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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CITIBANK, N. A., Petitioner V.

WELLS FARGO ASIA LIMITED

CASE NO: 88-1260

PLACE: Washington, D.C.

DATE: March 19, 1990

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 CITIBANK, N. A., :

4 Petitioner :

5 v. :

No. 88-1260

6 WELLS FARGO ASIA LIMITED :

7 -----x

8 Washington, D.C.

9 Monday, March 19, 1990

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:49 a.m.

13 APPEARANCES:

14 ROBERT H. BORK, ESQ., Washington, D.C.; on behalf of the
15 Petitioner.

16 THOMAS W. MERRILL, ESQ., Deputy Solicitor General,
17 Department of Justice, Washington, D.C.; on behalf of
18 United States as amicus curiae, supporting the
19 Petitioner.

20 DARRYL SNIDER, ESQ., Los Angeles, California; on behalf of
21 the Respondent.

C O N T E N T S

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3	ROBERT H. BORK, ESQ.	
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5	THOMAS W. MERRILL, ESQ.	
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1 did was on the depositor in the foreign branch, in the
2 Manila branch.

3 Now, a panel of the Second Circuit stated that
4 normally a deposit is repayable only at the branch where
5 it is made, but in this case, because there were routing
6 instructions, routine routing instructions for putting the
7 money back through New York on the way to repayment, that
8 they had somehow -- the banks had somehow agreed to repay
9 in New York --

10 QUESTION: Well, they found -- the Second
11 Circuit found there was a contract to that effect, a
12 contractual agreement.

13 MR. BORK: That's right. They found there was a
14 contract. And what that contract was, a routing
15 instruction, it was a little odd because the routing
16 instruction said that Citibank Manila would pay out of its
17 bank account in Citibank -- its bank account, not
18 Citibank, -- its bank account in Citibank, would repay
19 Wells Fargo Asia's bank account with Wells Fargo.

20 But simply because it went through New York the
21 Second Circuit decided that it was payable in New York,
22 and then shifted the person who had to pay from Citibank
23 Manila to Citibank in New York.

24 QUESTION: Well, we don't usually review those
25 very factual determinations, was there or was there not a

1 contract to a particular effect.

2 MR. BORK: Well, I think in this case what is up
3 for review is a question of Federal law. It is our
4 contention that that question of law, when they construed
5 that as a contract, is preempted by Federal law. And you
6 will notice, Mr. Chief Justice, that nobody in this case
7 defends the Second Circuit's rationale.

8 QUESTION: Well, do you contend that whatever
9 the Federal law is, the parties could not agree otherwise
10 by contract in a situation like this?

11 MR. BORK: They could agree otherwise than by
12 contract. As we have said in our brief and as the
13 Solicitor General says, this is clearly not a contract.
14 These are the routing instructions that are used in --

15 QUESTION: Well, then you are just arguing about
16 a very fact specific determination about the Second
17 Circuit, it seems to me, if you agree that whatever view
18 of Federal law one takes, the parties could change the
19 result by agreement.

20 MR. BORK: Yes, but according to Federal law,
21 Mr. Chief Justice, what I am saying is this cannot be a
22 contract. If it has been, then for 40 years the Federal
23 Reserve Board and the FDIC have been interpreting these
24 things wrong.

25 QUESTION: Well, but if they can -- if Citibank

1 could have agreed to this liability by an express
2 contract, you would know -- you could protect yourself in
3 every, every transaction after this by making sure that
4 you didn't have such a contract.

5 MR. BORK: No, we couldn't, Your Honor. What we
6 have here, all of these dollars are routed through New
7 York, 90 percent of them. That is the way the whole
8 industry works. If this were correct, all Eurodollars,
9 which are payable offshore only, suddenly hundreds of
10 billions of dollars suddenly become payable in New York.
11 Those are deposits offshore for which no reserves have
12 been created, for which no insurance has been paid --

13 QUESTION: So there are a lot of transactions
14 out there already that --

15 MR. BORK: Already out there. So you couldn't
16 cure the existing obligations by contract. Moreover, this
17 is an oral market. All of these deals are done, and there
18 are hundreds of billions of them done a day, on the
19 telephone by people who are about 25 years old. And all
20 they are allowed to do is give the amount, the interest
21 rate and the time of repayment. There are no other terms.

22 QUESTION: Well, they are allowed to make
23 contracts, aren't they?

24 MR. BORK: No, they're not. That's it.

25 QUESTION: People 25 years old in this job are

1 not allowed to make contracts?

2 MR. BORK: They are not allowed by their
3 employer to make contracts other than the amount, the
4 interest rate and the time of repayment. It is an oral
5 market, and it can't work with all kinds of terms being
6 done that way.

7 QUESTION: Well, does that say nobody ever gets
8 out of line?

9 MR. BORK: Never gets -- I assume that if
10 somebody gets out of line and makes a different kind of a
11 contract over the telephone that drastic repercussions
12 follow. But that is not the point here.

13 The point is that we have Federal law that says
14 that these deposits are payable only overseas at the
15 branch where made, when a sovereign foreign government
16 interferes with the power of the branch to repay.

17 QUESTION: Well, Mr. Bork, I think the Solicitor
18 General would offer a narrower approach than the adoption
19 of some Federal common law rule. I think you differ
20 somewhat in that regard.

21 MR. BORK: That is certainly true, Justice
22 O'Connor. The Solicitor General says he finds our rule
23 attractive -- and by the way, I am not arguing primarily
24 for a Federal common law rule. I am arguing primarily for
25 a straight out preemption, which I think I can prove. But

1 the Solicitor General says you don't have to reach that
2 issue because the common law, correctly interpreted, would
3 give us the same result.

4 And he does stress that there is an enormous
5 Federal interest here. If you look at page 12 of his
6 brief, page 18 of his brief, and towards the end of the
7 brief, he says if the common law doesn't come out right
8 they will have to come back and begin discussing whether
9 or not there is a Federal law that preempts, or that there
10 is a common law.

11 The fact is his position rests upon a notion
12 that the law is the same all over the world and in all
13 states. That may be true, but nobody knows it. And he
14 may be willing to rest on that, but the banks and the
15 banking regulators would find that situation present --
16 nobody would know where the risk --

17 QUESTION: What was the source of Federal
18 jurisdiction here? Was it diversity jurisdiction in the
19 Federal court?

20 MR. BORK: Yes, and there is a bank statute that
21 says that --

22 QUESTION: Are you relying on Section 632?

23 MR. BORK: For jurisdiction, and also I think
24 there was diversity jurisdiction here. But --

25 QUESTION: You think both existed?

1 MR. BORK: Yes. I think that is right, Justice
2 O'Connor.

3 But the fact is the Second Circuit's theory is
4 one I had not planned to discuss, because nobody in this
5 case, not the respondent, the amici, the respondent's
6 amici, our amici, the government, nobody supports the
7 Second Circuit's rationale, and nobody has ever seen that
8 rationale before in this entire market.

9 QUESTION: But I take it Wells Fargo supports
10 the district court's rationale?

11 MR. BORK: Wells Fargo has something more than
12 the district court's rationale. It has a really a very
13 revolutionary proposition. But even without a -- it's not
14 really the district court's rationale, I don't think, but
15 even without an agreement, a deposit in Manila is
16 repayable by Citibank in New York or anywhere else in the
17 world that Citibank has a branch, whenever any foreign
18 government interferes with repayment by the Manila branch.

19 Now that -- that theory absolutely destroys the
20 distinction between domestic deposits and deposits
21 overseas in foreign branches. And that is a distinction
22 upon which the banking industry in this area is built. It
23 is the distinction upon which all Federal regulation in
24 this area is built.

