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CONSTITUTIONAL LAW — ELECTRONIC SURVEILLANCE BY BUGGED AGENTS — IS ELECTRONIC SURVEILLANCE BY BUGGED AGENTS A SEARCH AND SEIZURE WITHIN THE FOURTH AMENDMENT?

Koran v. United States (5th Cir. 1969)
United States v. White (7th Cir. 1969)

Two recent federal circuit court decisions based on strikingly similar fact situations reflect conflicting positions on whether electronic surveillance by bugged agents¹ is a search and seizure within the fourth amendment. In Koran v. United States² the defendant was convicted of counterfeiting through the testimony of a government agent who, without a warrant, listened to a conversation between the defendant and an informer which was being transmitted from a device concealed on the latter’s person. The United States Court of Appeals for the Fifth Circuit affirmed the conviction, holding that Katz v. United States³ was not applicable to bugged agents, and that the evidence so obtained was not a search and seizure within the fourth amendment. In United States v. White⁴ the trial court had convicted the defendant of violating the federal narcotics laws⁵ based on testimony given by government agents, who, lacking a warrant, overheard various conversations between the defendant and an agent who had concealed a transmitter on his person. Even though the conversations took place within the defendant’s home, automobile, place of business and the informer’s home, the trial court held that their procurement was not a search and seizure. The Court of Appeals for the Seventh Circuit reversed, however, holding that under the rationale of Katz surveillance by means of a bugged agent was a search and seizure which,

1. The term bugged agent refers to electronic surveillance with the aid of a party who is participating in the conversation and includes either recording or transmitting by that party. The term non-participatory electronic surveillance refers to any electronic surveillance without the aid of a participant to the conversation. While wiretapping usually falls into the latter category, it has been treated as a separate problem. See generally Chorney, Wiretapping and Electronic Eavesdropping, 7 CRIM. L.Q. 434 (1965). For a thorough discussion of all the areas of electronic surveillance and for a good bibliography, see American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Electronic Surveillance (Tent. Draft, 1968).
2. 408 F.2d 1321 (5th Cir. 1969). The Second Circuit in a per curiam opinion in United States v. Kauffer, 406 F.2d 550 (2d Cir. 1969), and the Tenth Circuit in Holt v. United States, 404 F.2d 914 (10th Cir. 1968), have ruled the same way as the Fifth Circuit, using similar reasoning.
4. 405 F.2d 838 (7th Cir. 1969).
when undertaken without a warrant, was unreasonable and therefore in violation of the fourth amendment. *Koran v. United States*, 408 F.2d 1321 (5th Cir. 1969). *United States v. White*, 405 F.2d 838 (7th Cir. 1969).

Search and seizure cases involving the use of electronic surveillance equipment by government agents have been before the Supreme Court in a number of instances. In its initial decision in this area, *Olmstead v. United States*, the Court held that evidence obtained by wiretapping was not the product of a search and seizure under the fourth amendment since there could be no search without a physical trespass, and no seizure where "intangibles" such as words were taken. In *On Lee v. United States*, the Supreme Court, applying the *Olmstead* reasoning to evidence secured by bugged agents, held that since neither the concealment of a transmitter on an informer nor his entry into the defendant’s premises by false pretenses constituted a trespass, there could be no search and seizure within the meaning of the fourth amendment. In 1963, in *Lopes v. United States*, the Court after initially following the rationale enunciated in *Olmstead* and *On Lee*, added a new dimension to the electronic surveillance area by announcing that bugged agent surveillance should not be considered eavesdropping since the government was not listening to conversations it could not otherwise have heard, and by introducing the recording it was merely using the best evidence available. The Court further reasoned that the defendant could not complain about the recordation since it was part of the risk he undertook when he conversed with another person.

In the most recent bugged agent case considered by the Supreme Court, *Osborn v. United States*, the Court sanctioned a bugged agent


7. 277 U.S. 438 (1928).


