No. 99 Original

In the Supreme Court of the United States

OCTOBER TERM, 1984

PENYU BAYCHEV KOSTADINOV, PLAINTIFF

v.

WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

BRIEF FOR THE DEFENDANT IN OPPOSITION

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QUESTION PRESENTED

Whether this Court, pursuant to its original but non-exclusive jurisdiction under 28 U.S.C. 1251(b)(1), should grant leave to file the bill of complaint, in which plaintiff contends that he is entitled to immunity from prosecution under the Vienna Convention on Diplomatic Relations (23 U.S.T. 3229, T.I.A.S. No. 7502), even though this claim of immunity has already been considered and rejected by the court of appeals in connection with a motion to dismiss the indictment in the pending criminal prosecution and this Court declined to review that holding.

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JURISDICTION

Plaintiff invokes the original jurisdiction of this Court under Article III, Section 2 of the Constitution. This Court's original jurisdiction of actions and proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties is also addressed by 28 U.S.C. 1251(b)(1).

STATEMENT

Plaintiff, an assistant commercial counselor in Bulgaria's trade office in New York, moves for leave to file a bill of complaint. He prays that the Court issue a writ of prohibition or mandamus against the defendant, the Attorney General of the United States, prohibiting the Attorney General from subjecting him to criminal prosecution in the United States District Court for the Southern District of New York and from subjecting him to continued detention (Mot. 1; Complaint ¶ VI).

1. On September 30, 1983, plaintiff was indicted for attempted espionage and conspiracy to commit espionage, in violation of 18 U.S.C. 794(a) and (c). On October 6, 1983, plaintiff moved to dismiss the indictment on the ground that he is entitled to diplomatic immunity under the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3229, T.I.A.S. No. 7502,[1] and the Diplomatic Relations Act, 22 U.S.C. 254a *et seq.* On January 17, 1984, the district court dismissed the indictment, holding that plaintiff is entitled to diplomatic immunity under the Convention and the implementing statute (Mot. App. 1a-30a).

The court of appeals reversed and reinstated the indictment. Mot. App. 33a-50a; *United States* v. *Kostadinov,* 734 F.2d 905 (2d Cir. 1984). After a thorough review of the terms of the Vienna Convention, the court of appeals concluded that the district court's decision had been based on a misapprehension of the Vienna Convention's use of the term "mission" (Mot. App. 35a-36a, 42a-45a) and that plaintiff in fact is not a member of the Bulgarian "mission" for purposes of the immunity conferred by the Convention (*id.* at 35a-36a, 38a-42a, 49a-50a). The court of appeals also found that "[t]he State Department has consistently refused to recognize 'assistant commercial counselors' as having diplomatic immunity and has so notified Bulgaria" (Mot. App. 45a, 47a-49a). This Court denied plaintiff's petition for a writ of certiorari seeking review of the court of appeals' decision. No. 84-35 (Oct. 9, 1984).

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[1]The Vienna Convention entered into force in the United States on December 13, 1972. It was implemented by the Diplomatic Relations Act, 22 U.S.C. 254a *et seq.*

In pertinent part, Article 29 of the Convention states that a diplomatic agent shall not be liable to any form of arrest or detention; Article 31 states that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state; and Article 37 provides that the administrative and technical staff of a mission shall enjoy the privileges and immunities specified in Articles 29 to 35. See 22 U.S.C. 254b.

2. Plaintiff filed the instant motion for leave to file a bill of complaint under this Court's original jurisdiction several weeks after the Court declined to hear his claim of immunity under its appellate jurisdiction. Plaintiff alleges in the complaint that he is an "Assistant Commercial Counselor of, and a member of the administrative and technical staff of, the mission to the United States of the People's Republic of Bulgaria" (Complaint ¶ II). Plaintiff further alleges that the actions of the United States Attorney for the Southern District of New York, under the direction and control of the defendant, in detaining and prosecuting plaintiff violate Articles 29, 31 and 37 of the Vienna Convention on Diplomatic Relations (Complaint ¶ VI).

ARGUMENT

Plaintiff's motion for leave to file a bill of complaint should be denied. Under 28 U.S.C. 1251(b)(1), a suit to which an ambassador, public minister, or consul is a party is one over which this Court's original jurisdiction is not exclusive. In this case, there is an alternative forum in which plaintiff already has litigated and lost his claim of immunity.

