the British
24 Nationality can be read as saying that corporations formed
25 in the British Virgin Islands are not citizens, it doesn't

1 say they're not subjects of the United Kingdom, does it?

2 MR. ALBERT: Well, actually, the British
3 Nationality Act carves out classes of citizens, and
4 classes of subjects, and persons who are neither citizens
5 nor subjects, so in fact it --

6 QUESTION: I just didn't find anything that
7 indicated to me that a corporation formed in the British
8 Virgin Island was not a subject of the U.K., and we are
9 dealing here with a brief filed by the U.K. that says they
10 are subjects, so what do we --

11 MR. ALBERT: Well, I think that the question
12 here is whether the deference should be unyielding to a
13 litigation and advocacy position which the British
14 Government puts forth in its briefs versus the substantive
15 basis for that position which one would find in a statute.

16 QUESTION: Just looking at it from an American,
17 U.S. perspective under the statute, citizens are subjects,
18 and the fact that it is a corporation formed in the
19 British Virgin Islands would lead me to conclude that is a
20 subject of a foreign nation under our own statute.

21 MR. ALBERT: Respectfully, Justice O'Connor, I
22 think that the conclusion ought to be different, because
23 there is nothing with -- the first step in the inquiry is,
24 what would 1332(a)(2) have to say about corporations, and
25 we know that 1332(a)(2) is a reference to citizens or

1 subjects which is consistently -- which before the Letson
2 fiction was adopted had resulted in severe conflict over
3 whether there was jurisdiction for corporations at all.

4 What this Court did in Letson was adopted the
5 fiction not that the corporations were citizens or
6 subjects, but that the corporations would be deemed to be
7 citizens or subjects by virtue of the imputed citizenship
8 of its shareholders and, applying the same principle here,
9 you would impute the citizenship of the -- the citizenship
10 of natural persons resident within the British Virgin
11 Islands to a British Virgin Islands --

12 QUESTION: That's going back to a law that has
13 long since become obsolete. A corporation within the
14 United States is a citizen of the State in which it's
15 incorporated and where it has its principal place of
16 business. We don't look to the citizenship of the
17 shareholders any more. Why should there be such a
18 tremendous disparity between our modern view of what a
19 U.S. corporation is and the rest of the world when we
20 don't even really think of the corporation as an entity in
21 itself but say it's stuck by what its shareholder
22 citizenship is.

23 MR. ALBERT: Respectfully, Justice Ginsburg,
24 1332(c) does not say that corporations are citizens of
25 their States. It says that for purposes of diversity they

1 are deemed to be citizens of these States. It is a
2 counting rule, not a citizenship rule, and hence, the
3 Letson fiction still obtains. All that Congress did when
4 it adopted the 1332(c) language was to restrict the scope
5 of diversity jurisdiction by providing a second political
6 jurisdiction, principal place of business, which would
7 further limit the number of diversity cases which were
8 appearing in Federal courts.

9 This Court has never held that corporations were
10 political citizens or political subjects. Only 1332(c)
11 deems them to be so, and taking that a step further, it is
12 Congress' choice, because Congress' language in 1332(a)(2)
13 is that only citizens or subjects -- it does not use the
14 word aliens or anything broader -- are subject to
15 diversity jurisdiction.

16 QUESTION: Are you saying those words cover only
17 human individuals and not corporations?

18 MR. ALBERT: For 1332(a)(2), humans, then
19 applying the 1332(c) presumption, that would bring
20 corporations within the scope of diversity jurisdiction.

21 QUESTION: Well, 1332(a) does use the term,
22 aliens at the very end.

23 MR. ALBERT: Yes, there is a reference to it,
24 but not in the provision of 1332(a)(2) on the extension of
25 that dispute between citizens of a State and citizens or

1 subjects of a foreign State, and in fact, Mr. Chief
2 Justice, Congress in fact had used the word, aliens, the
3 broader word, in the original enactment, in the Judiciary
4 Act of 1789, but Congress abandoned that language when it
5 revised the statute in 1875.

6 QUESTION: Is a Spanish corporation -- as I
7 say -- is that -- does that come within 1332 jurisdiction,
8 a corporation formed in Scotland?

9 MR. ALBERT: In Scotland, yes, because a --
10 because the Scottish people, the English and Welsh people,
11 and the people of Northern Ireland all are citizens of the
12 Metropolitan United Kingdom, the United Kingdom of Great
13 Britain and Northern Ireland.