10. In *Wong Sun v. United States*, 371 U.S. 471 (1963), the Court held that intangibles, i.e., the defendant's own words, were capable of being seized.


12. *Id.* at 751–52.


14. *Id.* at 439. The *Lopes* Court cited to *Rathburn v. United States*, 355 U.S. 107 (1957), a wiretapping case, in analogizing the assumption of risk in having words transmitted or recorded by a confidant to the risk of being overheard in a telephone conversation. *Id.*

surveillance which was made pursuant to a search warrant rather than merely denying certiorari on the grounds that Lopes was controlling. By referring to the use of a warrant as a "procedure of antecedent justification before a magistrate that is central to the Fourth Amendment as a precondition to lawful electronic surveillance," the Court fell within both the broad ruling of the majority in Lopes and the narrower view of Mr. Justice Brennen's dissent, which strongly advocated that at the very minimum a search warrant should be required before any surveillance takes place. While the Osborn Court did not rule that a bugged agent surveillance was a search and seizure requiring a warrant, the opinion tends to undermine the position the majority had previously taken in Lopes.

In the recent electronic surveillance case before the Supreme Court, Katz v. United States, involving non-participatory surveillance, two issues were presented: (1) whether a non-participatory electronic surveillance was a search and seizure within the meaning of the fourth amendment; and (2) if so, whether a search conducted without a warrant was unreasonable. At the outset, the Katz Court rejected the trespass theory, thereby overruling Olmstead, and established a new test for determining whether electronic surveillance is a search and seizure.

Mr. Justice Stewart, speaking for the majority, stated that

[T]he underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment.

With respect to the second issue the Court concluded that the procurement of a search warrant, which provides for antecedent justification before a neutral magistrate, was a "constitutional precondition of the kind of electronic surveillance involved in this case."

In the instant cases the specific issue before both courts was the effect of the Katz decision on bugged agent surveillance. In Koran v. United States the Fifth Circuit rejected the defendant's contention that Katz established new guidelines which prohibited bugged agent surveillance.

16. Id. at 330.
19. See note 1 supra.
20. 389 U.S. at 353.
21. Id.
22. Id. at 359.
23. 408 F.2d 1321 (5th Cir. 1969). The Koran case was not a case of first impression in the Fifth Circuit. The court relied on Dryden v. United States, 391 F.2d 214, 215 (5th Cir. 1968); Dancy v. United States, 390 F.2d 370, 371 (5th Cir. 1968); Hansford v. United States, 390 F.2d 373 (5th Cir. 1968), (per curiam), cert. denied, 391 U.S. 915 (1968); Long v. United States, 387 F.2d 377, 378 n.1 (5th Cir. 1967).
without a warrant and held that bugged agent cases were an entirely distinct legal problem.\textsuperscript{24} The "crucial" distinguishing factor was phrased in terms of assumption of risk. The court reasoned that in a bugged agent situation the defendant assumes the risk that his conversant will expose his statements, whereas in \textit{Katz}, since the recording was made without the aid of one of the conversants, the subsequent exposure resulted from a risk which had not been assumed by the defendant.\textsuperscript{25} Therefore, the \textit{Koran} court concluded that \textit{On Lee}, \textit{Lopez}, and \textit{Osborn} were left undisturbed by \textit{Katz} and constituted the "established law" which controlled the decision.\textsuperscript{26} On the other hand, the Seventh Circuit in \textit{White v. United States} found that "for all conceptual purposes" the situations in \textit{Katz} and \textit{White} were the same, and the factual distinction suggested by the government based on the consent of a conversant was without legal significance.\textsuperscript{27} The court reasoned that both cases involved a bugging technique through which the "uninvited ear" invaded the privacy of the conversation without the consent of the respective speakers.\textsuperscript{28}

