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Case Digest

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CASE DIGEST

This CASE DIGEST provides brief analyses of cases that represent current aspects of transnational law. The Digest includes cases that establish legal principles and cases that apply established legal principles to new factual situations. The cases are grouped in topical categories and references are given for further research.

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I. CONSTITUTIONAL LAW

MEDICAL MALPRACTICE ABROAD BY UNITED STATES PHYSICIAN IN CONNECTION WITH DEPARTMENT OF STATE—REGULATIONS GOVERNING TORT CLAIMS PROVIDED FOR AN INVESTIGATIVE PROCEDURE FOLLOWED BY AGENCY DECISION—AGENCY FOR INTERNATIONAL DEVELOPMENT HOLDS NO CONSTITUTIONAL OBLIGATIONS TO EVALUATE MEDICAL MALPRACTICE CLAIM ON THE MERITS AND IN ACCORD WITH MINIMAL DUE PROCESS. *Tarpeh-Doe v. United States,* 904 F.2d 719 (D.C. Cir. 1990).

Plaintiff was an International Development Intern with the Agency for International Development and was stationed at the United States Embassy in Liberia. In 1982, she gave birth to a child who became ill shortly thereafter. The embassy physician who examined the child ordered immediate evacuation to the United States. He later consulted with a United States missionary physician who ordered the child transferred

to a Liberian hospital. The child was not properly treated in the Liberian hospital, eventually lost his sight, and may have suffered brain damage.

Plaintiff brought a negligence action that was properly filed and transferred to the Office for the Assistant Legal Advisor for International Claims and Investment Disputes. The Office investigated and denied the claim, offering no written explanation for the basis of its decision. Relevant statutes and regulations did not require that the basis for denial be documented in writing. Furthermore, under State Department regulations, a foreign tort claimant is not entitled to go to court if a claim is denied administratively.

Plaintiff, pursuant to the Federal Tort Claims Act (FTCA), appealed to the United States District Court for the District of Columbia. Plaintiff also claimed that the procedures for deciding her administrative claim violated the due process clause of the fifth amendment. The court denied both claims, but invited the plaintiff to file a motion for partial summary judgment on the due process claim.

Relevant statutes and administrative regulations do not require the State Department to identify or explain any of the evidence on which it relied in making a determination to deny relief. The district court held that this constituted a violation of the due process clause of the fifth amendment and remanded the administrative claim to the State Department. The court required the State Department to disclose the evidence on which it relied in denying the claim so that the plaintiff could comment on and counter the evidence.

The United States Court of Appeals for the District of Columbia Circuit *Held: Reversed.* The court concluded that no protected property or liberty interest was denied by the administrative scheme; therefore, the administrative scheme, though irrational, did not violate the due process clause.

The court noted that, while protected entitlements may arise from statutes and regulations restricting the exercise of official discretion, such entitlements are created only when the authority promulgating the regulation has placed substantive limits on official discretion. This statute, 22 U.S.C. section 2669(f) (1990), merely provides that "the Secretary of State *may* . . . pay tort claims . . . aris[ing] in foreign countries . . . ." *Tarpeh-Doe*, 904 F.2d at 722 (emphasis added). Thus, this statute does not limit the Secretary's discretion. Similarly, the regulations promulgated by the Secretary do not restrict his discretion any further. The regulations do not provide that the decisionmaker must comply with the findings of the investigating officer or that the decisionmaker provide a statement of reasons for not following the investigator's recommenda-

tions. Thus, because there are no substantive limits on official discretion, there is no due process violation.

The court cited *Hewitt v. Helms*, 459 U.S. 460, 471 (1983), for the proposition that "mere complexity" of an administrative scheme does not give rise to a protected liberty interest. The court recognized that a protected interest could arise based on "the consistent practice of a decisional body—even in the absence of express regulatory language or in the face of ostensibly contradictory agency policy statements." *Tarpeh-Doe*, 904 F.2d at 724. The court concluded, however, that the statute and regulations promulgated thereunder, without more, did not have to implicate the due process clause of the fifth amendment.