14 QUESTION: Well, my problem is if -- take
15 some -- the British Virgin Islands, a place that's still
16 held in something like colonial status, that you say that
17 Scotland, which has a great deal more independence,
18 belongs to the U.K. in the sense that it is a subject of
19 the U.K., but the British Virgin Islands, or the Cayman
20 Islands, that have less independence, are not subjects?
21 That may be something a lawyer could understand, but I
22 don't think it makes much sense, does it?

23 MR. ALBERT: I think that the distinction is, no
24 one is disputing here that the British Virgin Islands is
25 subordinate to the United Kingdom, no one is disputing

1 that its people ultimately are answerable to the authority
2 of the United Kingdom, but that simply goes --

3 QUESTION: Does it make them subject --
4 subjects?

5 MR. ALBERT: Subject to, not subject of, and
6 that is why the British Nationality Act is so important
7 here.

8 QUESTION: If it's so important, I guess then
9 maybe corporations incorporated in Scotland are not
10 citizens and subjects either, because it doesn't say
11 anything about corporations, does it?

12 MR. ALBERT: No, Justice Breyer.

13 QUESTION: Wouldn't people then be surprised if
14 it doesn't say anything, if we said that Scottish
15 corporations weren't citizens, or -- in fact, wouldn't the
16 people who live in these islands be a little surprised if
17 the Supreme Court were to say, you're not nationals? How
18 does it work? This is not an act that refers to
19 corporations.

20 MR. ALBERT: The proper allegation in a case
21 like this would be that a corporation is incorporated
22 under the laws of Scotland and is therefore a citizen or a
23 subject of the United Kingdom.

24 QUESTION: And the reason that they are but
25 these people aren't is?

1 MR. ALBERT: Is because England, Wales,
2 Scotland, and Northern Ireland, along with the Channel
3 Islands, are the constituent parts of the Metropolitan
4 United Kingdom. That is the Government with whom we
5 maintain a direct relationship, and when we treaty with
6 them, we -- our treaties are binding as to that nation and
7 those persons who are within those political subdivisions.

8 QUESTION: As of English law, the reason that --
9 although their law says, I guess, the counselor law, the
10 diplomatic manual, the thing that says you have to swear
11 allegiance if you're in the British foreign -- you know,
12 you're in the British Virgin Islands, all the laws are
13 subject to British authority and so forth, so the reason,
14 in your opinion, despite all those things they list in
15 their brief, that makes it very, very similar, the reason
16 that a corporation incorporated in Wales is a citizen of
17 the United Kingdom or subject of the United Kingdom but
18 these are not, because it's the British Virgin Islands,
19 is?

20 MR. ALBERT: Because when parliament enacts a
21 law of general applicability within the United Kingdom,
22 its applicability is to those four jurisdictions that I've
23 mentioned, England, Wales, Scotland, and Northern Ireland,
24 along with in some instances the Channel Islands, but it
25 does not, of its force, extend to the British Overseas

1 Territories, the British dependent -- what's now known as
2 the British Overseas Territories. They are regulated
3 separately.

4 When we enter into a treaty with the United
5 Kingdom on any subject whatsoever, unless our treaty
6 specifically extends to those territories, what happens in
7 those territories is unaffected by our treaty, so it is
8 not a two-way street of reciprocal obligations within the
9 United Kingdom. All of their powers of these
10 jurisdictions are derived from the United Kingdom, but
11 they don't have any reciprocal rights, and that is
12 especially true of the natural people who live within
13 these territories.

14 The natural people who live within these
15 territories have no right of abode within the -- have no
16 right of abode within the Metropolitan United Kingdom. If
17 you call them citizens or subjects, and in fact the United
18 Kingdom uses both terms now, it no longer adheres to the
19 old concept of subjects, they cannot travel to the United
20 Kingdom --

21 QUESTION: Are they stateless people?

22 MR. ALBERT: They are not stateless people at
23 all. They do have a State. Their State, their
24 overarching State is the United Kingdom, which extends to
25 them defense protection. The United Kingdom protects them

1 in an international sense, but they do have -- and in that
2 sense they a State.

3 QUESTION: They are British -- their State is
4 the U.K.?

5 MR. ALBERT: They are just -- they are very
6 similar to what our territorial residents would have been
7 before we extended citizenship.