The basic point of disagreement between the two courts is the extent of the risk which the speaker assumes when conversing with another person. The \textit{Koran} court held the risk extended to any means which one conversant chose to use in exposing his conversation with the other.\textsuperscript{29} Conversely, the \textit{White} court held that the risk undertaken in conversing with another was merely that the listener would memorize and repeat the content of their conversation, and not that the listener would allow third parties to overhear them.\textsuperscript{30}

\textsuperscript{24} 408 F.2d at 1323.
\textsuperscript{25} Id. at 1323–24.
\textsuperscript{26} While the Fifth Circuit in \textit{Koran} did not state what the "established law" was, it cited to a number of prior cases dealing with the bugged agent question. See note \textsuperscript{23} \textit{supra}. In \textit{Dancy v. United States}, 390 F.2d 370 (5th Cir. 1968), a post-\textit{Katz} decision, the court held \textit{On Lee}, \textit{Lopez} and \textit{Osborn} to be the controlling law. The Fifth Circuit's reliance on these cases appears erroneous, since in \textit{Katz}, the Court, by expressly repudiating the trespass doctrine as enunciated by \textit{Olmscheid}, sub silencio overruled \textit{On Lee} and \textit{Lopes} to the extent they relied on trespass. Only the \textit{Lopes} alternative argument — that the government was not listening to conversations it could not otherwise have heard — is still authoritative; however, the recent judicial trend has been to abandon that argument in favor of the reasoning announced in Justice Brennan's dissent in \textit{Lopez}. 373 U.S. at 446–71. The only unscathed "established law" applicable to bugged agent surveillance is \textit{Osborn}, which further undermined \textit{Lopes} by approving of the use of a warrant and consequently left the law applicable to bugged agents in a state of uncertainty. However, \textit{Osborn} is sufficient ground upon which the Fifth Circuit could have based its conclusion once it had determined that \textit{Katz} is inapplicable to bugged agents.
\textsuperscript{27} 405 F.2d at 843. The Seventh Circuit's decision in the instant case constitutes a reversal of the position it had taken in United States v. Haden, 397 F.2d 460, 465 (7th Cir. 1968), where it was decided that "Lopez was in no way undermined by \textit{Katz} ...", since \textit{Katz} did not involve a "misplaced confidence." 397 F.2d at 465. The Seventh Circuit affirmed its position in the instant case in United States v. Waller, \textit{\ldots} F.2d \textit{\ldots} (7th Cir. 1969), where it reversed a conviction based on evidence obtained by a bugged agent who acted without a warrant. This affirmation took place after both the Second Circuit, \textit{supra} note 2, and the Fifth Circuit had expressly repudiated the court's decision in the instant case.
\textsuperscript{28} 405 F.2d at 843.
\textsuperscript{29} 408 F.2d at 1323–24.
\textsuperscript{30} 405 F.2d at 845.
The Fifth Circuit found support for its position in Justice White's concurring opinion in *Katz*, where it was stated that *Katz* left the law of bugged agent surveillance undisturbed. He considered bugged agent surveillance closely analogous to the situation in *Hoffa v. United States*, where the conversant merely testified about an incriminating conversation he had had with the defendant. Thus, Justice White held *Hoffa* to stand for the proposition that "when one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard." From this, the Fifth Circuit concluded that the recording or transmitting of a conversation is a "logical and reasonable extension" of *Hoffa* and is part of the risk one assumes when confiding in another person.

The Seventh Circuit, while recognizing the validity of the *Hoffa* decision, found it inapplicable to electronic surveillance. It agreed with the government's contention that the defendant had assumed the risk that his confidence in another person might be misplaced and that the conversant might memorize and repeat what was said, but found, however, that the use of a transmitter by the conversant was not within the risk assumed and consequently violated the privacy to which a party to a conversation is entitled. Therefore, the court decided that the *Katz* test should be used in determining the legality of the search and seizure at issue.