25 And in this case you have two Federal -- you

1 have two regulatory systems. You have the Philippine
2 regulatory system, which fully regulates the Manila
3 branch, and you have the U.S. regulatory system. Now, a
4 depositor faces a trade-off, depending on which system he
5 wants to choose to go into. Deposit here and get all of
6 the protections, reserves, insurance and so forth that the
7 United States provides, or he can deposit abroad, without
8 the cost of the U.S. regulatory system and get a higher
9 interest rate. What he can't do is get both.

10 QUESTION: What are the risks that he takes?
11 Just the risk of a foreign freeze order? Because everyone
12 concedes that if the foreign branch is insolvent that the
13 primary branch, that the primary bank is liable.

14 MR. BORK: That is right. That is right, by
15 Federal law there, too. In 1917 the Federal Reserve
16 stated --

17 QUESTION: So what are the risks? Just a
18 foreign freeze order?

19 MR. BORK: Foreign expropriation, freeze,
20 anything that restricts the ability of the foreign branch
21 to repay the debt when it is due. That is called
22 sovereign risk, and that is what the government has said,
23 by law, rests with the depositor and not with the home
24 office.

25 And it can't operate its regulatory system any

1 other way, because if all of those deposits suddenly
2 become payable in the United States, perhaps the Federal
3 Reserve will have to create reserves against those
4 deposits, and there are hundreds of billions of them out
5 there. Citibank, for example, and it is not alone in
6 this, has many more deposits overseas than it has in this
7 country. And if they all came here to be repaid after
8 they were lost to a foreign government, the situation
9 would be pretty serious.

10 So, if Respondent's theory were adopted, what
11 would happen is that the Federal Reserve Board would have
12 to figure out whether it is going to require reserves
13 against all of those deposits. The FDIC would have no
14 choice under its statute.

15 QUESTION: Is your, is your suggestion that --
16 the fact that -- the holding that there was a contract to
17 pay in New York or to expose Citibank's assets everywhere,
18 that is just out of the case because nobody defends the
19 holding below?

20 MR. BORK: No, no, actually General Merrill is
21 going to address that aspect of the case, and I had hoped
22 to discuss the Federal law, but I am willing to discuss it
23 too if you wish.

24 QUESTION: Okay, no.

25 MR. BORK: The, that's in the case, but I think

1 by Federal law that is not the way to view standard
2 routing instructions, because if you do all Eurodollars
3 are wiped out and they all become domestic dollars.

4 But anyway, the law in this case was made in
5 1913 by the Federal Reserve Act, which delegated to the
6 Federal Reserve Board the power to license foreign
7 branches under such regulations, upon such conditions as
8 they saw fit. The Federal Reserve Board then --

9 QUESTION: We will resume there at 1:00 p.m.,
10 Mr. Bork.

11 (Thereupon, at 12:00 noon, the oral argument in
12 the above-entitled matter was recessed, to reconvene at
13 1:00 p.m. this same day.)
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(12:59 p.m.)

1
2 CHIEF JUSTICE REHNQUIST: We will resume
3 argument now in Citibank v. Wells Fargo.

4 Mr. Bork.

5 MR. BORK: Mr. Chief Justice:

6 Since General Merrill is going to discuss the
7 issue of the routing instructions, I would like not to use
8 up all of my time on that issue. But I want to say just a
9 couple of things. There is only one finding of fact in
10 this case about what those routing instructions mean.
11 That was by the district court. The district court found
12 as a fact that was not an agreement making the deposits
13 collectable in New York. The court of appeals did not
14 find that clearly erroneous, it simply read the words of
15 the telexes and said that's an agreement. I think that is
16 a matter of law, not of fact. And these are routine
17 transactions, and I think as a matter of Federal law they
18 cannot be taken as agreements.

19 And in fact I think Federal law covers this
20 entire field I have mentioned to you, Congress' delegation
21 to the Federal Reserve Board to make all the regulations
22 as to foreign banks. The Federal Reserve Board did that
23 in its most -- its clearest statement of Federal law was
24 in its 1970 bulletin opinion, which is to be found at page
25 87 of the appendix, and I will quote just three sentences

1 from that.

2 It said said exemptions, that is, exemptions
3 from -- for foreign branches from reserve requirements and
4 exemptions from interest rate limits, are intended
5 principally to enable foreign branches of U.S. banks to
6 compete on a more nearly equal basis with other banks in
7 foreign countries in accordance with the laws and
8 regulations of those countries.

9 Having given the policy of Federal interest, a
10 Federal policy in having competitive foreign branches, in
11 the very next sentence the opinion goes on to say, to lay
12 out the law, a customer who makes a deposit that is
13 payable solely at a foreign branch assumes whatever risk
14 may exist that the foreign country might impose
15 restrictions on withdrawals.

16 To make it still clearer, the very next sentence
17 says when payment of a deposit in a foreign branch is
18 guaranteed by a promise of payment at a banking office in
19 the United States if not paid at the foreign office, the
20 depositor no longer assumes such risk.

21 QUESTION: What would you call that in the world
22 of administrative law, Mr. Bork, an interpretive
23 regulation or interpretation of a regulation?

24 MR. BORK: It is an interpretation of the 1918
25 opinion, which is a regulation, and then you will have --

1 I think this is a regulation. I think you will see in
2 1982 and 1983 in the appendix staff opinions published by
3 authority of the board which say the same thing. They --
4 but the important point is the matter of practical
5 construction for decades and decades, since 1918 to the
6 present day, the Federal Reserve Board and the FDIC since
7 1933 have been operating on that rule. And among other
8 things, the Federal Reserve Board and the FDIC for 40
9 years have been saying that these routing instructions,
10 which every day send \$750 billion through New York, every
11 day, these routing instructions are not agreements to
12 repay in the United States. And the finding -- the
13 holding to the contrary by the court of appeals, I think,
14 is clearly a holding of law and not a finding of fact.

15 But in any event, our brief discusses how the
16 law was made at some length, and Congress has ratified in
17 1980 these interpretations and these regulations. That is
18 in our brief, too. The clear fact is that Federal law had
19 to be created, if we were going to have Eurodollar
20 markets, if we were going to have foreign branches that
21 are competitive with other countries. Other countries
22 don't have a rule of home office liability. The risk of
23 sovereign interference under English law and under French
24 law rests with the depositor in the foreign branch. That
25 was the rule here up until this case. But it is clearly

1 the rule that the Federal Reserve and the FDIC have laid
2 down and operate on.

3 Now, if the court of -- if this Court --

4 QUESTION: May I just interrupt for a second?
5 How do we determine whether the -- whether a deposit is
6 payable solely at a foreign branch? For example --

7 MR. BORK: If it's made at the foreign branch -
8 -

9 QUESTION: -- if it is not insolvent it would
10 have been payable somewhere else, wouldn't it?

11 MR. BORK: If it's -- under the 1917 regulation
12 of the Federal Reserve Board, if there is insolvency or a
13 credit failure, it is payable by the home office.

14 QUESTION: Then how can you say it is payable
15 solely at the branch office?

16 MR. BORK: In terms of sovereign risk, because
17 of the 1918 regulation which said that the reserves will
18 not be created by sovereign --

19 QUESTION: Yes, but the -- but your sentence you
20 read to us says a customer who makes a deposit that is
21 payable solely at a foreign branch assumes a certain risk.

22 MR. BORK: He assumes the risk. The risk he
23 assumes is that the foreign country might interfere with
24 repayment.

25 QUESTION: Right.

1 MR. BORK: He does not assume the risk if the
2 branch manager will run off with the funds.

3 QUESTION: Well, I understand that, but if the
4 branch manager does run off with the funds, it is payable
5 someplace else. So how can you say it is payable solely
6 at a foreign branch?

