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The Supreme Court's Return to Personal Jurisdiction

By David J. Weiner, Washington D.C.

In *Goodyear Dunlop Tires Operations, S.A. v. Brown*¹ and *J. McIntyre Machinery, Ltd. v. Nicastro*,² both handed down on the final day of the Supreme Court's 2010 term, the Court clarified the tests used to determine when a state may exercise personal jurisdiction over a nonresident defendant. In *Goodyear*, Justice Ruth Bader Ginsburg wrote for a unanimous Court and held that a state cannot exercise general personal jurisdiction over a foreign company whose only contacts

with the state stem from the company's products travelling through the stream of commerce and winding up in the forum state. In *J. McIntyre*, a four-justice plurality, helmed by Justice Anthony Kennedy and joined by Justices Stephen Breyer and Samuel Alito in a narrow concurring opinion, held that a foreign company that markets a product only to the United States generally, but does not purposefully direct its product to an individual state, is not subject to specific jurisdiction

See "Personal Jurisdiction," page 50

Teaching Arbitration in Ukraine

By Roy B. Gonas, Miami

Let us start at the beginning. Even when speaking with people in the United States having advanced academic degrees, including lawyers, it needs to be said Ukraine is not Russia. It is not even in Russia. Adopting words from a Ukrainian jurist, "Ukraine is a new country starting in 1991." Those few words reveal pride and independence. Ukraine is a beautiful country in Eastern Europe with a difficult past, growing intelligentsia, fascinating culture, agricul-

tural and manufacturing industries and is a signatory to the New York Convention. The country's importance, in large part, is due to its geographic location and natural resources. Strong, opposing political factions leave its future uncertain. My wife and I visited Ukraine, Poland and Denmark in 2010. I returned this year as an invited lecturer at two Ukrainian universities. What was intended as a holiday trip in April 2010,

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Border Crossing Made Easier and Faster!

By Giselle Carson, Jacksonville

Are you interested in faster, simpler and more secure international travel for yourself and your clients? Then I invite you to keep reading. I had the opportunity to experience firsthand the time savings and convenience of some of the programs I describe below. I am hopeful that you will find them useful and interesting.

Low-Risk Travelers Save Time With Trusted Traveler Programs

U.S. Customs and Border Protection (CBP) operates several international Trusted Traveler Programs such as Global Entry, FAST, NEXUS and SENTRI. These programs provide expedited screening and admission into the U.S. at designated points of entry for pre-approved, low-risk travelers and can save travelers a significant amount of time and stress.

While attending the 2011 American Immigration Lawyers Association (AILA) annual conference in San Diego, I observed the efficiency and advantages of SENTRI and Ready Lane (not a Trusted Traveler Program but with similar advantages) at Otay Mesa, a U.S.-Mexican port of entry.

Although the Trusted Traveler Programs are intended for frequent international business travelers, there is no minimum number of trips necessary to qualify. To apply, travelers must complete an online application at the Global Online Enrollment System (GOES) website (www.globalentry.gov), pay a non-refundable application fee, pass a background check and undergo an interview with a CBP officer at an enrollment center. Most enrollment centers are located at a border or major airport. A separate application must be completed on behalf of or by each applicant.

The Trusted Traveler Programs are not for all travelers. They are designed for "low-risk" travelers. Applicants voluntarily undergo an ex-

tensive background check against criminal, law enforcement, customs, immigration, agriculture and terrorist indices. Several factors can lead to a denial of an application: having a criminal conviction (including misdemeanors) in any country; having been found to be in violation of U.S. customs, immigration or agricultural laws; or providing false or incomplete information on the application.

Applicants with any derogatory background should not apply as they can also jeopardize their current status and/or any other application for benefits that they might have. In the event that an applicant is denied or revoked from the program, the person is provided a document with a reason for the denial and can challenge the decision.

Global Entry and a Ninety-Second Admission After International Travel

Speedy passport verification and customs declaration are key benefits of this program. Upon arrival in the U.S. or other participating foreign partner countries, approved travelers can go directly to a Global Entry kiosk to process their admission. Program users have said, "Once you experience how the program works, you will never want to get in the entry line again."

The traveler activates the kiosk by inserting a passport or U.S. permanent resident card into the document reader. Once the passport or card is read, fingerprints are verified and a photograph is taken. After completing the customs declaration form on the touch-screen, a transaction receipt is issued. The receipt is presented to the CBP officer as the traveler exits the inspection area. All in ninety seconds! This process allows a Global Entry traveler to bypass long lines and wait times (which can be a half hour or more, particularly if several international flights arrive

at the same time) for CBP inspection.