8 QUESTION: They are subject of and to the United
9 States, I assume, the residents in the U.S. Territories.

10 MR. ALBERT: Residents of U.S. Territories are
11 now citizens by virtue of an amendment to the Immigration
12 and --

13 QUESTION: What were they before they were
14 citizens?

15 MR. ALBERT: They were nationals and natives.
16 They had no status. They were very much --

17 QUESTION: They were not stateless, were they?

18 MR. ALBERT: No, they were not.

19 QUESTION: And so why isn't a corporation
20 organized in the British Virgin Islands or the Cayman
21 Islands -- why is that stateless? There's only one State
22 it can belong to, because these are not independent
23 sovereigns. The BVI is not an independent sovereign.
24 What State does that -- you tell me that the individual
25 would belong to the U.K. What does a corporation belong

1 to?

2 MR. ALBERT: I do not advocate the position that
3 the Matimak -- the Matimak Court adopted that these
4 corporations were stateless. I do not think that that is
5 essential to the determination below, and I think that it
6 was a poor choice of words. There is a State involved.
7 The United Kingdom granted to the British Virgin Islands
8 the authority to adopt a Companies Act, just as United
9 States territories have authority under statute of
10 Congress to adopt their own incorporation laws. That does
11 not mean that the corporations that are incorporated
12 within the British Virgin Islands are subjects of, rather
13 than subject to --

14 QUESTION: They belong to some State, and either
15 they belong to the U.K., or they belong to something that
16 isn't a sovereign, or they're stateless. It's got to be
17 one of those three, so which is it?

18 MR. ALBERT: They belong to the United Kingdom,
19 but that does not answer the statutory question at issue
20 here, because even if they belong to a kingdom, even if
21 they belong to the United Kingdom, that does not make the
22 citizens or subjects of the kingdom. You can be an alien
23 and subject -- an alien to the United States, subject to
24 the kingdom, yet not be a citizen or subject of the United
25 Kingdom, and that was Congress' choice to make.

1 Congress --

2 QUESTION: Could I ask, the word subject in the
3 statute just tracks the word subject in the Constitution,
4 and I -- wasn't the status of the colonists before our
5 Revolution precisely the same as the status of the British
6 Virgin Islands?

7 MR. ALBERT: Justice Scalia --

8 QUESTION: Which would lead me to the inquiry
9 whether the -- even the revolutionaries considered
10 themselves subjects of the British Crown. If they
11 weren't, I guess they weren't engaging in a revolution
12 really, were they?

13 (Laughter.)

14 MR. ALBERT: The laughter from the audience in
15 fact focuses the point here, because that was the
16 fundamental shift in the understanding of the colonists
17 and their relationship to the British Government. Before
18 the Revolution, the old idea of subjectship was that it
19 was permanent. One could never abandon one's subjectship.
20 The political idea during the Revolution was a shift
21 toward the idea of volitional allegiance.

22 That is, that once the Crown abdicated parts of
23 its protective authority, then the people no longer were
24 subjects of the Crown, and the legal basis for the legal
25 philosophers during the formation -- in the 1774 to 1776

1 period was to justify how it was that we could throw off
2 our bonds to the British Crown, and the way in which they
3 justified it was to say that the King had abdicated, and
4 therefore, in the words of the Declaration of
5 Independence, we were no longer his subjects. What were
6 we? Well, there was a --

7 QUESTION: But we had been. We had been.

8 MR. ALBERT: Oh, we had been. We had been.

9 QUESTION: We occupied the same status in those
10 days as the British --

11 QUESTION: Why wasn't that status the one that's
12 comparable to the status of citizens in the Virgin Islands
13 here --

14 MR. ALBERT: Justice --

15 QUESTION: -- because they're not claiming that
16 they've been abandoned by the Crown here.

17 MR. ALBERT: Justice Stevens, there are two
18 places in which that abandonment can come about. One is
19 by the people themselves declaring themselves independent,
20 they saying that those bonds have been thrown off.

21 QUESTION: Of course, that hasn't happened here.

22 MR. ALBERT: It certainly has not happened here,
23 but there is another way, because when nations adopt the
24 idea of volitional allegiance, the new idea of what a
25 subject is, then the nation itself can change its laws to

1 determine what the status of its people are. Here, the
2 United Kingdom has changed the status of its persons. The
3 United Kingdom has moved away from that 18th and 16th,
4 17th century view of what a subject is and moved to our
5 view of what a subject is, and the British Nationality Act
6 explains exactly what these people are.

