

No. 99
Original

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

PENYU BAYCHEV KOSTADINOV,

Plaintiff,

v.

WILLIAM FRENCH SMITH,

Defendant.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

REPLY BRIEF FOR THE PLAINTIFF

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Summary of Argument

Exercise of the original jurisdiction is appropriate; the issues presented are of constitutional dimension and of great significance in international law. Plaintiff has no other domestic forum; if he were to be put to trial before his substantial claim to immunity were resolved, a central purpose of the Vienna Convention on Diplomatic Relations would be traduced.

The defendant's suggestion that plaintiff's status is that of a consul is unsupportable; if plaintiff were, however, a

consul he would, pursuant to the Consular Convention between the People's Republic of Bulgaria and the United States of America, be immune from the criminal jurisdiction. As the Convention is presently applied by both countries, he would be a member of the diplomatic mission.

Congressional extension, in 1978, of concurrent jurisdiction to the lower federal courts in cases *against* public ministers conflicts with the prior opinion of this Court that the grant of exclusive jurisdiction in such cases by the First Congress in 1789 was a matter of constitutional construction.

In this context it is manifestly appropriate, and within the intention of the Framers, that this Court exercise its original jurisdiction to hear a dispute on a question of treaty interpretation and international law of major significance between a Foreign Sovereign, through plaintiff, its agent and representative, and the United States.

ARGUMENT

1. The Constitutional grant of original jurisdiction in cases affecting public ministers has been rarely invoked. For the first time in 196 years a Foreign Sovereign, with which the United States has diplomatic relations, asserts in this Court, through plaintiff, that its agent and representative is a public minister grievously wronged by the executive, and invokes the original jurisdiction. The defendant replies that the case presents no "special circumstances." (Def. Brief 3).

Plaintiff's claim is founded on the provisions of the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, TIAS 7502, 500 U.N.T.S. 95, a Treaty in force in the United States since December 13, 1972. The right to

personal inviolability of a representative of a Foreign Sovereign is a necessary element of civilized behavior among states, and long recognized as such:

The person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the Sovereign he represents, but also hurts the common safety and well-being of nations;—he is guilty of a crime against the whole world.

Respublica v. deLongchamps, 1 Dallas 111, 116 (Court of Oyer and Terminer, etc. at Philadelphia, 1784).¹ The United States District Court for the Southern District of New York accepted plaintiff's claim and dismissed the indictment against him (Mot. App. 1a-31a). The district court established that the claim of personal inviolability is substantial and the position of the United States questionable. The court of appeals, while reversing, acknowledged that the premises of the Bulgarian Embassy's commercial office in New York are mission premises and that the commercial counselor in New York is a member of the diplomatic mission (Mot. App. 45a). The attention of this Court is appropriately directed to a case involving "important rights asserted in reliance upon federal treaty obligations." *Kolovrat v. Oregon*, 366 U.S. 187, 191 (1961).

The defendant's suggestion that plaintiff has "an alternative forum available for resolution of [the] claim of diplomatic immunity—the district court having jurisdiction over the pending criminal prosecution" (Def. Br. 4), is extraordinary. Plaintiff's claim was upheld in that forum. No domestic forum other than this Court is now "available for

¹ In *deLongchamps* an offense against the person of a member of the staff of an embassy was found criminally punishable as

(footnote continued on following page)

resolution of plaintiff's claim of diplomatic immunity." The further suggestion that plaintiff, if convicted and the conviction be affirmed, can later seek review on *certiorari* (Def. Br. 5), would, if applied, vitiate the constitutional principle and Treaty obligations at the heart of this proceeding. Plaintiff's claim to immunity from arrest, detention and trial would thus not be resolvable until he had first been arrested, detained and tried. The purpose of the Vienna Convention on Diplomatic Relations would be subverted. Plaintiff relies on the solemn Treaty obligation of the United States that "he shall not be liable to any form of arrest or detention. The [United States] shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity." Vienna Convention, Article 29. This Court has held that claims of double jeopardy must be resolved pre-trial. *Abney v. United States*, 431 U.S. 651 (1977). Similarly, a claim that an indictment violates the guarantees of the Speech and Debate Clause must be resolved pre-trial. *Helstoski v. Meanor*, 442 U.S. 500 (1979). If the constitutional promise of access to this Court for representatives of Foreign Sovereigns is to have meaning, the claim of immunity should be resolved pre-trial.