7 MR. BORK: Oh, it probably is payable -- well,
8 under -- that is probably Justice Harlan's distinction he
9 made, it's in our brief, which is that it is not payable
10 at the home office. You sue at the home office for breach
11 of contract, rescission, something of that sort. But it is
12 not the deposit itself that is repayable.

13 QUESTION: It seems to me one of the tough
14 issues in the case is whether or not this deposit was
15 payable solely at a foreign branch. That is one of --

16 MR. BORK: If this one wasn't, then none are.
17 And the Federal Deposit Insurance Corporation and the
18 Federal Reserve Board have been operating under their own
19 regulations for decades and decades on a wrong
20 interpretation of their own regulations. Because this is
21 an utterly standard routing instruction, utterly standard
22 transaction.

23 QUESTION: Mr. Bork, isn't it possible to -- I
24 don't know whether we are quarreling over the right words,
25 isn't it possible to have it payable at the home -- at the

1 home office, but not payable from the home office funds.
2 Couldn't you analyze it that way, saying even though you
3 have made it payable there, in order to overcome the
4 banking regulations here you have to make it payable there
5 out of the home office funds? Wouldn't that -- that would
6 give you the same result, wouldn't it?

7 MR. BORK: No, the court has -- here has said it
8 is payable out of the home office funds, although the
9 telexes don't say that. They say payable out of Manila
10 branch's funds. And the transfer, the electronic
11 transfer, takes place in New York because of this computer
12 system that nets out \$750 billion worth of these
13 Eurodollar transactions a day. That is why they all go
14 through New York, and the only reason. And that practical
15 industry fact has been understood by the regulatory
16 agencies not to be a contract that the home office will
17 pay.

18 If the Court should rule as we ask the Court to,
19 nothing in the regulatory system that has been in place
20 for decades now will change.

21 QUESTION: What would be our judgment if we
22 agree with you?

23 MR. BORK: You would reverse and judgment would
24 be entered for Citibank.

25 QUESTION: Nothing left -- nothing left of the

1 case to be decided below.

2 MR. BORK: That is right. That is right, Mr.
3 Justice White.

4 If the Court should rule the other way, however,
5 on these notions that Respondent offers, which are
6 essentially unworkable, they don't do -- for example, it
7 says an attachment of a deposit, the risk of that is on
8 the depositor, but a currency blocking, the risk of that
9 is on the home office. You can block currency for so long
10 it becomes an attachment.

11 QUESTION: But if we -- if we -- to agree with
12 you we first have to say that there was no contract, don't
13 we?

14 MR. BORK: That is correct.

15 QUESTION: Yes. And secondly, and if there
16 isn't any contract, there can't be any liability here,
17 because of the Federal law.

18 MR. BORK: That is correct. The risk of laws
19 rests with the depositor.

20 QUESTION: You don't think New York or
21 Philippine law has anything to do with it?

22 MR. BORK: If it did --

23 QUESTION: Let's assume there is no contract,
24 and then you say well, is there some other basis for
25 liability, and you say there can't be because of the

1 Federal law, even if New York might say -- the New York
2 law might be that the home office is liable.

3 MR. BORK: Well, I don't think the New York law
4 is that way.

5 QUESTION: Well, I know, but what if it were?

6 MR. BORK: But if it were I think that New York
7 law is preempted because a foreign branch banking is an
8 area of vital Federal interest. These branches exist only
9 because of Congress and the Federal Reserve Board. And
10 they have been regulated by Congress and the Federal
11 Reserve Board all of this time. And Congress said it
12 wants healthy competitive foreign branches to help assist
13 American business, to act as fiscal agents to the U.S.
14 government, and so forth. This is the area of almost
15 exclusive Federal concern, and there is Federal rules on
16 it which I think must preempt any rules to the contrary.
17 It is a very narrow preemption. It is just about where
18 the risk of sovereign laws lies.

19 QUESTION: The agencies may have operated on
20 this assumption for a long time that the home office is
21 not liable, but there is no -- is there some specific
22 provision in a statute to that effect?

23 MR. BORK: Well, the statute in 1913 said that
24 the Federal Reserve may license foreign branches on such
25 regulations and conditions as it deems necessary. The

1 Federal Reserve then began to make opinions and
2 regulations of the kind I just read you, which says the
3 risk of sovereign interference at the branch lies solely
4 with the depositor. In 1980 Congress passed the statute
5 saying reserves -- following the Federal Reserve practice
6 -- reserves are not creatable for deposits of foreign
7 branches. And the House report said that it is our
8 intention not to disturb the administrative
9 classifications that have been made under existing law,
10 which I think is a ratification of what the Federal
11 Reserve and the FDIC had been doing all of this time.

12 QUESTION: Thank you, Mr. Bork.

13 Mr. Merrill.

14 ORAL ARGUMENT OF THOMAS W. MERRILL

15 ON BEHALF OF UNITED STATES

16 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

17 MR. MERRILL: Mr. Chief Justice, and may it
18 please the Court:

19 The lower courts in this case adopted two
20 general theories in support of the conclusion that a
21 routine Eurodollar placed with a foreign branch of a
22 United States bank is a general obligation to the bank as
23 a whole. The district court found that there had been no
24 agreement between the parties as to where the deposit
25 would be repaid, but concluded that as a matter of law

1 that deposit obligation was an obligation of the bank as a
2 whole.

3 The court of appeals disagreed with that
4 statement of the rule of law, but found that in fact the
5 routing instructions that the parties had agreed to for
6 settlement of the deposit account in New York constituted
7 an agreement to repay in the United States.

8 Let me briefly address why both of those are
9 matter of deep concern to the Federal banking agencies and
10 why we think in particular the court of appeals' judgment
11 cannot stand as a matter of law.

12 It has long been understood by the banking
13 community and by the Federal banking agencies that the
14 relationship between a deposit agreement and instructions
15 for settlement of a deposit through the New York
16 clearinghouse bears roughly the same relationship as any
17 type of contractual obligation pays to provisions for the
18 clearance of a check that might be written in satisfaction
19 of that contractual obligation.

20 QUESTION: How do -- first of all, how do you
21 know this, Mr. Merrill, and second, how do we know it?
22 Was there expert testimony to this effect in the district
23 court?

24 MR. MERRILL: Yes, there was testimony in the
25 district court about the significance of the routing

1 instructions. And as far as I know, it was all to the
2 effect that the routing instructions were not understood
3 to be part of the obligation of the parties.

4 QUESTION: And so, what you are telling us now
5 about what everybody knows is based on the testimony of
6 expert witnesses before the trial court?

7 MR. MERRILL: It is not a question of fact, Your
8 Honor. The district court found --

9 QUESTION: Well, you -- you're telling us that
10 certain transactions have always been assumed to be just
11 like this or just like that. If that isn't a question of
12 fact, I don't know what is.

13 MR. MERRILL: Well, it is not a question of fact
14 because the district court found the facts in this case.
15 The district court specifically found two things. It
16 found -- it made a distinction between what it called the
17 provisions for clearing -- for repayment of -- it defined
18 repayment as the provisions for routing money between the
19 banks, and it distinguished that from collectability,
20 which it defined as where the parties could look to
21 satisfy the obligation. It found that there had been no
22 agreement reached on collectability, which is what we
23 understand to mean repayment.

24 QUESTION: So, are -- is what you are telling
25 us, were telling us a moment ago that everybody knows, is

1 that based on findings of the district court?

2 MR. MERRILL: We think that the court of appeals
3 ruled as a matter of law that this is an obligation in New
4 York. It did not question any of the findings of the
5 district court.