In applying the *Katz* test, the court examined the facts to determine if the defendant was, under the circumstances, justified in relying on his privacy in conducting the conversation. This inquiry necessitated the examination of two separate elements: first, whether the defendant's activity was directed at keeping his statements private; and secondly, whether the defendant should have reasonably anticipated this type of surveillance. With respect to the first, the court indicated that the mere use of a bugged agent to obtain evidence of the conversation is prima facie proof of the defendant's efforts to keep it private. Secondly, the court determined that the surveillance did not result from a risk which the defendant should have justifiably anticipated, because "[the defendant] surely is entitled to assume that the words he utters . . . will not be broadcast to the world." Thus the government's failure to procure a search warrant as required by *Katz* resulted in an unreasonable search and seizure.

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31. 389 U.S. at 362-64.
32. Id. at 363 n.1.
36. 405 F.2d at 846.
37. Id. at 843.
38. Id. at 846.
39. Id.
40. Id.
41. Id.
43. The *White* court dismissed the government's claim that the defendant had waived his fourth amendment rights by ruling that the defendant had no knowledge
An analysis of the conflicting positions of the two circuit courts indicates that the Seventh Circuit's decision in White is more in line with the underlying rationale of Katz. The conclusion of the White court is supported by the basic tenor of the Katz opinion, which requires all electronic surveillance to meet a test of reasonableness. 44 Katz was concerned with the preservation of the individual's privacy and liberty, and found these rights to be jeopardized by the unrestricted use of electronic devices. This danger is equally as apparent in bugged agent surveillance. The Seventh Circuit recognized this when it referred to the Katz Court's affirmative reference to Osborn as an illustration of the ideal means of undertaking bugged agent surveillance, i.e., by first obtaining a warrant. 48

Going beyond the reasoning of the Seventh Circuit but in support of their conclusion is the fact that the Katz Court affirmatively cited to Justice Brennen's dissent in Lopez, 46 where he expressed concern for the expanding use of electronic surveillance and noted the dire consequences it held for the basic constitutional rights of the individual. 47 Although Justice Brennen preferred a total prohibition of the use of such devices, he impliedly conceded to their use where a warrant is first obtained. 48

In addition to implications drawn from Katz, there is a strong practical argument which supports the Seventh Circuit's position. The requirement of antecedent justification through a warrant, if the prerequisites for obtaining a warrant are no more stringent than those approved in Osborn, will reduce the inherent dangers of electronic surveillance 50 of the electronic surveillance and therefore he did not have the ability to waive his rights. 405 F.2d at 844, 848.

While the Seventh Circuit appears to have obtained a satisfactory solution to the bugged agent problem, there is one troubling inconsistency in its opinion. Instead of rejecting the Lopez decision, which is logically inconsistent with the opinion in White, the court attempted to distinguish it on the basis of due process. The distinction was based on the fact that in Lopez the bugged agent testified against the defendant, thereby offering an opportunity for cross-examination, whereas in White he failed to do so testify. 405 F.2d at 847. This distinction, however, is immaterial to the determination of whether there was a search and seizure in violation of the fourth amendment, and therefore the court should have totally repudiated the result obtained in Lopez. See Justice Brennan's dissent in Lopez v. United States, 373 U.S. 427, 451 (1963).