Chief Judge Wald dissented. He argued that the statute and its legislative history contained nothing that indicated that Congress intended to permit agencies to act arbitrarily in granting or denying tort claims. He maintained that the "theme of justice, fair play, and merit-based determinations echoes through" the FTCA and its later amendments. *Id.* at 725. He stated that Congress "almost certainly expected the same equity principles to govern the administrative settlement of both foreign and domestic claims." *Id.* Therefore, he argued, the State Department regulations must be read as assuming that an administrative claim will be decided on the same legal or equitable principles that govern court determinations. Otherwise, "they must be read as providing superhighway procedures leading nowhere; paper promises designed to sidetrack the intent of Congress and to mislead the supplicant who invokes them." *Id.* at 726. *Significance*—The District of Columbia Circuit holds that the State Department's administrative scheme requiring employee tort claimants to file administrative claims with the Department and not providing for any further procedures once a claim has been denied, does not violate the due process clause of the fifth amendment.

II. Securities Regulation/Antitrust

THE FOREIGN CORRUPT PRACTICES ACT DOES NOT CREATE AN IMPLIED PRIVATE RIGHT OF ACTION THAT KENTUCKY TOBACCO GROWERS COULD USE TO RECOVER DAMAGES FROM COMPANIES THAT ALLEGEDLY ENGAGED IN CORRUPT PRACTICES TO THE DETRIMENT OF GROWERS. THE ACT OF STATE DOCTRINE, HOWEVER, DOES NOT NECESSARILY SERVE AS A BAR TO ACTIONS INVOLVING ANTITRUST VIOLATIONS BY FOREIGN GOVERNMENTS. *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990).

Plaintiffs were Kentucky growers of burly tobacco. Defendants routinely purchased large quantities of this tobacco not only from the Ken-

tucky markets, but also from producers in several foreign states. Defendants entered into an agreement with the government of Venezuela under which two of their subsidiaries would donate 12.5 million dollars to the Children's Foundation and, in return, the defendants' subsidiaries would obtain price controls on Venezuelan tobacco, eliminate controls on retail cigarette prices in Venezuela, procure tax deductions for the donation, and provide assurances that existing tax rates applicable to tobacco companies would not be increased. The defendants allegedly entered into the same arrangement with the governments of Argentina, Brazil, Costa Rica, Mexico, and Nicaragua.

Plaintiffs claimed that these foreign agreements depressed tobacco prices in the domestic market. Plaintiffs brought an antitrust action in the United States District Court for the Eastern District of Kentucky, claiming that the donations by the subsidiaries constituted unlawful inducements in restraint of trade. They also brought a complaint under the Foreign Corrupt Practices Act (FCPA). The court dismissed the antitrust claim on the grounds that it violated the act of state doctrine. The court dismissed the FCPA claim on the grounds that it was an impermissible private action.

The United States Court of Appeals for the Sixth Circuit *Held*: *Affirmed in part, reversed in part,* and *remanded.* The Sixth Circuit, deciding that the act of state doctrine did not bar the antitrust claim, stated that " '[t]he act of state doctrine is not a jurisdictional limit on courts, but rather is a prudential doctrine designed to avoid judicial action in sensitive areas.' " *Lamb*, 915 F.2d at 1026 (quoting *Liu v. Republic of China*, 892 F.2d 1419, 1431 (9th Cir. 1982)). The Sixth Circuit also held that, "like the bribes underlying the civil RICO and Robinson-Patman Act claims in [*Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l* (citation omitted)], the payments made by the defendants in this case to induce favorable action in Venezuela may support the plaintiffs' antitrust claims." *Id.* at 1027. Thus, the court remanded the antitrust claim for further proceedings.