1. This Court exercises its original jurisdiction only sparingly, and it is particularly reluctant to do so if there is another adequate forum in which to settle the controversy. *South Carolina* v. *Regan,* No. 94, Orig. (Feb. 22, 1984), slip op. 13; *id.* at 3 (Blackmun, J., concurring); *id.* at 17-19 (O'Connor, J., concurring); *United States* v. *Nevada,* 412 U.S. 534, 538 (1973); *Washington* v. *General Motors Corp.,* 406 U.S. 109, 113 (1972); *Ohio* v. *Wyandotte Chemicals Corp.,* 401 U.S. 493, 497-499 (1971). Plaintiff has wholly failed to show that this case presents special circumstances making it appropriate for the Court to exercise its original jurisdiction.

Plaintiff principally seeks a determination whether he is entitled to immunity under the terms of the Vienna Convention. However, there is an alternative forum available for resolution of plaintiff's claim of diplomatic immunity — the district court having jurisdiction over the pending criminal prosecution — and plaintiff already has sought relief in that forum by moving to dismiss the indictment on immunity grounds. Although the district court granted that relief, the court of appeals rejected plaintiff's claim and reinstated the indictment, and this Court declined to review that holding. Plaintiff does not contend that he was denied a full and fair opportunity to litigate his claim of immunity in the district court and court of appeals. Accordingly, the same considerations that caused the Court to decline to entertain plaintiff's immunity claim under its discretionary certiorari jurisdiction *a fortiori* weigh against the Court's exercise of its original jurisdiction to entertain the same claim. To do so would result in a wasteful diversion of the Court's limited resources from its paramount appellate responsibilities. See *Illinois* v. *City of Milwaukee,* 406 U.S. 91, 94 (1972); *Ohio* v. *Wyandotte Chemicals Corp.,* 401 U.S. at 499.

As we explained in the brief in opposition to plaintiff's certiorari petition (at 5-12), the decision of the court of appeals rejecting plaintiff's claim of immunity is correct and consistent with the longstanding position of the Department of State, which repeatedly has been conveyed to the Government of Bulgaria. Plaintiff's claim also raises no issue of general importance warranting the Court's attention, especially since he relies for his claim of immunity in large part on a press release that pertains only to the Bulgarian trade office (see 84-35 Br. in Opp. 6-9). Moreover, if the Court were to grant leave to file the bill of complaint, the result would be a further delay of the trial in district court, which already has been postponed for more than a year while plaintiff has litigated his immunity claim in the lower

courts. By the same token, if the Court denies leave to file, that action will not foreclose further consideration of the immunity claim. If plaintiff ultimately is convicted and the court of appeals affirms that conviction, plaintiff can present his immunity claim, along with any other claims, to this Court in a petition for a writ of certiorari seeking review of the judgment of the court of appeals affirming his conviction.

2. Although plaintiff does not contend that this Court has exclusive jurisdiction over the instant suit, which is brought by him as the plaintiff, he contends (Br. 3-6) that only this Court has jurisdiction over an action brought *against* an ambassador or public minister. Plaintiff therefore argues that the district court does not have jurisdiction over the criminal prosecution instituted against him, and he requests this Court in this original action to issue a writ of mandamus or prohibition to prevent the Attorney General and his employees and agents from proceeding with that prosecution in district court. It apparently is plaintiff's view that the United States may bring a criminal prosecution against him only in an original proceeding in this Court. This argument similarly need not be entertained by the Court at this time and is without merit.

In 28 U.S.C. 1251(b)(1), Congress has provided that "[t]he Supreme Court shall have original *but not exclusive* jurisdiction of * * * "[a]ll actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties" (emphasis added). Thus, assuming that plaintiff falls within the category of "public ministers, consuls, or vice consuls of foreign states" over whose cases this Court has original jurisdiction, the plain language of 28 U.S.C. 1251(b)(1) defeats his contention that the Court's original jurisdiction is exclusive.[2]

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[2]To be sure, Section 1251(b) does not, of its own force, vest concurrent jurisdiction in any other court, federal or state. *Ohio* v. *Wyandotte Chemical Corp.*, 401 U.S. at 498 n.3. But other statutes

Plaintiff contends (Br. 3-6), however, that Congress's amendment of 28 U.S.C. 1251(b)(1) in 1978[3] to provide that this Court has original but not exclusive jurisdiction of actions or proceedings to which ambassadors, public ministers, and consuls are parties is unconstitutional insofar as it permits civil or criminal proceedings to be brought *against* ambassadors and public ministers in federal district court. Plaintiff maintains that he is a "public minister" for these purposes and that this Court therefore has exclusive jurisdiction of any criminal prosecution of him. There are a number of flaws in this argument.

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accomplish that task, once Congress has "released" the case from this Court's exclusive jurisdiction.