This due process argument was also used by Chief Justice Warren in his concurring opinion in Lopez where he compared the conduct of the prosecution during trial in Lopez with that of the prosecution in On Lee. 373 U.S. 427, 441-46 (1963). 44. 389 U.S. 347, 359 (1967). 45. 405 F.2d 838, 844 (7th Cir. 1969). 46. Katz v. United States, 389 U.S. 347, 355-56 n.17 (1967). 47. 373 U.S. at 466-71. In distinguishing the risk of an associate's memorization and repetition of a conversation from the risk of his recordation or transmission of the conversation as spoken, Justice Brennen stated that "[t]here is no security from that kind of eavesdropping [bugged agents], no way of mitigating the risk, and so not even a residuum of true privacy." Id. at 466. Justices Douglas and Goldberg joined Justice Brennen in his dissent in Lopez v. United States, 373 U.S. 427, 446-71 (1963). Chief Justice Warren, in his concurring opinion in Lopez, 373 U.S. 427, 441 (1963), and Justice Stewart, writing for the majority in Osborn, 385 U.S. 223, 329 n.7 (1966), have expressed some of the same limited approval of Justice Brennen's view. 48. Lopez v. United States, 373 U.S. 427, 471 (1963). 49. The warrant has been deemed the best means of balancing the opposing interests of the individual's rights and the needs of law enforcement. See Greenawalt, supra note 8, at 231. 50. Electronic surveillance has been criticized as being unhealthy for society and degrading for government. See On Lee v. United States, 343 U.S. 747, 762 (1952).
without inhibiting the effective use of the bugged agent as a weapon of law enforcement.\(^{51}\)

The diverse views expressed by the *White* and *Koran* courts are both tenable interpretations of the impact of the *Katz* decision on the law governing electronic surveillance. The cause for the conflict between the circuits is that the Supreme Court in *Katz*, while applying a generalized concept of privacy to electronic surveillance, spoke only in terms of non-participatory electronic surveillance, thereby causing ambiguity to arise in the bugged agent situation. Hopefully the Supreme Court will grant certiorari to resolve this ambiguity, and in its review will look favorably upon the view expressed by the Seventh Circuit that bugged agent surveillance is a search and seizure within the fourth amendment.\(^{62}\)

*Richard W. Hollstein*

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**IN PERSONAM JURISDICTION — CONFLICT OF LAWS — CHOICE OF LAW CLAUSE — CHOICE OF NEW YORK LAW CLAUSE IN PROMISSORY NOTE INSUFFICIENT UNDER CPLR 302 TO GIVE NEW YORK COURT IN PERSONAM JURISDICTION OVER DISTRICT OF COLUMBIA DOMICILIARY.**


Plaintiff, a New York bank, brought the original action in the Supreme Court of New York, Nassau County, against defendants, executors of the estate of Charles Rose, a District of Columbia domiciliary, for breach of a $100,000 promissory note negotiated and executed in the District of

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\(^{52}\) Justice Black holds another view on this question as expressed by his dissent in *Katz*. He has steadfastly concluded that *Olmstead* is the proper approach and that the fourth amendment refers only to the searching and seizing of "intangibles," and that since voice vibrations are intangible the fourth amendment has no application. He refuses to "distort" the meaning of the fourth amendment by updating it to include such protection of an individual's privacy. *Katz* v. United States, 389 U.S. 347, 373 (1967) (Black, J., dissenting).
Columbia. Repayment was to be made by the mailing of payments from the District of Columbia to New York. The note further provided that it was to be governed and construed in accordance with the laws of New York. The New York court, utilizing the "transaction of business" provision of the New York "long-arm" statute\(^1\) to acquire in personam jurisdiction over the defendants, entered a default judgment against the estate in the amount of $122,792, interest and attorney's fees included. Plaintiff then brought the instant suit in the United States District Court for the District of Columbia to enforce the default judgment, and moved, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, for a judgment on the pleadings.\(^2\) The defendants answered the motion by alleging that the New York court lacked jurisdiction to render the default judgment against the estate. The district court denied plaintiff's motion, \textit{holding} that the defendant had alleged sufficient facts which, if proven, would result in a New York court, interpreting the New York "long-arm" statute, finding that the decedent did not have sufficient contacts with that state to give its courts in personam jurisdiction and therefore the court in the instant suit is not required to give full faith and credit\(^3\) to the New York judgment. \textit{Franklin Na'l Bank v. Krakow,} \_\_\_\_ F. Supp. \_\_\_\_ (D.D.C. 1969).