With respect to the claim of a private right of action under the FCPA, the court noted that this was a case of first impression at the appellate level. The FCPA "generally forbids issuers of registered securities and other 'domestic concerns' . . . to endeavor to influence foreign officials by offering, promising, or giving 'anything of value. . . .' " *Id.* (citing 15 U.S.C. sections 78-1(a), 78dd-2(a)). When a statute does not expressly provide expressly for a private right of action, courts will consider congressional intent, keeping in mind the four factors set out in *Cort v. Ash*, 422 U.S. 66, 78 (1975). These four factors are:

(1) whether the plaintiffs are among "the class for whose *especial* benefit"

> the statute was enacted; (2) whether the legislative history suggests a congressional intent to prescribe or proscribe a private cause of action; (3) whether "implying such a remedy for the plaintiff would be 'consistent with the underlying purposes of the legislative scheme' "; and (4) whether the cause of action is 'one traditionally relegated to state law, in an area basically the concern of States, so that it would be inappropriate to infer a cause of action.'

Lamb, 915 F.2d at 1028 (emphasis original).

Based on the *Cort* factors, the court found that the plaintiffs in this case had no implied private right of action. On the first *Cort* factor, the Sixth Circuit concluded that the statute was designed to protect the integrity of United States foreign policy and domestic markets and not to prevent the use of foreign resources to reduce production costs. Therefore, the plaintiffs could not claim that they were the intended beneficiaries of the statute. On the second and third *Cort* factors, the court noted that the Senate version of the bill originally contained a private right of action and that it was deleted from the final version of the bill. In addition, the report of the conference that ultimately produced the compromise bill made no mention of a private right of action. The court thus determined that Congress did not intend to create a private right of action. The court also determined that the legislative scheme's preference for compliance in lieu of prosecution would be frustrated if private plaintiffs could sue routinely.

Finally, on the issue of whether the plaintiff had other available remedies, the court noted that the international reach of the antitrust laws "dilutes the plaintiffs' assertion that a private cause of action under the FCPA constitutes the only viable mechanism for redressing anticompetitive behavior on a global scale." *Id.* at 1030. Thus, the court found no private cause of action for violating the FCPA. *Significance*—The Sixth Circuit holds that the act of state doctrine is discretionary and that no implied private rights of action exist under the FCPA.

III. Subject Matter Jurisdiction/International Arbitration

United States District Court Lacked Subject Matter Jurisdiction Under the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards to Vacate an Arbitration Award Entered in Mexico Despite Application of Domestic Law to Settle Underlying Dispute—Language of Article V(1)(e) of the Convention Stating that an Award May be Vacated Only by the Courts of the Country Under Whose Law the Award Was Made, Refers

ONLY TO THE PROCEDURAL LAW APPLIED BY THE ARBITRATORS, NOT THE SUBSTANTIVE LAW APPLIED TO THE DISPUTE—*International Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Industrial y Commercial,* 745 F. Supp. 172 (S.D.N.Y. 1990).

The parties to this dispute were an international business subsidiary of a United States telecommunications company, International Standard Electric Corporation (ISEC), and a corporation organized and doing business in Argentina, Bridas Sociedad Anonima Petrolera, Industrial y Commercial (Bridas). ISEC controlled more than fifty percent of the Argentine telecommunications market through a subsidiary, Compania Standard Electric Argentina, S.A. (CSEA), and in 1978, it offered Bridas twenty-five percent participation. Bridas agreed and the parties entered into a shareholders agreement. The agreement provided that disputes were to be decided by arbitrators selected "by the International Chamber of Commerce (ICC) in accordance with the Rules of Conciliation and Arbitration." *International Standard Elec. Corp.*, 745 F. Supp. at 174. The agreement further provided that it would be "governed by, and construed under and in accordance with, the laws of the State of New York." *Id.*

In 1985, Bridas filed a Request for Arbitration and Summary of Complaint alleging that ISEC had made misrepresentations or committed fraud in connection with the sale of stock to Bridas and that the parent corporation unlawfully had managed CSEA. Bridas also alleged that the parent corporation breached its fiduciary obligations to Bridas in connection with a 1984 recapitalization of CSEA and that it breached its fiduciary and contractual obligations by selling its ninety-seven percent interest in CSEA to a major competitor of Bridas in Argentina.