7 QUESTION: The British Nationality Act has
8 nothing to do with corporations.

9 MR. ALBERT: But the British Nationality Act
10 does have to do with what the people in the British Virgin
11 Islands are --

12 QUESTION: And the other thing they --

13 MR. ALBERT: -- and then applies --

14 QUESTION: I understand your point there, but --
15 so I'm cutting you off, but they say that in these places
16 the Queen appoints the Governor, the Governor is
17 responsible for internal security, public service, and
18 court administration, but all the laws they pass in these
19 places are subject to review by the Foreign Office, the
20 Commonwealth Office, and then the Queen in Council, which
21 is a group of particular individuals, that the Legislative
22 Council swears its allegiance to the Crown before it takes
23 place, and so they haven't just discarded this place at
24 all. They've sort of treated it as we might treat a city
25 inside a State, or some other kind of semi-independent

1 entity, and you say to that, what?

2 MR. ALBERT: Or more particularly, as we would
3 treat one of our territories, because the ability of
4 Congress to legislate for its --

5 QUESTION: You mean, people in our Territories
6 like Puerto Rico, let's say, which is a Commonwealth --

7 MR. ALBERT: Yes.

8 QUESTION: -- or Samoa, they are not subjects of
9 the United States?

10 MR. ALBERT: They are not subjects of the United
11 States.

12 QUESTION: They don't owe their allegiance to
13 the United States, and they're not subject to its laws.
14 Which is it?

15 MR. ALBERT: The position that has been
16 advocated here, and I think that the -- and that has been
17 uniformly advanced by the scholars is that citizenship
18 versus subjectship is simply -- are simply two sides of
19 the same coin determin -- describing what the relationship
20 is of one in either a democracy or a monarchy, and what
21 has happened in the United Kingdom is that as the country
22 has evolved from a strict monarchy to a constitutional
23 monarchy with democratic principles, that the ideas of
24 subjectship have evolved, and the idea of citizenship has
25 been incorporated into their law. This --

1 QUESTION: Do you feel some discomfort in
2 saying, well, that's what the U.K. law is, and you told us
3 that what the Companies Act means, when U.K. itself is
4 telling this Court, you've got it all wrong? You're
5 standing before the Court as an interpreter of U.K. law.
6 You're riding the whole -- your whole case on what U.K.
7 law is, and yet the U.K. tells us, you read it wrong.

8 MR. ALBERT: I would have thought that had the
9 United Kingdom had a statute on which it could rely, or
10 any decision on which it could rely, it would cite them.
11 The only authority to which it cites in the record at all
12 is in the lodging --

13 QUESTION: Which -- go ahead.

14 MR. ALBERT: Is in the lodging at page L31, an
15 excerpt from its diplomatic manual which describes the
16 various categories under the British Nationality Act.

17 The other authority upon which it relies are its
18 diplomatic notes in which it asserts that it views these
19 people as its subjects, but if you look to each citation
20 of that -- those diplomatic notes, they come not in a
21 submission to a court, asking a court to determine what
22 British law is, but in a protest to the State Department
23 after a case has been decided saying, we don't like the
24 decision of this court.

25 Now, I've cited to the -- I've certainly cited

1 to the text of the British Nationality Act which tells you
2 where the diplomatic -- where the diplomatic manual
3 derives its basis.

4 QUESTION: Is it a fair summary to say that it's
5 a litigating position and therefore we do not owe it
6 Chevron deference?

7 MR. ALBERT: I think it is a pure advocacy
8 position, and it does not deserve --

9 QUESTION: Are you arguing for what we might
10 call a variable definition of subject, that VI residents
11 are subjects of Great Britain in some cases and not
12 others?

13 That is to say, you said earlier that the U.K.
14 could make a treaty binding on VI residents, VI citizens,
15 so that you can be subject of Great Britain in some
16 instances and not others.

17 MR. ALBERT: Justice Kennedy, the U.K. itself --

18 QUESTION: If I characterize your argument that
19 way, would that be a proper characterization of your
20 argument?

21 MR. ALBERT: I think that at the second level of
22 Matimak inquiry, when -- that the Court would necessarily
23 have to inquire as to whether or not a person is or is not
24 a subject, and I think that I would be -- I am willing to
25 concede that Britain could change its statute for general

1 purposes or for limited purposes so as to give to these
2 territorial citizens the right to proceed in American
3 courts, and we would defer to that simply by reason of --
4 simply for reasons for international comity.

