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## Recent Cases

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## RECENT CASES

GREGORY G. COSTAS\*

### SOVEREIGN IMMUNITY

*Southeastern Leas. Corp. v. Stern Dragger Belogorsk Etc.*, 493 F.2d 1223 (1st Cir. 1974).

The instant action was dismissed by the U.S. District Court for the District of Massachusetts on the basis of a suggestion of immunity from the State Department. The dismissal brought about the release of the arrested Soviet vessel Belogorsk.

On appeal, appellants maintained that the vessel was neither owned nor controlled by the Soviet Union and that the court erred by accepting the suggestion of immunity without conducting an independent judicial inquiry when faced with such allegations. Alternatively, appellants contended that the U.S.S.R. waived sovereign immunity by agreeing in a treaty that Soviet vessels would enter U.S. ports subject to the applicable laws and regulations of the United States.

In addressing itself to the first issue, the court expressed reluctance to depart from established authority to the effect that the certification and request that a vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of foreign relations. Furthermore, upon submission of such certification to the district court, it becomes the court's duty, in conformity with established principles, to release the vessel and to proceed no further in the case (citing *Ex parte Peru*, 318 U.S. 578, 63 S.Ct. 793, 87 L.Ed. 1014 (1943).). In light of such authority, the appellate court upheld the District Court's action with respect to the executive suggestion of immunity. The court also rejected appellant's second contention out of hand and concluded by affirming in entirety the District Court's decision.

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## JURISDICTION

*U.S. v. Fernández.* 496 F.2d 1294 (5th Cir. 1974)

The defendant below was convicted in the U.S. District Court for the Western District of Texas on six counts of an indictment charging him with possessing, forging, and uttering three U.S. Treasury checks allegedly stolen from the U.S. mails. On appeal Fernández alleged error as to the trial judge's charge to the jury, prejudicial comments made by the prosecutor in final argument, and lack of sufficient evidence to support conviction on three of the counts contained in the indictment. Additionally, he challenged the jurisdiction of the federal court to hear the case because the alleged crimes took place outside of the territorial jurisdiction of the U.S. Due to its significant relation to the international arena, only the court's treatment of the last issue will be covered.

In the court below, appellant made timely motion to dismiss for lack of jurisdiction. The motion was denied and he raised the question again on appeal.

The appellate court found that under the theory of objective territorial jurisdiction, the trial court had the right to charge and try Fernández for the offenses. Looking to *Strassheim v. Dailey*, the court offered the following quotation as the point of origin for the objective territoriality theory:

"Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of harm as if he had been present at the effect, if the state should succeed in getting him within its power." 211 U.S. 280, 285, 31 S.Ct. 558, 560, 55 L.Ed. 735, 738 (1911).

The above theory was found to be readily applicable to the instant case because the alleged acts of possessing, forging, and uttering the checks in Mexico were intended to, and did produce, a detrimental effect within the U.S. Such effect being that the normal disbursement of Social Security funds to those lawfully entitled to them was thwarted. Thus, the jurisdictional issue was resolved favorably for the Government.

## IMMIGRATION

*Muñoz—Casarez v. Immigration and Naturalization Service.* 511 F.2d 947 (9th Cir. 1975)

Petitioner, an alien and citizen of Mexico, was admitted to the United States for permanent residence on June 13, 1956. He subsequently went to Mexico in July, 1969 for a visit of approximately one month's duration.

On January 26, 1970 he was convicted of voluntary manslaughter in California. Thereafter on April 18, 1973, an Order to Show Cause and Notice of Hearing was issued charging that petitioner was subject to deportation pursuant to Sec. 241 (a) (4) of the Immigration and Nationality Act, 8 U.S.C. Sec. 1251 (a) (4), which provides for the deportation upon the order of the Attorney General of an alien convicted of a crime involving moral turpitude committed within five years after entry.

The immigration judge held that the petitioner should be deported. The Board of Immigration Appeals upheld the ruling and petitioner filed for review.

On appeal, the issue raised was whether Casarez's return to the U.S. after the 1969 absence constituted an entry under Sec. 241(a)(4).

Section 101(a)(13) of the Act, 8 U.S.C. Sec. 1101 (a)(13) defines entry as any coming of an alien into the U.S., except that an alien having a lawful, permanent residence shall not be regarded as making entry if he can satisfy the Attorney General that his *departure* was "not intended or reasonably to be expected by him" or was not voluntary (emphasis added).

Citing *Rosenberg v. Fleuti*, 374 U.S. 449, 83 S.Ct. 1804, 10 L.Ed. 2d 1000 (1963), the court found that the term "intended" refers to "an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence." 374 U.S. at 462, 83 S.Ct. at 1812. Further, the criteria to be considered are length of the absence, purpose of the visit and whether travel documents are necessary.

The petitioner asserted that he never intended to abandon his residence in the U.S. The court pointed out however, that it is not abandonment of residence that constitutes a return to the U.S. an "entry." But rather it is a departure which is "meaningfully interruptive" of residence.

Thus, on the record of the case, the court upheld the immigration judge and the Board of Immigration Appeals and found that the petitioner's return to the U.S. constituted an entry under Sec. 241(a)(4).