6 QUESTION: Well, but your -- your opening
7 remarks, Mr. Merrill, were to the effect that there are a
8 lot of things that people have been taking for granted for
9 a long time, and this is how the cow ate the cabbage, so
10 to speak. And I am asking you what is the source of our
11 knowledge that that is how the cow ate the cabbage?

12 MR. MERRILL: Well, two things basically. One
13 would be, of course, prior case law about the relationship
14 between banking deposits and routing instructions, which
15 is entirely -- is completely consistent that the routing
16 instructions have no effect on the modification of the
17 obligation. That is the holding of the Second Circuit in
18 the Braka case. It's the holding of the Fifth Circuit in
19 the Callejo case.

20 QUESTION: Well, but those cases aren't binding
21 on us.

22 MR. MERRILL: No, those are cases construing as
23 a matter of law that the type -- those types of routing
24 obligations don't constitute a contract. The district
25 court found that the routing instructions were not a

1 contract that affected the obligation to repay.

2 QUESTION: Well, how can you say then the court
3 of appeals didn't disagree with any of the findings of the
4 district court?

5 MR. MERRILL: Because the court of appeals
6 accepted the findings that --

7 QUESTION: That there wasn't a contract?

8 MR. MERRILL: But construed the routing
9 agreements to be a legal obligation to repay in the United
10 States.

11 QUESTION: Well, isn't that -- in short there
12 was an agreement.

13 MR. MERRILL: There was an agreement about
14 routing instructions, but the court of appeals changed the
15 interpretation of that as a matter of law to be an
16 agreement to repay in New York. There are approximately
17 \$1.5 trillion worth of Eurodollar deposits in existence in
18 the world today; 90 percent of those are cleared through
19 these banks in New York.

20 The Federal Reserve and the Federal Deposit
21 Insurance Corporation have for years followed a basic two-
22 step process in deciding the question of where an
23 obligation is repaid -- is repayable. Whether it is
24 payable only outside the United States or payable in the
25 United States.

1 First they look to the agreement of the parties,
2 the deposit agreement. And if the deposit agreement
3 specifically provides for a place of payment, that is
4 where it is determined to be payable.

5 Secondly, if there is no agreement, it is
6 presumed to be payable at the branch where it has been
7 placed.

8 Now, if the court of appeals is correct that
9 routine routing instructions, which are no different in
10 any material respect from the routing instructions that
11 accompany all of these Eurodollar transactions, constitute
12 an agreement to make the obligation -- the underlying
13 obligation payable in the United States, then the entire
14 understanding on which the banking agencies have been
15 operating has been totally revolutionized. The Eurodollar
16 market would be called into question, and it would have
17 significant implications for the security and stability of
18 the United States banking system.

19 QUESTION: Well, Mr. Merrill, in responding to
20 the question you take a different position than Mr. Bork
21 takes in how we should resolve it. He would propose
22 articulation of some Federal common law.

23 MR. MERRILL: I don't think there is any
24 difference in our position with respect to the Second
25 Circuit's rationale. I think we both agree that as a

1 matter of law that is simply erroneous.

2 QUESTION: Well, if it isn't -- if we don't say,
3 as he suggests, that there, it is governed by some Federal
4 law, then what law does apply here?

5 MR. MERRILL: Well, we have suggested in our
6 brief that as a matter of New York and Philippine law
7 there is no basis whatsoever for concluding that these are
8 general obligations of the bank. I can understand how the
9 Court might be reluctant to wade into deciding questions
10 of Philippine law, and our invitation brief we simply
11 suggested that the matter be remanded to the Second
12 Circuit.

13 QUESTION: That isn't our reluctance. Our
14 reluctance is to say lucky thing for the Eurodollar market
15 that New York and Philippine law provide this way.
16 Because had they provided otherwise all the chaos that you
17 have just described would ensue.

18 You want us to say fortunately, in this
19 particular case since it is either New York or Philippine
20 law that governs, and since that law effectuates all the
21 good things you say, everything works out okay. The next
22 case may be Louisiana, and we will worry about that when
23 we get to it. That is basically what you are telling us.

24 MR. MERRILL: Well, we think that if in fact New
25 York and Philippine law had a contrary understanding, that

1 that would have very serious implications for the way in
2 which the Federal banking system operates, and we would at
3 that point urge the application of some type of Federal
4 common law rule to resolve this case.

5 QUESTION: I see.

6 MR. MERRILL: Our reluctance to do so so far has
7 been that we have been quite convinced that in fact there
8 is nothing in either New York or Philippine law which
9 suggests that it is in any way inconsistent --

10 QUESTION: Well, but that is going to have to be
11 done back at the court of appeals, isn't it?

12 MR. MERRILL: That would be the most natural
13 thing to do about that, and I can understand how the Court
14 might not wish to do that, given that both parties have -
15 - that the Court granted certiorari. We recommended in
16 our invitational brief granting certiorari only on the
17 second question about the routing instructions, but the
18 Court has granted certiorari on both questions. Parties
19 have extensively briefed the question of what the
20 underlying rule of law ought to be, and the Court may very
21 well wish to consider a proceeding to decide that
22 question.

23 The Federal government has no policy objection
24 to the use of a Federal common law rule in this context.
25 We would in fact be quite delighted with such a rule. We

1 simply have been concerned --

2 QUESTION: Why do you call it a common law rule?

3 MR. MERRILL: Excuse me?

4 QUESTION: Why do you call it -- call it a
5 common law rule?

6 MR. MERRILL: A Federal common law rule?

7 QUESTION: Yes.

8 MR. MERRILL: We don't construe our regulations
9 as being preemptive. We think they are interpretive
10 regulations which rest on the understanding that the
11 common law rule, absent agreement --

12 QUESTION: Well, they are evidence of what the
13 common law rule is, you think.

14 MR. MERRILL: Yes. The Federal government has
15 been operating on an understanding for years --

16 QUESTION: And if there is a Federal common law
17 rule, it preempts the state law, doesn't it?

18 MR. MERRILL: It would in that, yes, Your Honor.

19 QUESTION: Is what you're saying that the
20 regulations follow not a sort of Federal common law, but
21 the common law rule that has been in existence for a long
22 time, that is shown by its state court decisions?

23 MR. MERRILL: Yes, the Federal scheme is keyed
24 to the agreement of the parties. The Federal banking
25 examiners, when they go out and decide whether or not

1 something is payable only outside the United States, will
2 look to see if there is an agreement. If there is no
3 agreement they assume that the separate entity doctrine,
4 which the banking system has followed for decades,
5 applies, and that the agreement is -- the deposit is
6 payable only outside the United States.

7 This entire structure has been built up on that
8 premise. The Eurodollar market exists on that premise.
9 If the rule were to the contrary it would have serious
10 implications for the United States banking system because
11 it would mean that foreign governments could expropriate
12 or place freeze orders on the assets --

13 QUESTION: So Federal regulations really just
14 adopted what they saw as being the law already in force in
15 the majority of jurisdictions?

16 MR. MERRILL: That is our understanding, Your
17 Honor. But if that turned out to be mistaken, it would
18 have very serious implications for the integrity of the
19 banking system. It would mean, for example, that a
20 foreign government -- United States banks do business in
21 many, many foreign governments that are subject to all
22 sorts of political and economic instability.

23 QUESTION: Do you think that the Federal Reserve
24 Board would have the authority to put out a regulation to
25 this effect, make it the force of law that --

1 MR. MERRILL: It's unclear, Justice White, and
2 that's -- that proposition has never been tested. The
3 Federal Reserve has broad authority over branch banks in
4 foreign governments. It can specify the terms and
5 conditions under which those branch banks operate. And it
6 is conceivable that that statutory authority would be
7 broad enough to justify the issuance of a preemptive rule.