The ICC appointed three individuals to serve as the arbitral panel and designated Mexico City as the location of the arbitration. The arbitral panel appointed an independent expert in New York corporate and contract law to serve as an advisor. The panel found that ISEC had breached its contractual and fiduciary duties through the 1984 recapitalization and through the sale of its ninety-seven percent interest. The panel awarded Bridas 6,793,000 dollars with interest compounded annually at twelve percent, 1,000,000 dollars in legal fees, and 400,000 dollars for the cost of the arbitration. ISEC refused to recognize and accept enforcement of the award and sought to vacate it. Bridas cross-petitioned, claiming that the United States District Court lacked subject matter jurisdiction to grant such relief under the Convention.

The United States District Court for the Southern District of New York *Held*: *Dismissed* for lack of jurisdiction. Article V(1)(e) of the

United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (Convention) provides that " 'an application for the setting aside or suspension of an award' can be made only to the courts or the 'competent authority of the country . . . *under the law of which* [the] award was made.' " *International Standard Elec. Corp.*, 745 F. Supp. at 176 (emphasis original). The court concluded that "the phrase in the Convention '[the country] under the laws of which the award was made' undoubtedly referenced the complex thicket of the *procedural* law of arbitration obtaining in the numerous and diverse jurisdictions of the dozens of nations in attendance at the time the Convention was being debated." *Id.* at 177. (emphasis original).

Thus, the court held that under the Convention, only the courts of the state in which the dispute was arbitrated had jurisdiction to vacate, set aside, or suspend the award. The court held further that article V(1)(e) of the Convention referred only to the procedural law applied by the arbitrators and not the substantive law that the parties agreed would govern their dispute.

The court cited numerous cases from foreign jurisdictions (India, Germany, the Brussels Court of Appeals, France, Spain, and South Africa) that also have concluded that a court has no jurisdiction to set aside a foreign award based on domestic law. The court held further that "the core of petitioner's argument, that a generalized supervisory interest of a state in the application of its domestic substantive law (in most arbitrations of the law of contract) in a foreign proceeding, is wholly out of step with the universal concept of arbitration in all nations." *Id.* at 178. The principle underlying the arbitration process is that the merits of the dispute are not subject to review by courts, whose main purpose is to ensure that the arbitration process employs fair procedures. Because the arbitrators in this case applied Mexico's procedural law, only Mexican courts have the power to review and possibly vacate the award. *Significance*—United States District Court rules that the suspension and set aside provision of article V(1)(e) of the United Nations Convention grants jurisdiction solely to the courts of the country under whose procedural law the arbitration award was decided.

IV. Aliens and Citizenship

Immigration and Naturalization Service Found to be Violating Aliens' Statutory and Due Process Rights by Preventing the Exercise of the Right to Apply for Asylum and Interfering with the Right to Obtain Counsel—INS Permanently Enjoined from Coercing Alien Detainees into Signing Voluntary Departure Agreements and from Interfering with the

RIGHT TO OBTAIN COUNSEL, *Orantes-Hernandez v. Thornburgh*, No. 88-6192, slip op. (9th Cir. Nov. 20, 1990).

In 1982, plaintiffs brought suit in the United States District Court for the Central District of California, alleging that Immigration and Naturalization Service (INS) officials routinely were coercing Salvadorans to "voluntarily depart" instead of exercising their right to apply for asylum under the Refugee Act of 1980. The INS failed to provide prior information about the right to seek asylum and interfered with the ability of aliens to obtain counsel. The INS also failed to provide telephone access to Salvadorans, prohibited them from obtaining or possessing any written material other than the New Testament, failed to maintain adequate law libraries at detention centers, placed them in solitary confinement without notice or a hearing, and engaged in other tactics designed to frighten them into electing to "voluntarily depart."

The district court entered a preliminary injunction that remained in effect until the decision in this case. The injunction prohibited the INS from coercing Salvadorans when informing them of "voluntary departure" and ordered the INS to provide specified oral and written notice of their rights ("*Orantes* advisal") before informing them about "voluntary departure." The injunction also required the INS to provide aliens with a list of free legal services along with the notice. The court allowed the aliens to retain copies of all of these documents.

Plaintiffs alleged that, despite the preliminary injunction issued in *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982), the INS continued to deny Salvadorans their basic rights. Namely, the INS continued to engage in a pattern of pressuring Salvadorans who initially did not select it to accept "voluntary departure." The plaintiffs, therefore, sought to make the injunction permanent. The district court issued the permanent injunction.