Under 28 U.S.C. 1351, as amended in 1978 (Pub. L. No. 95-393, § 8(a)(1), 92 Stat. 810), the federal district courts have original jurisdiction, exclusive of the courts of the States, of all "civil actions and proceedings" brought against "consuls or vice consuls of foreign states" or "members of a [diplomatic] mission or members of their families (as such terms are defined in section 2 of the Diplomatic Relations Act)." The term "members of a mission" is defined in Section 2(1) of the Diplomatic Relations Act to mean the head of a mission and those members of a mission who are members of the diplomatic staff, "or who, pursuant to law, are granted equivalent privileges and immunities"; members of the administrative and technical staff of a mission; and members of the service staff of a mission. 22 U.S.C. 254a(1).

The legislative history of the 1978 amendments makes clear that although state courts, by virtue of 28 U.S.C. 1351, do not have jurisdiction of *civil* actions and proceedings against consuls, vice consuls, and members of missions, the States may enforce their *criminal* laws in state court against such persons if they are not entitled to diplomatic immunity from prosecution. The legislative history also establishes that such persons were intended to be subject to prosecution in federal district court for violation of federal criminal law. See S. Rep. 1108, 95th Cong., 2d Sess. 5-7 (1978); H.R. Rep. 95-526, 95th Cong., 1st Sess. 8-9 (1977). The jurisdiction of the district courts over criminal cases, as established by 18 U.S.C. 3231, is unrestricted so far as the status or citizenship of the defendant is concerned and, accordingly, embraces prosecution of plaintiff unless some other provision of law prevents it.

[3]Pub. L. No. 95-393, § 8(b), 92 Stat. 810.

a. The first insuperable obstacle is that plaintiff is not a "public Minister" for purposes of the original jurisdiction provisions of Article III, Section 2 of the Constitution and 28 U.S.C. 1251. A "public minister" is a member of the diplomatic staff of an embassy. The term does not include consuls, who are "the commercial representatives of foreign governments" (*Ames* v. *Kansas,* 111 U.S. 449, 464 (1884)) and who historically have not been protected by immunity from criminal prosecution. See, *e.g., In re Baiz,* 135 U.S. 403, 419-425 (1890); *Bors* v. *Preston,* 111 U.S. 252, 256-261 (1884); *United States* v. *Ortega,* 24 U.S. (11 Wheat.) 467, 473 (1826); *United States* v. *Ravara,* 2 Dall. 297 (Cir. Ct. D. Pa. 1793); *Farnsworth* v. *Sanford,* 115 F.2d 375, 379-380 (5th Cir. 1940), cert. denied, 313 U.S. 586 (1941). Cf. *United States* v. *Wong Kim Ark,* 169 U.S. 649, 678-679 (1898). See generally R. Stern & E. Gressman, *Supreme Court Practice* 605-606 (5th ed. 1978). As noted above (see page 2, *supra*), the court of appeals has already held, in connection with plaintiff's motion to dismiss the indictment, that plaintiff, an assistant commercial counselor in Bulgaria's New York trade office, is not a member of the diplomatic mission of the Government of Bulgaria. That also is the position of the Department of State. See Mot. App. 32a-50a. Plaintiff therefore is not a "public Minister" for purposes of this Court's original jurisdiction.

Thus, if plaintiff even falls within the category of persons referred to in the grant of original jurisdiction to this Court in Article III, Section 2 of the Constitution — "Ambassadors, other public Ministers and Consuls" — he must be embraced by the third term: "Consuls."[4] Plaintiff does not

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[4]Because the term "Consuls" refers to commercial representatives of foreign governments (*Ames* v. *Kansas,* 111 U.S. at 464), it is the most suited of the three groups of foreign representatives mentioned in Article III, Section 2 to include persons in plaintiff's position.

argue that Congress cannot constitutionally vest the federal district courts with jurisdiction of criminal prosecutions brought against "Consuls." And with good reason. As plaintiff presumably recognizes, the First Congress provided in Section 13 of the Judiciary Act of 1789 that this Court's original jurisdiction in cases in which a consul or vice consul is a party was not exclusive, and it further provided in Section 9 of that Act that the district courts had jurisdiction of prosecutions brought against consuls and vice consuls. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, 76, 80-81. In *Ames* v. *Kansas, supra,* which plaintiff invokes (Br. 3-6), this Court relied upon these very provisions of the Judiciary Act of 1789 in holding that the Court's original jurisdiction under Article III, Section 2 is *not* exclusive. The Court explained (111 U.S. at 464):

> It thus appears that the first Congress, in which were many who had been leading and influential members of the convention, and who were familiar with the discussions that preceded the adoption of the Constitution by the States and with the objections urged against it, did not understand that the original jurisdiction vested in the Supreme Court was necessarily exclusive.