8 But it is not the understanding of the Federal
9 Reserve that it has at this point issued such a rule. Its
10 understanding is that it has been following the agreement
11 of the parties, and that the agreement of the parties,
12 when there is no express agreement of the parties to the
13 contrary, that the intention is that the deposit is
14 payable --

15 QUESTION: May I ask one question before you sit
16 down? In your view, if the deposit arrangement provided
17 that the deposit would be repayable by the home office in
18 the event of insolvency or act of God in Manila, would
19 that -- but not with regard to foreign risk, would that
20 deposit be payable solely at a foreign branch within the
21 meaning of the interpretive regulation that Judge Bork
22 called our attention to?

23 MR. MERRILL: Our understanding, Justice
24 Stevens, is that a deposit in a branch in a foreign bank
25 is always payable at that branch, and thus is always

1 subject to the law of that branch. If a credit risk
2 occurred --

3 QUESTION: You could answer my question yes or
4 no, I think.

5 MR. MERRILL: Our position is that if it were
6 payable in whole or in part in the United States it would
7 not be payable only outside the United States.

8 QUESTION: Even if it is only conditioned on
9 insolvency or act of God.

10 MR. MERRILL: If there were express agreement to
11 that effect, that is correct. If there were a guarantee
12 of payment at the home office, that is correct.

13 QUESTION: Thank you, Mr. Merrill.

14 Mr. Snider.

15 ORAL ARGUMENT OF DARRYL SNIDER

16 ON BEHALF OF THE RESPONDENT

17 MR. SNIDER: Mr. Chief Justice, and may it
18 please the Court:

19 At the outset I will provide an overview of the
20 four central points that I would like to leave with you
21 today. First, the Philippine decree in question, MAAB 47,
22 did not in any way prohibit repayment of these deposits, a
23 finding of the district court which was affirmed broadly
24 by the Second Circuit in its opinion.

25 Second, Citibank's unconditional promise to

1 repay is not limited to any particular assets.

2 Third, no Federal law or regulation limits
3 Citibank's obligation to repay to any particular assets.

4 And fourth, and finally, policy considerations
5 do not call for this Court now to create new Federal law
6 in this area.

7 Let me then turn to my first point. It is one
8 that really hasn't been discussed. It has been glossed
9 over today; it was glossed over in the briefs. And I
10 think it is so fundamental to an understanding of this
11 case and to the contractual relationship of the parties
12 and what the courts below did that we must deal with it at
13 the outset.

14 The brief of the petitioner and the argument
15 today proceeds upon the false assumption that some action
16 taken by the Philippine Central Bank prevented repayment
17 of these deposits by Citibank. And in fact that is
18 exactly contrary to what both courts below held.

19 So we must begin by analyzing what is it that
20 the Philippine government did, and how did that action
21 relate to either the assets of Citibank on the one hand,
22 or the deposits of Wells Fargo on the other hand.

23 If we look at the verbiage of MAAB 47 and the
24 way it was construed and enforced by the Philippine
25 Central Bank and the government, what we find, contrary to

1 Petitioner's argument, is that it was only Citibank's
2 assets in its Manila branch that were affected by the
3 Philippine regulation.

4 What the Philippine Central Bank said was
5 because of certain economic instability in our country we
6 are going to request that you obtain prior approval from
7 us if you are going to reduce the overall level of your
8 loan activities in the Philippines. It did not say, as in
9 a Perez case or in a Garcia case or some of these other
10 cases, we are going to seize the deposit, we are going to
11 garnish the deposit of Wells Fargo, the debtor, the
12 depositor here. It did not take action that was directed
13 at all at Wells Fargo. Wells Fargo merely had two
14 deposits for six months on deposit with Citibank at the
15 time that this action occurred.

16 The deposits were made in June of 1983. The
17 regulation was adopted in October of 1983. In December
18 these deposits matured, and Citibank at that time had no
19 legal excuse for nonpayment. After Wells Fargo demanded
20 payment at Manila and Citibank refused to pay, they then
21 claimed that they had a defense of impossibility. So it
22 is important at the outset to understand that the --

23 QUESTION: Well, is that quite correct? They
24 didn't really defend on grounds of impossibility. They
25 defended on the ground that Manila had imposed

1 restrictions on the withdrawal --

2 MR. SNIDER: Justice Stevens, if --

3 QUESTION: -- and that that was in the nature of
4 a contractual defense, that under the terms of the
5 regulation if such restrictions are imposed they don't
6 have to pay.

7 MR. SNIDER: In the answer that they filed, one
8 of the affirmative defenses they pled, although they did
9 not use the specific word "impossibility," was that
10 payment was excused, or that they were unable to pay as a
11 result of MAAB 47 and the action taken by the Philippine
12 government.

13 QUESTION: But you do agree, do you not, that
14 MAAB 47 was a restriction on withdrawals?

15 MR. SNIDER: No, I disagree, Justice Stevens. I
16 think that is at the very root of the case. Let me point
17 to two pieces of evidence that were found by the court
18 below to answer that very question.

19 First of all, in the spring of 1984 Citibank
20 made a limited request to the Philippine Central Bank
21 requesting that it have permission to repay only to the
22 extent of its non-Philippine assets that it held in its
23 Manila branch. And having postured the question that way,
24 which I would submit was part of their litigation
25 strategy, they got back an answer which said of course,

1 you can repay these deposits to the extent of your non-
2 Philippine assets at the Manila branch.

3 But here is the question they didn't ask. They
4 didn't ask can we have permission under this regulation to
5 repay with our assets that are outside the Philippines.
6 Because had they asked that question, they would have got
7 an answer that they didn't like. And Justice Stevens, we
8 didn't just sit back then. We asked ourself that question
9 in December of 1984, and it's at page 95 of the Joint
10 Appendix, the Philippine Central Bank sent a telex to
11 Wells Fargo's counsel answering the very question, we have
12 no objection, they said, to repayment of these deposits,
13 as long as you do not in any way reduce the Philippine
14 assets of Citibank at its Manila branch.

15 QUESTION: Well, that would be true with any
16 freeze order, wouldn't it, and funds?

17 MR. SNIDER: That's the point. No action was
18 taken to freeze the deposits. The only thing that was
19 frozen here, and only frozen for a limited period of time,
20 were the assets of Citibank. And so the question that is
21 being raised is there some nexus or some link --

22 QUESTION: Well, but I suppose that with any
23 freeze order, if say France freezes money, I'm sure that
24 France would be quite happy to say well, you can
25 substitute one deposit for another so long as you keep the

1 amount in deposit as of the time of our freeze order.

2 MR. SNIDER: Justice Kennedy, let me see if I
3 can distinguish two things. What the Philippine
4 government was saying is with respect to the loans that
5 you have made to Philippine borrowers, whether they be
6 farmers or merchants, we do not want you to reduce,
7 because we don't want an outflow of foreign currency. We
8 don't want you to reduce the overall level of those loans
9 to Philippine borrowers. You can call them in, you can
10 collect them, you can pay them back, but you must maintain
11 a level of overall funding in the Philippines. They did
12 not in any way go further and say, in addition, to the
13 extent that you pay off Wells Fargo, you are going to have
14 to in addition to that fund other borrowers that were
15 putting in U.S. dollar deposits. That was not part of the
16 regulation at all.