## EXECUTIVE DISCRETION IN FOREIGN AFFAIRS

*Jensen v. National Marine Fisheries Service (NOAA)*. 512 F.2d 1189 (9th Cir. 1975).

Bjorn Jensen et al, plaintiffs below, brought action in the U.S. District Court for the Western District of Washington, seeking a declaratory judgment and an injunction against the enforcement of a regulation of the International Halibut Commission and of the Northern Pacific Halibut Act of 1937. 16 U.S.C. Sections 772b, 672d and 772e, which provide criminal penalties for the violation of the Commission's regulations. The court dismissed the complaint for lack of jurisdiction and the plaintiffs appealed.

The appellants were owners and operators of fishing boats which ply the Pacific Ocean catching fish with devices known as otter trawls. The Commission is the progeny of a 1954 treaty between the U.S. and Canada promulgated for the purpose of preserving the halibut fishery in the Northern Pacific (5 U.S.T. 5, T.I.A.S. No. 2900). Essentially, the treaty provides that the Commission will enact regulations for this purpose subject to the approval of the President of the U.S. and the Governor General of Canada. Presidential approval in the U.S. was delegated to the Secretary of State by executive order.

Appellants specifically complain of a Commission regulation which prohibits them from keeping halibut incidentally caught in their nets while pursuing other species of fish and requires them to return the halibut to the sea when they have been so caught.

On appeal, the appellants asserted jurisdiction under the Administrative Procedure Act, 5 U.S.C. Sections 702 and 704, and argued that the Secretary's action in approving the regulation constituted agency action reviewable by the federal courts. They also argued that the action of Congress in passing the Northern Pacific Halibut Act was an unconstitutional delegation of legislative power to the President due to an absence of guidelines concerning the approval of Commission regulations.

The court found, for the purposes of the appeal, that the Secretary's actions were those of the President, thereby precluding review under

the terms of the APA because presidential action in the field of foreign affairs is committed to presidential discretion by law. Additionally, the court pointed out that the Supreme Court had held that such decisions are political in nature and do not present a justiciable case or controversy within the meaning of Article III of the Constitution (*Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568, 1948).

Secondly, the court held again that nonjusticiability served to prevent the district court from assuming jurisdiction of the claim grounded in the unlawful delegation of Congressional power to the President. This holding stemmed from the fact that appellants presented only the possibility of being prosecuted for violation of the regulation thus failing again to establish the existence of a case or controversy.

Lastly, the court stated that notwithstanding the nonjusticiability of the issue, the delegation of power was not improper because in cases where legislation is to be made effective through negotiation and inquiry within the international field, the President must often be given a degree of discretion and freedom from statutory restriction which would be improper if purely domestic affairs were involved (citing *U.S. v. Curtiss-Wright Corp.*, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255, 1936).

## CHOICE OF LAW

*Challoner v. Day and Zimmermann, Inc.*, 512 F.2d 77 (5th Cir. 1975)

This diversity suit arose as a result of the premature explosion of a howitzer round manufactured by Day and Zimmermann, defendant below. The incident occurred in Cambodia while U.S. armed forces were engaged in combat with the North Vietnamese. One serviceman was seriously injured and another killed.

Challoner and the administrator of the deceased serviceman's estate, plaintiffs below, brought suit in the U.S. District Court for the Eastern District of Texas. Plaintiffs' suit was grounded upon strict liability principles provided by Texas law. Judgment was entered for the plaintiffs and the defendant appealed.

Concerning international law, the principal issue on appeal was whether the District Court was correct in applying Texan substantive

law. Other issues raised dealt with the finer points of strict liability in Texas, jury instructions, and admissibility of certain U.S. Government reports.

The defendant argued that under the Erie-Klaxon doctrine, Texas choice of law rules should be used which in turn would require the application of Cambodian law (ostensibly more favorable to manufacturers) because Cambodia was the situs of the injury. The court agreed with the contention as far as it went, but then provided a number of reasons why it was going to arrive at a contrary holding.

Citing *Lester v. Aetna Life Insurance Company*, 433 F.2d 884 (5th Cir. 1970), the court found that Cambodia had no interest or policy at stake as concerned the litigants in, or the outcome of, the case at bar. As a result, the court concluded that the application of Texan substantive law would best serve the interests of the states involved (Wisconsin being Challoner's domicile, Tennessee being the decedent's domicile, Pennsylvania being the locus of the defendant's principle place of business, and Texas being the forum state).

In further buttressing its holding, the court pointed out that under established principles of international law Cambodia had no standing to determine rights or liabilities between foreign subjects arising out of the military activities of a foreign power because a nation is understood to cede a portion of her territorial jurisdiction when she allows the troops of a foreign nation to pass through her dominions (*The Schooner Exchange v. M'Faddon*, 7 Cranch 116, 3 L.Ed. 287 (1812)).

Lastly, in view of the court's nature as an instrumentality created to effectuate the laws and policies of the United States, it took the position of being unwarranted, legally or morally, to frustrate well established American policies (specifically a manufacturer's strict liability) by an application of the local policies of a foreign government to the case at bar. Thus, the judgment of the District Court was affirmed.