Kiosks are currently available at twenty U.S. international airports, including Washington (IAD), Houston, New York (JFK), Los Angeles, San Francisco, Atlanta, Miami, Ft. Lauderdale, and Orlando. The program is open primarily to U.S. citizens, U.S. lawful permanent residents, and citizens of certain partner program countries such as the Netherlands and Mexico.

Global Entry is not specifically designed to facilitate travel to and from Mexico or Canada. SENTRI and NEXUS, discussed below, are designed to facilitate travel to and from those countries. As of 12 July 2011, however, Global Entry members are able to use SENTRI and NEXUS lanes to enter the U.S.

The Global Entry program has received so much praise, American Express has even offered to pay the application fee as a benefit to its Platinum cardholders. Global Entry cards are valid for five years. For more information on the program, visit www.globalentry.gov.

Crossing the Canadian or Mexican Border Often? Make it Easier by Using the NEXUS and SENTRI Programs

The NEXUS and SENTRI travel programs are designed to minimize the inconvenience of traveling between U.S., Mexican and Canadian borders for pre-screened, pre-qualified travelers.

NEXUS is a joint U.S.-Canadian program that provides expedited processing for pre-approved travelers by U.S. and Canadian officials at dedicated processing lanes at northern ports of entry and at NEXUS kiosks at certain airports and marine reporting locations.

The program is open to citizens or permanent residents of the U.S. or Canada residing in either or both

countries for the past three years and who pass a background check. U.S. and Canadian authorities both must approve each application.

SENTRI (tip to remember: Southern) is a U.S.-Mexican program that allows for expedited admission of pre-approved travelers on the southern border. They can use dedicated commuter lanes and port-of-entry lines. The program was first implemented at the Otay Mesa, California, port of entry where I had the opportunity to observe how SENTRI cardholders were rapidly admitted to the U.S., while travelers without SENTRI waited in the heat in long lines to process their admission to the U.S. There are currently about ten SENTRI-dedicated commuter lanes located in various ports of entry in Arizona, Texas and California.

Upon approval of the application, the traveler receives a Radio Frequency Identification Document (RFID) that will identify his or her record and status in the CBP database upon arrival at the U.S. port of entry. A decal is also issued for the traveler's registered vehicle or motorcycle. NEXUS members can use a SENTRI lane to enter the U.S. from Mexico provided they are in a SENTRI-approved vehicle, and vice-versa.

NEXUS and SENTRI participants in good standing can use the Global Entry kiosks mentioned above at no additional cost. Before using these kiosks, however, NEXUS and SENTRI holders need to request access through GOES and wait for CBP approval. For additional information on these programs, visit: www.cbp.gov.

OneStop and Express Connections Innovations

CBP is also partnering with the private sector in two initiatives to facilitate the processing of international travelers. These two programs are "OneStop" and "Express Connections."

The "OneStop" program at Houston's Intercontinental Airport offers a designated primary inspection lane for international travelers arriving without checked baggage. Under this

program, approximately 800 passengers per day are allowed to bypass the baggage carousel and exit the federal inspection service area more quickly.

Through "Express Connections," international travelers who have closely scheduled flight connections during the hours of 10 a.m. to 7 p.m. can receive assistance in making their connections. A contract employee directs the identified travelers to a special lane for expedited CBP processing. Express Connection is currently in place at limited ports of entry but is expected to be expanded in the future. Imagine not having to worry about making your tight connection or spending the night in an airport!

Ready Lanes Accept a Mix of Radio Frequency Identification Documents

Ready Lanes, dedicated lanes for motor vehicle traffic, accept only RFID (Radio Frequency Identification)-enabled cards. The Otay Mesa Ready Lane opened in May 2011. While most drivers and passengers wait in long lines to cross the border, those with RFID-enabled decals typically have a lane that is readily available for border crossing with no wait.

Ready Lanes operate seven days a week, but different sites have different hours depending on the local travel pattern. To use this dedicated lane, all adult travelers (sixteen years and older) in a vehicle must present a WHTI-compliant, RFID-enabled card approved by the Department of Homeland Security, which includes: the U.S. Passport Card; the Enhanced Driver's License (EDL); the Enhanced Tribal Card (ETC); Trusted Traveler Cards (NEXUS, SENTRI and FAST cards); the new Enhanced Permanent Resident Card (PRC); or new Border Crossing Card (BCC).