17 If you just look at what the Philippine Central
18 Bank itself said it did, rather than the way Citibank
19 characterizes it, it's clear in Joint Appendix 95, it is
20 clear with the wording of the stand still agreement, which
21 is Joint Appendix 118, and moreover it is clear that by
22 the time that the Philippine Central Bank gave partial
23 permission to repay, based on the request that was made,
24 which is at Joint Appendix 89 to 91, that they had no
25 objection whatsoever to Citibank repaying these deposits

1 after --

2 QUESTION: Did you make this argument at the
3 court of appeals?

4 MR. SNIDER: Yes, Justice White, and in fact --

5 QUESTION: Well, that isn't the ground the court
6 of appeals relied on.

7 MR. SNIDER: It is one of the two grounds of the
8 court of appeals' opinion, Your Honor -- Justice White.
9 Let me see if I can point you to that. Part of the
10 confusion that I heard this morning was over exactly what
11 the Second Circuit decided and to what extent that related
12 to decisions of the district court. If you turn to
13 Petitioner's Appendix, this is in the white --

14 QUESTION: Petition for Certiorari.

15 MR. SNIDER: Petition for Certiorari, that
16 Appendix, at page 7a. At the bottom paragraph, the very
17 first sentence answers one of the questions that you posed
18 this morning to Mr. Bork. In the present case, the
19 district court found that the parties had agreed that
20 repayment was to occur in New York. That finding plainly
21 is not clearly erroneous. That was the first arm of the
22 Second Circuit's decision, which I would submit is binding
23 here and is a fact finding not generally to be reviewed by
24 this Court.

25 But then the court went on, and on the bottom of

1 that paragraph at page 7a said since MAAB 47 has no effect
2 on a bank's obligations to perform acts outside of the
3 Philippines, we conclude that the district court did not
4 err in upholding WFAL's claim. And that is the same
5 finding that was made by the district court below, that
6 MAAB 47 --

7 QUESTION: That may be, but suppose the --
8 suppose the Philippine branch wanted to make the
9 repayment? MAAB 47 interferes with that.

10 MR. SNIDER: No, it did not. Only -- it only
11 interfered with it if it used Philippine assets. That is
12 the key to this case.

13 QUESTION: Well, that's pretty --

14 MR. SNIDER: But they had more than Philippine
15 assets. And in fact what Judge Knapp held in his first
16 ruling was that there was nothing in MAAB 47 that
17 prevented Citibank from transferring assets from New York
18 or elsewhere, anywhere else in the world that it had
19 assets, into the Manila branch. After all, that is an
20 internal bookkeeping matter between the Manila branch and
21 Citibank.

22 QUESTION: Mr. Snider, the Court granted
23 certiorari on two questions, and the first, of course --
24 you know them as well as I do. The first assumes that
25 the, there was a prevention by the Philippine decree.

1 Now, you are entitled to argue for affirmance on an
2 alternate ground under our rules, but the Court is not
3 ordinarily interested in getting into very fact-specific
4 questions.

5 MR. SNIDER: Okay. Let me move then to my
6 second point, Justice Rehnquist.

7 QUESTION: Could I ask you a question that
8 relates to what you just referred us to in the court of
9 appeals' opinion? The court of appeals, as you quoted it,
10 said in the present case the district court found that the
11 parties had agreed that repayment was to occur in New
12 York.

13 MR. SNIDER: Yes, Justice Scalia.

14 QUESTION: Now, can't one agree that repayment
15 is to be made in New York without agreeing that that
16 repayment is to be made out of the funds of the New York
17 bank?

18 MR. SNIDER: I think --

19 QUESTION: The only factual finding made by the
20 district court is that repayment was to be made in New
21 York. Even if we accept that and do not at all overturn
22 it, it does not establish the point that repayment is to
23 be made out of New York funds, which is what is asserted
24 to be contrary to the Federal banking regime here.

25 MR. SNIDER: Yes. And that -- I agree with

1 that. And that essentially takes us to my second point.
2 In other words, you don't look to the agreement of the
3 parties to where it can be collected. You look to local
4 law. In this case --

5 QUESTION: All right. So you agree that no
6 factual finding precludes us in this case. The district
7 court did not find that there was agreed to be repayment
8 out of New York funds. It just agreed that repayment
9 would be in New York.

10 MR. SNIDER: I would agree that no fact finding
11 absolutely prohibits your decision. What I am saying is
12 that, once the court made the fact finding that repayment
13 was to occur in New York and it applied the applicable law
14 of Sokoloff, which had been on the books for 60 years
15 since Judge Cardozo decided that case. And once you apply
16 that law what you will see is essentially this distinction
17 in the books. And that is that when a foreign government
18 seizes the assets of a bank, the depositor can still
19 collect the deposit at the home office of the bank.

20 In a Perez-type case, if the foreign government
21 goes further and takes a second step and seizes the
22 deposit, or garnishes the deposit, or freezes the deposit
23 in some respect, then that is a risk, indeed, that was
24 taken by the depositor. And unless you have a Garcia type
25 guarantee in that situation then you are out of luck.

1 QUESTION: But that -- all of that assumes that
2 Sokoloff and New York law is what governs. And if we were
3 to assume that it is instead Federal law that governs,
4 there would be no factual finding at least that would
5 prevent us from reaching the conclusion that this didn't
6 have to be paid in New York, out of New York funds.

7 MR. SNIDER: I think that the -- the fact
8 finding that is binding is that repayment was to occur in
9 New York. There is no fact finding on where those assets
10 have to come from. But both courts held -- the district
11 court held that it could be repaid in Manila without
12 violating the decree. The New York court merely narrowed
13 that holding, the Second Circuit narrowed that holding by
14 saying indeed, since we find it to be repayable in New
15 York, we don't even have to reach that question. Citibank
16 has enough assets in New York; we find it to be payable
17 there.

18 QUESTION: I take it you, your position is you
19 could not have gone to the Manila counter and demanded
20 payment at the Manila counter?

21 MR. SNIDER: Well, this was not a demand deposit
22 in the first place, but we could have made a demand there
23 because, indeed, in the trial of this case, we submitted
24 it to the trial court on the basis that Philippine law
25 applied and that it was repayable in Manila upon the

1 maturity of the deposits in six months.

2 And the court held that indeed at the end of six
3 months appropriate steps had been taken. Wells Fargo had
4 done what was necessary, and payment was to be made. Its
5 payment was unexcused. There is no condition on the
6 obligation here with respect to payment.

7 Let me then address the question of Federal law
8 that Mr. Bork raised this morning, and I think Justice
9 Scalia was driving at in his last question. One of the
10 questions that has now been raised for the first time by
11 Petitioner at this Court and was not raised in the two
12 lower courts is whether or not Reg. D and the 1970 Board
13 interpretation can be construed to displace local law on
14 this subject, which has been a set of dual regulation for
15 the last 60 or 70 years, and has traditionally been the
16 subject not of Federal law, but with respect to state law.
17 We are not talking about the question of reserves. That
18 has been a subject of Federal law. We are talking about
19 the traditional relationship between a bank and its
20 depositors.

21 QUESTION: Of course at the time these regs were
22 adopted, and these provisions that Mr. Bork was reading to
23 us, there was no difference between Federal law and state
24 law. I mean, there was assumed to be a common law. I
25 mean, we are talking today as though at the time these

1 things -- this thing was set up and these regs. were issued
2 people were thinking well, it is the common law, but is it
3 New York common law or is it Federal common law. In fact,
4 this was before Erie, and we didn't think there was a
5 difference, did we?

6 MR. SNIDER: Not before Erie, but that was
7 certainly the enactment of the Federal Reserve Act. I
8 think it's really the 1970 Board interpretation that Mr.
9 Bork read to you in part today that they rely on. That
10 Board interpretation sets up a way of defining when
11 reserves must be made with respect to foreign deposits.
12 It does not in any way purport to regulate the subject of
13 when a depositor can be repaid from a foreign branch. It
14 is not a rule about liability. I think that the
15 petitioner here has mixed up cause and effect.