The United States Court of Appeals for the Ninth Circuit *Held: Affirmed.* The Ninth Circuit did not reach any constitutional or statutory interpretation issues in its analysis; instead, it relied on the "important role of the federal courts in constraining misconduct by federal agents." *Orantes-Hernandez*, slip op. at 14317. The Ninth Circuit noted that the record supported the district court's findings and the appropriateness of the permanent injunction. The court determined that during the post-preliminary injunction period the INS did not give the "*Orantes* advisal" to many class members and continued its pattern of coercing detainees to accept voluntary departure. In addition, the INS prevented many class members from contacting attorneys and receiving legal advice. *Significance*—The Ninth Circuit permanently enjoins deceptive and threatening INS practices against alien detainees, including coercion

into "voluntary departures" from the United States.

V. Aliens and Citizenship

PASSPORT IS "CONCLUSIVE EVIDENCE" OF CITIZENSHIP AND MAY NOT BE REVOKED BY SECRETARY OF STATE UNLESS PASSPORT HOLDER IS GIVEN A HEARING PRIOR TO REVOCATION—REVOCATION MAY BE HAD ONLY ON THE BASIS OF FRAUD, MISREPRESENTATION, AND OTHER EXCEPTIONAL GROUNDS—*Magnuson v. Baker*, 911 F.2d 330 (9th Cir. 1990).

Charles Myers was born in Canada in 1912. He fled to the United States in the mid-1970s after being convicted of tax evasion in Canada. In 1985, he applied for a passport, claiming that he had obtained derivative citizenship in the United States. Myers argued that he was entitled to citizenship because his father was a naturalized United States citizen. A passport examiner for the Seattle Passport Agency rejected Myers' application. On review, however, the highest ranking officer of the Seattle Passport Office concluded that Myers was a United States citizen and awarded Myers a passport.

Subsequently, the Immigration and Naturalization Service (INS) sought to revoke the passport claiming that it had been issued in error. The INS asked Myers to return the passport and threatened him with fines and imprisonment if he failed to comply.

Myers' request for a hearing was rejected by the Office of Citizenship Appeals. Myers subsequently filed suit in the United States District Court for the Eastern District of Washington, claiming that once the State Department had issued a passport, it had no authority to revoke it unilaterally. This was a case of first impression. The district court concluded that 22 U.S.C. section 2705 gives a passport "the same force and effect as certificates of naturalization or citizenship issued by the Attorney General or a court of naturalization jurisdiction [and] would be nullified if the Secretary could revoke a passport on a whim." *Magnuson*, 911 F.2d at 332. Further, the district court held that a passport holder must be allowed to challenge a revocation before it occurs.

The United States Court of Appeals for the Ninth Circuit *Held: Affirmed.* The Ninth Circuit held that, under 22 U.S.C. section 2705, the Secretary of State has the power to decide who is or is not a citizen, because passports grant "conclusive evidence of citizenship." *Magnuson*, 911 F.2d at 333. The court reasoned, therefore, that Myers' possession of a passport rendered the INS powerless to deport him. The court construed the passport statute according to its "plain meaning" because there was no significant legislative history. *Id.* at 334.

Furthermore, since section 2705 grants no express revocation power to the Secretary, the court held that the Secretary could exercise power no greater than the Attorney General in revoking other documents that provide "conclusive evidence of citizenship." The Secretary can revoke a passport only if (a) the passport holder receives an opportunity to be heard prior to revocation, and (b) the Secretary seeks revocation on the basis of fraud, misrepresentation, or some other exceptional ground. This is similar to the standards that the Attorney General and the naturalization courts use to decide whether to revoke citizenship and certificates of naturalization.

According to the court, imposing these requirements was the only way to be sure that a passport is treated in the same way as other documents that provide conclusive evidence of citizenship. *Significance*—The Ninth Circuit announces that the Secretary of State may not unilaterally revoke a passport; may seek revocation only on grounds of fraud, misrepresentation or other exceptional circumstances; and must provide a passport holder with an opportunity for a hearing prior to any revocation.