5 QUESTION: But doesn't that potential indicate
6 that there is sovereignty, because --

7 MR. ALBERT: Once --

8 QUESTION: -- isn't sovereignty the capacity to
9 exercise power and authority?

10 MR. ALBERT: Sovereignty is that power. The
11 question is whether or not they are subjects.

12 I'll give you an example.

13 QUESTION: They are subjects because of the
14 potential of the exercise of that power.

15 MR. ALBERT: The land that sits in the middle of
16 London at Leicester Square, the famous Tolk v. Moxie Land,
17 is subject to the sovereignty of the United Kingdom, but
18 that does not make the land a subject, and so the mere
19 fact that the United Kingdom adopts legislation which
20 regulates behavior of its people, both within the
21 metropolitan United Kingdom and within its territories,
22 does not mean that the people within its territories are
23 subjects for purposes of 1332, and I say that especially
24 in light of the fact that as we stand here today the
25 United Kingdom has adopted a new statute which has not yet

1 come into force, because a statutory instrument has not
2 yet been signed for it, which will render the British
3 Territories' citizens to be British citizens, giving those
4 British citizens now the right of abode within the United
5 Kingdom, and that will happen in the future. It probably
6 will happen soon, maybe in a matter of months, maybe in a
7 matter of years, but it has not happened yet, and we
8 determine subject matter jurisdiction as of the time of
9 the commencement of --

10 QUESTION: How does that affect a corporation?
11 You're talking about what will be the status of
12 individuals.

13 MR. ALBERT: I think that a -- that applying --
14 that the proper way to apply the Letson principle here is
15 that a British Virgin Islands Corporation should never be
16 subject to diversity jurisdiction precisely because the
17 presumption is that its shareholders have opted for
18 British Virgin Islands status rather than opted for
19 British status.

20 QUESTION: And that would be the case -- it
21 would be -- the Congress would be immobile as well. In
22 order to make -- if I follow your argument correctly, in
23 order to make a BVI corporation subject to 1332
24 jurisdiction, there would have to be a constitutional
25 amendment, because the Constitution uses the same words

1 for a citizen or subject -- citizen or subject.

2 MR. ALBERT: The Second Circuit did not reach
3 the constitutional --

4 QUESTION: That's what I'm putting to you,
5 because the statute uses the same term, citizens or
6 subjects.

7 MR. ALBERT: I do not think that there is a
8 presumption in this Court that the use of the same
9 language in Article 3 and in title 28 means that the
10 statute has --

11 QUESTION: Well, tell me what subject means
12 within Article 3 that it doesn't mean within 1332 and why
13 a court should interpret it -- interpret them differently.

14 MR. ALBERT: Because if you look to the
15 Judiciary Act of 1789, which was adopted nearly
16 contemporaneously, Congress used the broader language,
17 alien, rather than the narrower language, citizen or
18 subject, and --

19 QUESTION: That's not -- the Constitution says
20 citizen or subject, doesn't it?

21 MR. ALBERT: That's correct, it does, and --

22 QUESTION: What does it mean -- what does
23 subject mean within the Constitution, within Article 3, as
24 it reads?

25 MR. ALBERT: It would be mere speculation on my

1 part to suggest what it was that they meant, since this
2 was one of the least debated provisions of the
3 Constitution.

4 QUESTION: But you're urging a certain statutory
5 interpretation, and you said, well, maybe it has a
6 different meaning, the word subject, in the Constitution,
7 so I'm asking you to tell me what could be those different
8 meanings.

9 MR. ALBERT: I think that it is entirely
10 possible that in 1787 Congress -- the Convention intended
11 to extend the grant of authority to the full measure of
12 diversity jurisdiction over cases involving all
13 foreigners, but the reason that I don't think that they
14 focused on the issue was because in 1787 there really were
15 not these cases of -- there were not a lot of cases,
16 probably no cases in which there were people who lacked
17 subjectship yet nevertheless were foreigners.

18 With respect to these trading colonies in
19 particular, the people who were involved in the mercantile
20 trade involving these Caribbean colonies were not people
21 who were resident within those colonies --

22 QUESTION: What about Canadians? Until Canada
23 domesticated its constitution, I suppose for most of the
24 19th Century Canadians were not subjects of the Crown?

25 MR. ALBERT: I think Canadians were subjects of

1 the Crown by virtue of the fact that they were in a
2 settler colony rather than in a plantation, a plantation
3 colony, and the -- one of the difficulties of the British
4 law of that entire era is that it never really had a
5 uni -- it never had a uniform picture of who its persons
6 were, and what the relationship was between the Crown and
7 each one of the different types of colonies that were
8 created, and it was very, very difficult for the -- it was
9 very difficult for Britain, because Britain had different
10 types of colonies which promoted different types of
11 British interests, and therefore it created different
12 types of Governments within them, and created different
13 statuses with respect to immigration and migration to
14 Europe for those people.