16 What the regulation says is that you look at the
17 contractual relationship of the parties to assist you in
18 determining whether or not reserves must be assessed. It
19 doesn't say the converse of that. It doesn't say you look
20 at whether reserves were paid, and then from having looked
21 at whether reserves were paid you come back and decide
22 whether there is liability or not. And I would submit to
23 you that that is indeed why the U.S. government here in
24 its brief and in its argument does not contend that local
25 law has been displaced by Reg. D or by the 1970 Board

1 interpretation at all.

2 And in fact on this question we sought to
3 clarify the matter with the Federal Reserve Board of
4 Governors. And one of the pieces of evidence that was put
5 in at the trial court and is before you in Joint Appendix
6 135 is an opinion letter of the board of governors for the
7 Federal Reserve Board in April of 1987, after this case
8 was tried -- after this case was filed.

9 And that opinion letter distinguishes the
10 concept of liability on the one hand and reserves on the
11 other. It says that Reg. D and the 1970 Board
12 interpretation regulate reserves but do not regulate the
13 subject of liability as between a bank and its depositors,
14 and goes on to say in fact nothing in Reg. D or the Board
15 interpretation would prevent a bank from transferring
16 assets from a U.S. office to a foreign office to effect a
17 repayment in these circumstances.

18 And so, just as Justice Stevens was saying
19 earlier this morning in his questioning, just like in the
20 case of insolvency where the home office might well have
21 to pay because the foreign branch office cannot pay, the
22 same is true in this circumstance.

23 Now, that is not to say that Wells Fargo did not
24 take any risk whatsoever. We are not here to say that we
25 took no risk and therefore somehow Citibank should have

1 paid reserves. That is not the issue.

2 But the question is what is the risk that Wells
3 Fargo took. The risk it took was a Perez-type risk that
4 the foreign government might actually take an action that
5 was directed at it as an individual. After all, that is
6 what Mr. Castro did in the Perez and Garcia cases. He was
7 taking a certain action to seize the deposits of certain
8 political individuals that he wished to point out and to
9 deprive of their assets. That is a very minimal risk when
10 you are talking about a banking institution in the inter-
11 bank market.

12 We did not take the risk. And I would submit
13 that the expert of Citibank at the trial admitted that in
14 this situation Wells Fargo did not take the risk that some
15 other regulation might be adopted that interfered in some
16 way with Citibank's assets. It goes to the heart of the
17 very question that is before the Court today. And Mr. Ian
18 Giddy, who is Citibank's own expert, on cross-examination
19 gave the following testimony. "And the expectations of
20 bankers, the practice, that is what I am trying to get to,
21 is that they would be repaid by the home office, isn't it.
22 Answer, under the circumstances where the branch had its
23 assets restricted or seized, and that was a poor loan
24 decision by the bank and it is their risk, they are still
25 liable for the deposits." One of the important --

1 QUESTION: Where are you reading?

2 MR. SNIDER: I am reading, I'm sorry, Justice
3 Blackmun, I am reading from Joint Appendix 378, 379. Our
4 own expert, of course, came to the same conclusion.

5 QUESTION: You cited as to the Board opinion
6 that's at 135 and 136 of the Appendix, but I -- if you
7 would look on page 136, what that opinion says is that,
8 under these provisions, deposits payable only at a
9 particular office outside the United States are not
10 subject to reserve requirements.

11 Then it goes on, however, this is true even if
12 the depository institution, by which I gather it means the
13 foreign branch, even if the depository institution may be
14 contractually obligated to obtain funds in order to pay
15 the deposit from another office of the depository
16 institution located outside the United States.

17 MR. SNIDER: Yes.

18 QUESTION: It significantly seems to indicate
19 that if it were required to get funds to pay the
20 department from another office in the United States we
21 would have a different problem. And that is what you are
22 arguing was the situation here.

23 MR. SNIDER: Well, at worst it would mean that
24 Citibank should have reserved against these deposits. I
25 don't think that this regulation --

1 QUESTION: Well, but one must assume that if
2 they don't have to reserve against them they don't have to
3 pay them, unless we have a very crazy system in this
4 country. I mean, surely you would expect the reserve
5 requirements to bear some relationship to the obligations
6 of the institution.

7 MR. SNIDER: I think they bear a relationship,
8 but I think once again that is reversing cause and effect
9 here. Nothing in this regulation or the interpretation of
10 it in any way attempts to assess liability or to displace
11 local law with respect to the relationship between a bank
12 and its depositors.

13 QUESTION: (Inaudible) the court of appeals'
14 decision right across the board or not?

15 MR. SNIDER: Yes, Justice White, I -- it was
16 heard this morning in this courtroom that no one supported
17 that view, but I wanted to wait my turn to tell you that I
18 did.

19 We support the Second Circuit's opinion, and we
20 find that it has at least two important elements. One,
21 just a simple finding that the deposit was repayable in
22 New York by Citibank was sufficient for the Second
23 Circuit, having found such an agreement, to uphold the
24 lower court's decision. Because if it is payable in New
25 York and the parties agree that it is payable in New York,

1 then Citibank certainly has assets there.

2 QUESTION: Yes, but the part, the district court
3 didn't think that there -- that the -- whatever agreement
4 he found, namely the district court found that it was
5 repayable in New York, but that it was collectable
6 elsewhere. And certainly the district court did not rely
7 on the agreement to make Citibank liable. He had to go to
8 the New York law.

9 MR. SNIDER: He did have to go to --

10 QUESTION: Is that right?

11 MR. SNIDER: That is right. He did have to go
12 to --

13 QUESTION: So he did not rely on the fact that
14 there was a contract. Whatever kind of a contract he
15 found, it wasn't the basis for liability in the district
16 court.

17 MR. SNIDER: It takes more than just a yes or no
18 answer, if you would permit me, Justice White. If you
19 look at page 16a of Petitioner's Appendix, we have the
20 district court's second opinion. And indeed he did find
21 an agreement that the confirmations established an
22 agreement that repayment was to occur in New York.

23 QUESTION: Right.

24 MR. SNIDER: Now, he goes on, on page 17a, as
25 you said, to decide that there was not a specific

1 agreement as to where things were to be collected, where
2 the money was to be collected. In other words, he found
3 no limitation as to where it was to be collected. But we
4 need to put this in context. This case was tried after
5 summary --

6 QUESTION: Well, put it in the context that the
7 district court put it. He said that, he said now I am
8 going to have to look elsewhere for liability, besides
9 their agreement, I have to look at New York law.

10 MR. SNIDER: He did.

11 QUESTION: And he did.

12 MR. SNIDER: He did. But we need to go back --

13 QUESTION: And that is not the ground that the
14 court of appeals has cited on.

15 MR. SNIDER: The court of appeals narrowed that
16 decision and, from finding that it was repayable in New
17 York, decided that Citibank had to pay their -- had
18 assets.

19 QUESTION: Just because it was going to, just
20 because the funds were going to be transferred from there?

21 MR. SNIDER: Well, it was more than that. In
22 fact, the testimony that had been given to the district
23 court on the subject went beyond just the so-called
24 standard routing instructions. And in fact at pages 10
25 and 11 of our brief, and I won't go through all the

1 testimony with you today, but it is there. The testimony
2 was given by Mr. Boughey, the testimony was given by Mr.
3 Cole, who were called by Wells Fargo, and indeed the
4 testimony was given by Mr. Howard, the chief financial
5 officer of Citibank, that in addition to these routing
6 instructions the parties expected and agreed that
7 repayment would occur in New York.