The traditional bases of in personam jurisdiction was the individual's presence within the forum state or his consent to such jurisdiction.\(^4\) In 1877, the Supreme Court in \textit{Pennoyer v. Neff}\(^5\) raised these bases to constitutional stature by adjudging them to be the sole criteria for satisfaction of the due process clause of the fourteenth amendment.\(^6\) Later, domicile was likewise held to occupy constitutional stature as a basis for in personam jurisdiction.\(^7\) However, it became increasingly apparent that strict adherence to these traditional bases of jurisdiction was not readily compatible with the increased nationalization of commerce.\(^8\) Moreover, the technological advances in communications and transportation made the defense of a suit in a foreign state far less burdensome.\(^9\) After first attempting to broaden the states' scope of jurisdiction through the creation of

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2. Fed. R. Civ. P. 12(c). The Court noted, however, that the proper motion in this instance should have been a motion for summary judgment pursuant to Rule 56 since "matters outside the pleadings" were presented.
5. 95 U.S. 714 (1877).
6. Id. at 732-34.
various exceptions such as "implied consent"10 or "doing business,"11 the Supreme Court, in International Shoe v. Washington,12 rejected the concepts of presence and consent as "legal fiction"13 and enunciated a flexible guideline for determining whether due process standards had been met. This guideline requires only that the defendant have had "certain minimum contacts with [the forum] such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"14

In response to the flexible rule of jurisdiction announced in International Shoe, a number of state legislatures,15 including New York,16 enacted single-act statutes designed to do away with the "legal fictions" of consent and presence as the exclusive tests of jurisdiction.17 The New York statute, section 302 of the Civil Practice Laws and Rules (CPLR),


13. Id. at 318.


specifically provides, *inter alia*, that New York courts shall have jurisdiction over "any nondomiciliary, or his executor or administrator [who] . . . transacts any business within the state. . . ."

The overall issue presented by the instant case is the effect that a valid choice of law clause will have on a determination of jurisdiction under the constitutional limitations of the due process clause of the fourteenth amendment. The narrower issue, and the one on which the Krakow court focused, is whether the choice of New York law proviso was a sufficient contact with New York to allow that state to assert in personam jurisdiction over the District of Columbia domiciliaries under the "transaction of business" clause of CPLR 302.

There would appear to be no doubt that the choice of New York law clause in the promissory note is valid. In order for such a provision to effectively instruct the trying forum as to which law should apply, it must bear some reasonable relationship either to the parties or to the transaction itself. It is well-established that when the state chosen is where "performance by one of the parties is to take place or where one of the parties is domiciled or has his principal place of business," the selection of that state's laws as controlling will be held to be reasonable. Since plaintiff is a New York bank and performance, *i.e.*, repayment, was to take place in New York, the choice of New York law in the instant case is valid and will be deemed to control.

Once the validity of the choice of law clause is established, the inquiry becomes jurisdictional in nature. The classic case defining the limits of the New York "long-arm" statute is *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, where the New York Court of Appeals, in denying the defendant's motion to dismiss for lack of jurisdiction, looked to the totality of the defendant's voluntary activities within the state in holding that the defendant had engaged in "purposeful acts" in New York.

19. See pp. 768-70 infra.
   (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . unless . . .
      (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice . . .
which invoked the "benefits and protections" of New York law. The activities which the court deemed purposeful consisted of the negotiation and execution of a supplemental agreement in New York, the shipment of defective machines to New York, and the installation and testing of such machines by defendant's employees in plaintiff's New York plant. The parties had also intentionally included a clause stating that the contract had been executed in New York (which it had not) and that it was to be governed and construed in accordance with New York law. Although it could be argued that such a clause constituted "purposeful activity" in New York sufficient to invoke "the benefits and protections" of New York law, the court of appeals merely footnoted the issue. Judge Fuld stated:

*We do no more than note the added fact that the contract itself expressed the agreement of the parties that it was to be regarded as having been made in New York and as governed by New York law.*

This cursory treatment of the expressed intention of the parties seems to indicate that New York courts will give little, if any, independent weight to a choice of law clause in determining whether a defendant has "transacted any business" under CPLR 302. Rather, such treatment serves to emphasize that by "purposeful activities" the New York courts are going to insist on actual conduct within the state rather than activity which could be termed legal conduct.