No "wasteful diversion of the court's limited resources" (Def. Br. 4) would result from ordering argument. There are no factual disputes. The record in the district court is fully sufficient. The point of law raised by the complaint is clear; whether plaintiff is entitled to immunity pursuant

(footnote continued from previous page)

"an infraction of the law of nations." *Id.* In 1790, the First Congress made such violation an offense against the United States. 1 Stat. 117, 118. The current 18 U.S.C. §112 is the direct descendent of the act of 1790.

to the Vienna Convention.² Leave to file should be granted, with argument ordered on the merits of the case. See, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

2. The People's Republic of Bulgaria has at all times insisted that plaintiff is a member of the staff of its mission to the United States. And the United States has conceded that assistant commercial counselors in Washington, D.C., performing the same functions plaintiff performs in the New York mission office, are members of diplomatic missions. Access to the original jurisdiction "is a privilege, not of the official, but of the sovereign or government which he represents . . ." *Ex parte Gruber*, 269 U.S. 302 (1925). It is therefore alone for the People's Republic of Bulgaria, with which the United States enjoys diplomatic relations, to maintain its privilege under the constitutional grant of access to this Court and proclaim plaintiff's representative status. Plaintiff has been directed to make that claim. This is the essence of the procedural prerequisites of Article III, Section 2, Clause 2.

3. Authority is cited for the propositions that *consuls* are generally denied immunity and that the original jurisdiction as to suits affecting *consuls* is not exclusive. These arguments are doubly flawed. Contrary to the defendant's suggestion (Def. Br. 7), plaintiff is not a consul. Plaintiff was repeatedly notified to the United States as assistant commercial counselor of the Bulgarian Embassy's commercial office in New York (Mot. App. 27a), and accepted as such (Mot. App. 29a). Second, if plaintiff were a consul,

² Defendant's ascription to plaintiff of the "view that the United States may bring a criminal prosecution against him only in an original proceeding" (Def. Br. 5) is incorrect. Plaintiff claims immunity from the criminal jurisdiction of all United States courts.

he would still enjoy immunity from the criminal jurisdiction of the United States by the express terms of Article 16 of the Consular Convention between the People's Republic of Bulgaria and the United States of America, signed April 15, 1974 and in force May 29, 1975, 26 U.S.T. 687, TIAS 8067.³ As applied by both countries, the consular functions are performed by the consular divisions of the respective diplomatic missions pursuant to Article 51 of the Convention.⁴ Thus, if the plaintiff's functions were consular, as contended by the defendant, he would be immune pursuant to the Consular Convention and a member of the diplomatic mission.

4. The defendant apparently misapprehends plaintiff's reliance upon *Ames v. Kansas*, 111 U.S. 449 (1884). The controlling language is as follows:

Acting on this construction of the constitution, congress took care to provide that no suit be brought *against*

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Article 16

*Immunity of Members of a Consulate from the
Jurisdiction of the Receiving State*

1. Consular Officers . . . shall be immune from the criminal, civil and administrative jurisdiction of the receiving state.
2. Consular employees . . . shall be immune from the criminal jurisdiction of the receiving state . . .

4

Article 51

*Performance of Consular Functions by a
Diplomatic Mission*

1. The provisions of this Convention shall also apply in the case of consular functions being performed by a diplomatic mission.
2. The names of the members of the diplomatic mission entrusted with the performance of consular functions shall be communicated to the receiving State.
3. The members of the diplomatic mission referred to in paragraph 2 of this Article shall continue to enjoy the privileges and immunities granted them by virtue of their diplomatic status.

an ambassador or other public minister except in the Supreme Court, but that he might sue in any court he chose that was open to him. (emphasis in original)

Id., at 464. The cases involving consuls and states (Def. Br. pp. 8, 9) are beside the point. If the *Ames* court were correct, the First Congress was engaged in constitutional "construction" when it provided that the original jurisdiction was exclusive as to suits brought *against* ambassadors or other public ministers, and this grant could not be subsequently amended by legislatures further removed from direct knowledge of the Framers' intent.

5. Defendant misunderstands both the substance of plaintiff's claim and the difference between the proceeding in the original jurisdiction and the prior petition in the appellate jurisdiction. The plaintiff does not rely "in large part" on a "press release" (Def. Br. 4). He relies on Treaty obligations of the United States—multilateral obligations under the Vienna Convention, and bilateral obligations under the 1963 compact pursuant to which the Bulgarian Embassy's commercial office was transferred from Washington to New York and remained part of the diplomatic mission. The government has conceded that the Bulgarian commercial counselor's office in New York is part of the Embassy. The subject matter remains the violation of the solemn Treaty obligations of the United States, and plaintiff here invokes for the first time a provision of the Constitution intended for the precise situation presented. This Court in *Ames v. Kansas*, *supra*, expressed the belief that "it may safely be assumed that nothing will ever be done to encroach upon the high privileges of those for whose protection the constitutional provision was intended." 111 U.S. at 469. Today, 100 years after *Ames* and nearly two

centuries after the framing of the Constitution, plaintiff, as representative and agent of the People's Republic of Bulgaria, invokes the Constitutional promise to the representatives of Foreign Sovereigns of a hearing in this Court.

CONCLUSION

The motion for leave to file bill of complaint should be granted and argument ordered on the merits of the case.

Respectfully submitted,

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