8 And after all, we have got to realize that in
9 the Eurodollar market we are dealing with dollars in which
10 these transactions not only clear in New York, but there
11 is a specific agreement embodied in the very nature of the
12 Eurodollar transaction that the parties are agreeing that
13 the bank, the institution, stands behind these deposits.

14 One of the important concepts --

15 QUESTION: So you say that all this talk about
16 what the regulatory agencies have been believing all these
17 years, you think they for years have known exactly what
18 you are just saying now?

19 MR. SNIDER: Oh, indeed, and in fact --

20 QUESTION: That there should have been reserves
21 all the time.

22 MR. SNIDER: No, not that there should have been
23 reserves. Indeed, if you go back to the 1918
24 interpretation you will see that the Federal Reserve
25 itself acknowledges that the institution itself ultimately

1 remains liable for the deposits.

2 But I wanted to go back to the context --

3 QUESTION: I still, I still find it hard to
4 understand why, if the New York domestic branches are
5 fully liable for all Eurodollars, there are no -- under
6 any contingency, that there are no reserves required.

7 MR. SNIDER: Perhaps that was too broad a
8 statement. Let me come back. What we have had since
9 1983, since Citibank defaulted in this case, is a
10 situation in the world market, and much of this is
11 discussed in the amicus brief of the Bank of Montreal, a
12 situation in which banks now will only place money in
13 secure money centers. There are no longer inter-bank
14 deposits in Manila, no longer inter bank deposits in
15 Panama. They are either in London or in Frankfurt or the
16 Cayman Islands, in a secure location. And the reason for
17 that is because no one in 1983 assumed that the depositors
18 were taking this kind of sovereign risk, and that is what
19 the trial was all about, after all.

20 We moved for summary judgment. The -- Citibank
21 came in and said we will prove a custom and practice that
22 indeed depositors in the marketplace will not be repaid
23 whenever there is any interference whatsoever with our
24 assets or any repayment. And the trial was had. They had
25 their day in court. The witnesses were called. And

1 indeed the court found that there was no such custom and
2 practice.

3 And one of the key points that the district
4 court relied upon is at the very time that these deposits
5 were made, in June of 1983, Citibank was offering a 10
6 percent interest rate in Frankfurt, London, Singapore and
7 Manila, and yet everyone knew that in terms of political
8 economic instability, the Philippines were a riskier
9 location. And yet the interest rates were identical.

10 QUESTION: Well, based on what you say, then,
11 the Federal Reserve assumes that deposits are safer in
12 France than they are in New York.

13 MR. SNIDER: No, I don't think that it assumes
14 that they are safer. I think that the only purpose now
15 for the Federal Reserve regulation of reserves is no
16 longer a concept that we have to have a certain amount of
17 money set aside in case there is some kind of a run on the
18 bank. I think that was one of the original purposes.

19 As the 1980 amendments to the act provide, the
20 only remaining purpose for the Federal Reserve regulation
21 of reserves is monetary policy, the implementation of
22 monetary policy.

23 QUESTION: So you -- I think you say that the
24 Federal Reserve understanding is just wrong.

25 MR. SNIDER: No, I don't, Justice White. Let me

1 try one more time. The Federal Reserve understanding is
2 that because they did not want -- they wanted U.S. banks
3 on the one hand to be able to compete in the Eurodollar
4 market, okay. To do that they had to make offshore
5 deposits free from reserves and free from FDIC
6 assessments, so that U.S. banks could be competitive and
7 could offer the same kind of interest rates that banks
8 abroad are offering. Okay?

9 Having set up that exemption from reserves, they
10 then were concerned about a situation like Garcia, and
11 this whole interpretation came up because of a Garcia
12 situation. That's where the depositor not only made the
13 deposit at the offshore branch, it simultaneously exacted
14 a promise out of the bank saying but if anything happens
15 to interfere with repayment, I've got a guarantee that I
16 will be repaid in New York. And the Federal government
17 and the Board interpretation is saying no, you can't do
18 that.

19 QUESTION: I -- if the -- if the Federal Reserve
20 Board had been asked how this case should come out you
21 would say they would have said just like the Second
22 Circuit did?

23 MR. SNIDER: I believe they would say that,
24 except for their objection here through the Solicitor
25 General to the reliance upon routing instructions. But I

1 believe that they would agree that, in the absence of a
2 Garcia guarantee, that the normal rule of Sokoloff
3 applies, that when only the assets of the bank are
4 interfered with or regulated by the foreign government and
5 there is no action to take on the deposits. In fact, the
6 very language of the C.F.R. regulation that they rely on,
7 204.128, is when there is imposition of a restriction on a
8 withdrawal.

9 And I ask you, has there been an imposition of a
10 restriction on Wells Fargo's deposit with respect to
11 withdrawal? Both courts below have answered that question
12 no. The only action taken in the Philippines was to
13 restrict Citibank's assets to require them to continue to
14 invest in the Philippines until the Philippines could
15 restructure its debt. It had no objection, as it said in
16 the telex, to repayment of these deposits with dollars in
17 New York in the United States.

18 Let me just finish, since I have a limited
19 amount of time left, with some policy considerations that
20 I think are important here. This market is one in which
21 only two of the top 50 banks in the world are from this
22 country. This market is one in which, while there are
23 billions of dollars of transactions taking place every
24 day, they take place under terms and understandings that
25 have been agreed to and agreed upon by bankers around the

1 world, and the subject matter that we are talking about is
2 one that is not appropriate, in my view, to regulation by
3 a court through enforcement or interpretation of a
4 regulation like Reg. D.

5 This is a matter that should be discussed -- if
6 we are going to change the rules, because all Wells Fargo
7 contends is that the status quo should be maintained, but
8 if Citibank wants to change the rules, it is a more
9 appropriate subject either for private negotiation --

10 QUESTION: (Inaudible) court.

11 MR. SNIDER: We went to court, Justice White,
12 because under the rules at that time the depositor could
13 be repaid, and in fact the court found that when Citibank
14 announced this new rule, the depositors around the world
15 reacted with outrage and despair. No one else in the
16 world had this understanding except Citibank.

17 And the court below said you know, it would have
18 been a dead cinch, you had this view, you knew that nobody
19 else was taking the view that they were taking the
20 sovereign risk. It would have been so easy for you either
21 by way of contract, by putting a legend on your
22 confirmation slips, by sending out a letter or some other
23 means communicating to all these depositors that you had
24 this unique view that everyone else was taking the risk.

25 And in fact I don't even believe Citibank had

1 the view until after they defaulted. Because what did
2 they do right after they defaulted? They sent a letter to
3 us and to the other depositors and said now that you are
4 assuming the sovereign risk we will pay you 1-1/8 percent
5 interest over LIBOR, which is the London Inter-Bank Offer
6 Rate. They didn't do that before, they just paid us the
7 10 percent. And both experts said we didn't pay any
8 sovereign risk premium. And as soon as this situation
9 happened the, Citibank went out and it offered a point and
10 an eighth over LIBOR.

11 Those offers by Citibank are found in the Joint
12 Appendix 115 with respect to Wells Fargo, 116 for Marine
13 Midland, and 399 for the Bank of Montreal.

14 So, Citibank, having come to its own unique view
15 of the world, then attempted essentially to shift this
16 loss to all of its depositors. What it is asking this
17 Court to do is to give it something that it couldn't
18 accomplish in private arms' length negotiation, that it
19 couldn't accomplish through the application of local law.

20 Thank you, Your Honor.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Snider.

22 The case is submitted.

23 (Whereupon, at 1:49 p.m., the case in the above-
24 entitled matter was submitted.)

25

CERTIFICATION

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

No. 88-1260 - CITIBANK, N.A., Petitioner V. WELLS FARGO ASIA LIMITED

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

BY *Lona M. May*

(REPORTER)

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