Thus, since it would not appear that a choice of law clause constitutes sufficient contact under New York law for that state to invoke in personam jurisdiction, the District of Columbia court was correct in deciding that the New York default judgment was not entitled to full faith and credit. However, it must be kept in mind that the limits which the New York courts place on their assertion of in personam jurisdiction under CPLR 302 are not necessarily coextensive with the outer limits of the due process clause as interpreted by the Supreme Court. Therefore, the question still remains as to what effect a valid choice of law clause will have on a state's assertion of in personam jurisdiction where it is limited only by the due process clause.

25. Id.
26. Id. at 457 n.6, 261 N.Y.S.2d at 19 n.6, 209 N.E.2d at 76 n.6 (emphasis added).
The answer to this question lies ultimately in a combined reading of the Supreme Court decisions in International Shoe,29 Hanson v. Denckla,30 and McGee v. International Life Ins. Co.31 The one basic principle which underlies the Court’s decision in International Shoe is that a state may exercise in personam jurisdiction whenever an individual’s relationship to the state is such as to make the exercise of that jurisdiction reasonable.32 In McGee, the Court expanded the concept of reasonableness to include a California court’s assertion of in personam jurisdiction over an insurance company whose sole contact with California was the mailing of one policy into the state.33 However, in Hanson the Court felt constrained to emphasize that all restrictions on jurisdiction had not been abrogated by holding that, as a result of the inherent “territorial limitations on the power of the respective States,” due process requires, at the minimum, that a state not exercise in personam jurisdiction unless there is “some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”34 These cases taken together indicate that there are three requirements which must be met before a state’s exercise of in personam jurisdiction will satisfy due process standards.35 The first of these requirements dictates that there be some act or transaction consummated by the defendant within the forum state.36 The defendant need not be physically within the state, but may consummate the transaction by mail or other means.37 The mere inclusion of a valid choice of law clause in a contract would not appear to satisfy this first requirement.

35. 357 U.S. at 251.
36. Id. at 253.
37. Id., supra note 29.
since it is simply the invocation of the benefits and protections of the chosen state's laws and not an act or transaction within the state. Therefore, some contact other than a choice of law clause, such as the mailing of payments into the chosen state\(^40\) or the execution or negotiation of the contract there,\(^41\) would be necessary before jurisdiction could be constitutionally asserted.

The second requirement is that the cause of action arise out of, or result from, the activities of the defendant within the forum state.\(^42\) Since under the first requirement it was noted that the mere inclusion of a choice of law clause does not constitute an act within the chosen state, it is clear that this clause cannot be the act out of which the cause of action arose. Therefore, again it would be necessary for there to be some contact with the forum state other than the invocation of that state's laws as a term in the contract in order for this second requirement to be met.

These first two rules essentially set forth the minimum contact that is a prerequisite to a state's assertion of in personam jurisdiction.\(^43\) It is only after such minimum contact has been established that the third requirement, the test of reasonableness as announced in *International Shoe*, comes into play.\(^44\) Since any determination of reasonableness is the product of a balancing of interests,\(^45\) the Court in *International Shoe* stated that an "estimate of the inconveniences . . . [to the parties in having trial away from their 'home' forum] . . . is relevant in this connection."\(^46\) This has been held to embrace those factors which are weighed under the doctrine of *forum non conveniens*.\(^47\) It is in this respect that the choice of law clause takes on jurisdictional importance in addition to its primary function and effect of controlling which law will apply. In determining the proper forum it has been held that

\[f\]actors of public interest . . . have a place in applying the doctrine. . . . There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the

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\(^{40}\) *Cf. id.; G. Benedict Corp. v. Epstein*, 47 Misc. 2d 316, 262 N.Y.S.2d 726 (Sup. Ct. 1965).