An advantage of the Ready Lane over the SENTRI lane is that it can be used by a group of travelers in one vehicle with any mix of RFID-enabled travel documents. A Ready Lane is not a Trusted Traveler lane, however. The accepted RFID-enabled documents verify only citizenship and identity, not necessarily a low-risk

traveler. For more information about Ready Lanes, visit: www.cbp.gov.

ESTA—Travel Without a Visa for Some

The Visa Waiver Program (VWP) allows eligible citizens or nationals from thirty-six designated program countries to travel to the United States for tourism or business for stays up to ninety days or less without first obtaining a visa. In March 2010, Greece was the latest country to join the VWP. The DHS is engaged in ongoing membership discussions with select countries for membership.

Citizens or nationals of Visa Waiver countries must complete a mandatory online application under the Electronic System for Travel Authorization (ESTA) to obtain electronic approval or clearance prior to boarding an air carrier or a sea carrier to the U.S. The clearance is valid for multiple trips for two years or until the expiration of the applicant's passport.

The CBP receives approximately 40,000 ESTA applications per day. Most applications are approved within seconds. Others go to a "pending" status for review by an ESTA representative. Those on the pending queue typically receive an answer in less than seventy-two hours. If travel is denied, the applicant must apply for a non-immigrant visa at a U.S. embassy or consulate.

The CBP has discretionary authority to waive travelers' ESTA registration in cases of emergent circumstances such as civil unrest and natural disasters. A waiver of the ESTA registration is handled on a case-by-case basis at the port of entry. Contacting the port prior to the arrival is highly recommended.

The implementation of ESTA has eliminated the requirement that ESTA-approved VWP travelers complete a Form I-94W prior to their admission to the U.S. These travelers also no longer receive a green I-94W departure card. Instead, travelers will receive a passport stamp, in lieu of the I-94W, that confirms duration of stay. The CBP is looking into ways to automate the entry process, including

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eliminating the widely used Form I-94 in the near future. The use of this electronic database is streamlining the CBP's collection of information and increasing efficiency; however, it also contributes to a decrease in application clarity and little response for aggrieved applicants.

VWP Expansion—Which Country is Next?

We are likely to see an increase in the number of Visa Waiver Program countries, which will help U.S. commerce, revenue, travel and security. The expansion and modification of the VWP is one of the proposals under the Secure Traveler and Counterterrorism Partnership Act of 2011. The proposed Act amends country qualifications for program participation. It replaces visa refusal rates with visa overstay rates to determine eligibility for participation and sets a maximum 3% visa overstay rate during the previous fiscal year for program countries. This change could make a number of interested countries VWP-eligible. It is likely that Poland, Brazil or Argentina might be the next VW country. Stay tuned for which country will be next to qualify.

ESTA Applicants, Be Aware

The AILA and other stakeholders have been working with the CBP to improve and provide clarification on some of the ESTA application questions. For example, many business visitor applicants are confused by questions such as "Are you seeking to work in the U.S.?" If the traveler is coming for a business meeting or conference that might lead to a job interview, or coming for after-sale service, the answer should be "No," but many answer "Yes." Foreign nationals and their attorneys should be very careful in responding to these ambiguous questions, as an incorrect answer could lead to an application denial. In some cases, an applicant should consider obtaining a B-1/B-2 visa instead of entering the U.S. under the Visa Waiver Program.

Another warning for an ESTA applicant concerns the CBP's treatment of 221(g) notices. Applicants are required to disclose visa denials in question "F" of the application, which asks, "Have you ever been denied a U.S. visa or entry into the U.S. or had a U.S. visa cancelled?" The applicant can answer "Yes" or "No" and, if "Yes," "when and where."

Visa applicants, at times, receive a document from the post with a

"221(g)" notation indicating that their case is suspended pending administrative processing or receipt of supplemental information or documents. The CBP considers all 221(g) actions on visa applications as visa denials, even if the visa was subsequently issued.

Applicants have been refused entry and issued expedited removal orders on the basis of misrepresentation for their failure to report a visa denial in their ESTA application when they received a 221(g) notice. Neither the ESTA application nor the posts make clear to applicants that a 221(g) notice is a denial. The CBP has advised that if a traveler has ever applied for a U.S. visa and did not receive it for any reason, then he or she should answer "yes" to question F. I recommend that applicants elaborate, as much possible in the "where" box, on the facts relating to the 221(g) issuance. For example: "Peru – 221(g) Embassy requested additional documents."