Nor has this Court in any other case ever questioned the constitutionality of the decision by the First Congress not to make exclusive the Court's original jurisdiction of cases affecting "Consuls." See *California* v. *Arizona,* 440 U.S. 59, 65 (1979); *Illinois* v. *City of Milwaukee,* 406 U.S. 91, 100-101 (1972); *United States* v. *California,* 297 U.S. 175, 187 (1936); *In re Baiz,* 135 U.S. at 419-425; *Bors* v. *Preston,* 111 U.S. at 256-261; *United States* v. *Ortega,* 24 U.S. (11 Wheat.) at 469-475. See also *United States* v. *Ravara,* 2 Dall. at 298 (Wilson & Peters, J.J.). Accordingly, because plaintiff is, at most, within the category of "Consuls" mentioned in Article III of the Constitution, his constitutional

challenge to the district court's jurisdiction to entertain the criminal prosecution brought against him is completely without merit.

b. The result is no different even if we assume that plaintiff is, as he maintains, a "public Minister" within the meaning of Article III, Section 2 of the Constitution. This is so because the principle that Congress may make the original jurisdiction of this Court concurrent with the jurisdiction of lower federal courts is not confined to the cases involving "Consuls" that were addressed by the Judiciary Act of 1789. Nothing in the text of Article III, Section 2 suggests such a limitation. Nor do this Court's decisions. To the contrary, the Court has repeatedly held that Congress may vest the district courts with jurisdiction of cases in which a State is a party, even though such cases, like those involving consuls, also are within this Court's original jurisdiction. See, *e.g.*, *Ames* v. *Kansas, supra; United States* v. *California,* 297 U.S. at 187; *Georgia* v. *Pennsylvania R.R.,* 324 U.S. 439, 464 (1945); *United States* v. *Alaska,* 422 U.S. 184 (1975). In addition, this Court repeatedly has made clear, in broad terms, that "the original jurisdiction of this Court is not constitutionally exclusive — that other courts can be awarded concurrent jurisdiction by statute" (*California* v. *Arizona,* 440 U.S. at 65), and it has so indicated without limiting its conclusion only to particular aspects of the Court's original jurisdiction, such as these involving States or consuls.[5] Plaintiff's attempt at this late date to create an

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[5]See, *e.g.*, *Georgia* v. *Pennsylvania R.R.,* 324 U.S. at 464 ("Clause 2 does not grant exclusive jurisdiction to this Court in the cases enumerated by it"); *Illinois* v. *City of Milwaukee,* 406 U.S. at 101 n.2, quoting H.R. Rep. 308, 80th Cong., 1st Sess. A 104 (1947) (" 'The original jurisdiction conferred on the Supreme Court by Article 3, section 2, of the Constitution is not exclusive by virtue of that provision alone. Congress may provide or deny exclusiveness.' "); *Ames* v. *Kansas,* 111 U.S. at 464 ("the first Congress * * * did not understand that the

exception to this established rule for suits involving "public Ministers" is meritless.[6]

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original jurisdiction vested in the Supreme Court was necessarily exclusive. That jurisdiction included all cases affecting ambassadors, other public ministers and consuls, and those in which a State was a party."); *id.* at 468, quoting *Gittings* v. *Crawford,* 1 Taney's Dec. 1, 9 (D. Md. 1838) (" 'The true rule in this case is, I think, the rule which is applied to ordinary acts of legislation in which the grant of jurisdiction over a certain subject matter to one court does not, of itself, imply that that jurisdiction is to be exclusive. In the clause in question there is nothing but mere affirmative words of grant, and none that import a design to exclude the subordinate jurisdiction of other courts of the United States on the same subject matter.' ").

[6]The language in *Ames* v. *Kansas* that plaintiff quotes (Br. 3-4), regarding the intent to keep open the Nation's highest court for the determination of suits against ambassadors and public ministers, occurs in a discussion of the legislative intent underlying the First Congress's assignment of concurrent jurisdiction of some cases to the inferior federal courts. 111 U.S. at 463-465. Not only has 28 U.S.C. 1251 been amended so that it no longer ensures exclusive original jurisdiction for suits or proceedings against ambassadors or public ministers, but the Court in *Ames* affirmed the right of Congress to make such a change so long as it did not deprive this Court of original jurisdiction (111 U.S. at 464).

CONCLUSION

The motion for leave to file the bill of complaint should be denied.

Respectfully submitted.

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