\(^{43}\) Note, *supra* note 37, at 353–54.

\(^{44}\) See p. 769 *supra*.

\(^{45}\) *Developments in the Law, supra* note 4, at 924.


trial . . . in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.\textsuperscript{48}

It thus appears that a choice of law clause would weigh heavily in favor of the chosen state's assertion of in personam jurisdiction over a non-domiciliary defendant, since the chosen state's courts would be best qualified to apply their own law. However, the appropriateness of having trial in the controlling-law state is not the only factor to be taken into consideration under the reasonableness test. Other factors which the Supreme Court has enumerated are

the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. . . . \textsuperscript{[P]}laintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. . . . \textsuperscript{49}

With the addition of these other considerations, the importance of the choice of law clause becomes somewhat diluted. The advantage of having the chosen state try the case may be outweighed by the fact that any judgment recovered by the plaintiff may not be enforceable without further litigation in defendant's home forum, as was the situation in the instant case. Another factor which may weigh against trial in the chosen state when the contract has been negotiated and executed elsewhere is that by such action the plaintiff has demonstrated that it would not be overburden-some to sue in a foreign jurisdiction.\textsuperscript{50} Another factor which should be taken into account in the balancing of interests tests is the fact that the choice of law clause may not have been freely bargained-for; if this be the case, no weight should be given to such a clause.\textsuperscript{51}

There is also a certain class differentiation which, though seldom articulated, may well influence court decisions in this area.\textsuperscript{52} It has been suggested by one commentator that when the interests of a defendant, who

\textsuperscript{48} Gulf Oil Corp. v Gilbert, 330 U.S. 501, 509 (1947).
\textsuperscript{49} Id. at 508.
\textsuperscript{50} See, e.g., Knight v. District Ct., 424 P.2d 110 (Colo. 1967), where the court, in holding that the Colorado District Court had jurisdiction over the Utah petitioners, stated that "it seems to us to be eminently fair and just to require the petitioners, who were able to come over the mountain to borrow $30,000, to return when they are allegedly in default as concerns repayment. . . ." Id. at 113; Reibich, Jurisdiction of Maryland Courts Over Foreign Corporations Under the Act of 1937, 3 Md. L. Rev. 35 (1938), wherein the author states that the scales should be tipped in favor of due process when we consider along with the convenience to the plaintiff the fact that the defendant corporation came to the jurisdiction to contract with the plaintiff. Id. at 70–71.
\textsuperscript{52} Developments in the Law, supra note 4, at 936.
is a natural person, are being weighed in the balancing of interests test, the courts should be less constrained to find jurisdiction over such a defendant than in the case where a defendant corporation's interests are being weighed.\textsuperscript{53} The rationale for such differentiation is that a state is generally without the power to exclude an individual from doing business or making contracts in the state, but can completely exclude foreign corporations or admit them subject to conditions; and since a state has this power over corporations generally, it should require less contacts to subject a corporation to that state's in personam jurisdiction.\textsuperscript{54}

In conclusion, it would appear that the district court's holding that the defendant alleged sufficient facts, which if proven, would defeat the action in that if the sole contact with New York was the choice of law proviso it would not meet the "transacting of business" provision of the New York long-arm statute. Moreover, on the broader constitutional level, it is submitted that even where a choice of law clause is reasonably related to the parties or the transaction, and therefore controlling as to which law should apply, without some other form of contact with that state, this clause alone is not a sufficient basis on which a state may assert in personam jurisdiction. However, once a minimum contact is shown to exist, then the choice of law clause becomes a persuasive, but not definitive, factor in determining whether such assertion is reasonable.

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\textsuperscript{53} Ehrenzweig, \textit{supra} note 34, at 292.