15 QUESTION: So among the subjects, or -- well,
16 the entities that are under U.K. sovereignty, which are
17 those are subjects and which of them are not?

18 MR. ALBERT: The ones which are certainly not
19 subjects right now are those which are the British
20 Overseas Territories, which include the British Virgin
21 Islands, the Cayman Islands, Bermuda, the Turks and
22 Caicos --

23 QUESTION: Which ones are? Which ones are?

24 MR. ALBERT: Pardon?

25 QUESTION: Which ones are?

1 MR. ALBERT: The Isle of Man, the Channel
2 Islands are British -- are British citizens, and --

3 QUESTION: I didn't ask citizen, I said,
4 subjects.

5 MR. ALBERT: Oh, British subjects, sorry.
6 British subjects, and --

7 QUESTION: How about the Falklands?

8 MR. ALBERT: The Falklands -- the Falklands,
9 those residents are not British citizens. They are
10 British Overseas -- Overseas Territories citizens.

11 QUESTION: How about Leicester Square?

12 (Laughter.)

13 MR. ALBERT: It has no status whatsoever,
14 because it is property, not a person.

15 Thank you.

16 QUESTION: Thank you, Mr. Albert.

17 Ms. Reid, you have 6 minutes remaining.

18 REBUTTAL ARGUMENT OF SARAH L. REID

19 ON BEHALF OF THE PETITIONER

20 MS. REID: Mr. Chief Justice, and may it please
21 this Court:

22 I will try to be brief. I would like to
23 separate the inquiry between corporations and then address
24 natural persons. Corporations are incorporated through
25 the laws of their legislative district. The United

1 Kingdom's brief details quite clearly how the corporations
2 are incorporated, rather like our States, corporations in
3 Northern Ireland are incorporated under the laws of
4 Northern Ireland. As I understand respondent's argument,
5 that would make them stateless entities, because they are
6 not actually incorporated in Scotland, Wales, or the
7 United Kingdom. Clearly, that is an absurd result, given
8 the presence of the British --

9 QUESTION: I think his answer was that if
10 they're formed under Scotland, Wales, Northern Ireland,
11 they're okay, but if they're formed under BVI, they're
12 not.

13 MS. REID: Right. I think he may have
14 inadvertently been in error, because the Northern Ireland
15 corporations are actually incorporated under a different
16 law than those of the ones in England, but the point is
17 the same. All of these entities incorporate under their
18 own individual quasi State or district law, all subject to
19 the Crown, and they all should be analyzed in the
20 identical way. They are all subject to and subjects of
21 the United Kingdom.

22 In terms of the natural citizens, I just wanted
23 to point -- the British Nationality Act, of course, has no
24 applications to corporations, and the analysis that
25 somehow we should adopt the old Letson rule is

1 inapplicable both because it's United Kingdom law, we have
2 no learning -- I mean, United States law, no learning on
3 what -- how the United Kingdom would do it, but it seems
4 sensible to adopt the more modern view, but the 1981
5 Nationality Act, interestingly, in schedule 5 to section
6 41, in terms of naturalization and becoming a citizen or a
7 British Overseas Citizen, or a British, what was then
8 known as Dependent Territory citizen, you're required to
9 take the following oath of allegiance: I, name, swear by
10 Almighty God that on becoming a British Dependent
11 Territory citizen I will be faithful and bear true
12 allegiance to Her Majesty Queen Elizabeth II, her heirs
13 and successors, according to law.

14 I submit to you that that is the definition of a
15 subject, and of allegiance, and that really is --
16 demonstrates that the United Kingdom has come before this
17 Court not as a litigation posture, because it has no
18 interest really in any of these cases, but as a concern
19 over the fact that its sovereignty is not being recognized
20 by the judiciary when it has been recognized by the United
21 States Government in numerous treaties, and again, I won't
22 read them, but I would simply refer you to the Consular
23 Convention and footnote 17 of the United Kingdom's brief,
24 which details the numerous treaties that have been entered
25 into governing the British Virgin Islands and other of the

1 Overseas Territories.

2 If the Court has no further questions, I will
3 submit.

4 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Reid.
5 The case is submitted.

6 (Whereupon, at 11:56 a.m., the case in the
7 above-entitled matter was submitted.)

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