The CBP has advised that it manually reviews, within seventy-two hours, all ESTA applications in which the applicant marked "yes" to question F. The CBP has also indicated that a "yes" answer will not result in an automatic denial of the ESTA application. In practice, however, 221(g) notices based on administrative processing are resulting in

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denials, and 221(g) notices based on a request for additional documents are resulting in approvals. This is an evolving issue that should continue to be followed.

TRIP for Resolution of Travel Issues

Travelers may experience frustrating and unpleasant repeated entry or exit denials or referrals to secondary inspections because of incorrect information on the government's databases as a result of mistaken identity or other issues. To try to resolve these issues the DHS, in conjunction with the Department of State and the Transportation Security Administration (TSA), has implemented a Traveler Redress Inquiry Program (DHS TRIP) for travelers who have inquiries or seek resolution of entry difficulties at airports, train stations or other ports of entry or border crossings.

According to the Department of Homeland Security, DHS TRIP can help resolve some of the following traveler issues:

- Inability to print a boarding pass from an airline ticketing kiosk or from the internet;
- Denial or delayed boarding;
- Incomplete or inaccurate personal information;
- ESTA denials; and
- Amendment of a traveler's record as a result of not submitting the I-94 upon departure.

Travelers can file an electronic or paper inquiry requesting an investigation of their case. Upon filing, the person receives a redress control number that can be used for case status updates and/or to book airline tickets or cross the border after the complaint is resolved. The applicant should also receive a letter describing why he or she is experiencing travel problems.

If no response is received, the traveler or the traveler's attorney can file an inquiry. An inquiry typically results in the issuance of one of three responses: "in process;" "pending paperwork" (when the traveler

needs to submit additional information); or "closed" (when the case has been resolved). The average response time for a TRIP redress is sixty-two days. In practice, the program has not been very reliable. At times, the traveler receives no response, but the person's admission problems disappear.

DHS TRIP is something to consider as travelers have very few options by which to resolve very frustrating travel problems. As of June 2010, the DHS had adjudicated and closed approximately 74,000 cases since the program's inception in 2007. In 2010, the DHS Office of the Inspector General (OIG) recognized the problems and limitations of DHS TRIP and issued recommendations for improvements. We are hopeful that the recommendations will be implemented. For additional information on this program, please visit www.dhs.gov/trip.

B-1 in Lieu of H-1B Could Be Ending

There was a significant amount of discussion among several AILA panels about the possible ending or significant restriction to the use of the B-1 in lieu of H-1B visa. The B-1 in lieu of H-1B has been a convenient visa choice for foreign nationals coming to perform H-1B-caliber work for a short period of time while being paid by and benefiting a foreign employer. There have been reports and allegations of misuse and fraud by some employers, however, who appear to use this visa category to circumvent the H-1B cap and control wage requirements. If your clients are users of this visa category, follow this development as more is likely to occur.

Enhancing Competitiveness and the Travel Experience

America has been losing out on millions of international travelers. The uncertainties, expenses and delays that characterize America's visa and entry process have been actively discouraging international travelers from visiting our country.

The DHS and the CBP are work-

ing to identify ways to streamline the process and programs to make U.S. entry and exit more efficient, secure and pleasant. They envision the development of reciprocal Global Entry and Trusted Traveler programs with other countries, which should increase travel and tourism to the U.S.

Additionally, discussions are underway with TSA to pilot a Trusted Traveler program this fall at select airports (likely Atlanta, Miami, Detroit and Dallas) and airlines (likely Delta and American Airlines). The program will be open to select frequent business flyers enrolled in CBP's Trusted Traveler programs. These travelers will have a quicker trip through security checkpoints, including, maybe, keeping their shoes on! For now, most of us should continue to be ready to take out our laptops, remove our shoes and jackets, and remember to throw out our bottle of water. But, the future should bring much improved travel experiences—particularly for low-risk travelers who can pack light!



G. Carson

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Ms. Carson was born in Cuba and immigrated to Montreal, Canada, before coming to the U.S. Her experiences facilitate the representation of clients throughout the world. She is a frequent writer and lecturer on immigration issues, and she has represented clients in cases in federal court and before federal and state agencies. She is General Counsel for the Jacksonville Regional Chamber of Commerce and a board member of the Jacksonville Bar Association. She is a triathlete and marathoner. Ms. Carson can be reached at gc@marksgray.com.