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STATUTORY CONSTRUCTION--EXTRA-TERRITORIAL APPLICATION OF FEDERAL STATUTES--APPLICATION OF FEDERAL TORT CLAIMS ACT TO CLAIMS ARISING IN FOREIGN AREAS LEASED TO THE UNITED STATES

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STATUTORY CONSTRUCTION—EXTRA-TERRITORIAL APPLICATION OF FEDERAL STATUTES—APPLICATION OF FEDERAL TORT CLAIMS ACT[1] TO CLAIMS ARISING IN FOREIGN AREAS LEASED TO THE UNITED STATES—Decedent, an airlines employee, was killed in a plane crash at Harmon Field, Newfoundland, a base leased to the United States by Great Britain for ninety-nine years.[2] The plaintiff, decedent's administratrix, brought suit in a district court against the United States, relying on the Federal Tort Claims Act as a waiver of federal immunity from suit. Judgment for the United States was reversed by the Court of Appeals.[3] On certiorari to the Supreme Court, *held*, reversed. The claim arose in a foreign country and the FTCA specifically retains federal immunity from suit on such claims.[4] *United States v. Spelar*, 338 U.S. 217, 70 S.Ct. 10 (1949).

The principal case is the latest of three recent decisions by the Supreme Court involving the question, did Congress intend to make a federal statute applicable to events occurring in areas not subject to the sovereignty of the United States?[5] The first of them, *Vermilya-Brown Co. v. Connell*,[6] involved a suit by employees for additional compensation under the Fair Labor Standards Act;[7] the services in question had been rendered on the Bermuda base leased by Great Britain to the United States for ninety-nine years.[8] The applicability of the FLSA to this employment turned on whether this base was a "possession" of the United States

[1] 62 Stat. L. 982, c. 171 (1948), 28 U.S.C., c. 20.

[2] This is one of the bases leased to the United States in exchange for 50 over-age destroyers pursuant to Executive Agreement of March 27, 1941, 55 Stat. L. 1560, 1572, 1574, 1590 (1941).

[3] (2d Cir. 1948) 171 F. (2d) 208.

[4] 62 Stat. L. 985, §2680(k) (1948), 28 U.S.C. §943(k).

[5] In all three of these cases, the Court held that Congress had legislative power to act beyond the limits of United States sovereignty with respect to the matters involved.

[6] 335 U.S. 377, 69 S.Ct. 140 (1948).

[7] 52 Stat. L. 1060-1069, c. 676 (1938), 29 U.S.C.A. §§201-219.

[8] This lease was executed pursuant to the Executive Agreement referred to in note 2, supra.

within the meaning of the FLSA.[9] Making no reference whatever to presumptive limits on the territorial application of federal statutes, the majority of the Court held that Congress, in using the term "possessions" in the FLSA, would have intended to include the leased base within that term had the matter then been considered. Thus the Court held that the term "possession" might include areas not subject to the sovereignty of the United States,[10] necessarily implying that a case by case analysis of statutes employing this term as a territorial limitation would be necessary to determine Congressional intent.[11] It is not unfair to say that the evidence relied on by the majority as demonstrating this Congressional intent was something less than conclusive,[12] the uncertainty being increased by the fact that

[9] The FLSA applies to employees engaged in commerce, ". . . among the several States or from any State to any place outside thereof," and defines state as meaning, ". . . any State of the United States or the District of Columbia or any Territory or possession of the United States." 52 Stat. L. 1060, §§3(b), 3(c) (1938), 29 U.S.C.A. §§3(b), 3(c). Although the Court's opinion is not clear on the matter, it is believed that the decision assumes that commerce between a state and a possession of the United States was involved, for otherwise, barring a possibility discussed below, it is difficult to see how the question of defining the term "possession" would have been relevant. One may fairly ask why the Court undertook to define the term possession when it could, consistently with the literal language of the statute and the evidence, have reached the conclusion that commerce between a state and a "place outside thereof," viz., the Bermuda base, was involved? While the Supreme Court's several opinions do not refer in terms to this possibility, reference to the transcript of record before the Supreme Court reveals that it was raised on pages 5 and 6 of plaintiffs' (respondents') brief, and that a rather exhaustive answer was made in the brief for the United States filed amicus curiae, pages 40 et seq. Perhaps the Supreme Court accepted the argument of the United States, which in part was as follows: (1) the phrase "from any State to any place outside thereof" was inserted by Congress to bring within the FLSA those employees who were engaged, within a state as defined in the FLSA, in commerce between such state and a foreign country; (2) hence the phrase must be considered as referring only to employees engaged in commerce within a state as defined in the FLSA; (3) hence, from this view of the case also, we must decide whether the Bermuda base was a state as defined in the FLSA, and the only possibility is that it falls within that definition because it is a possession of the United States.

[10] Vermilya-Brown Co. v. Connell, supra, note 6, at 386. By so doing, the majority was able to avoid the argument, adopted by the district court in this case, [(D.C. N.Y. 1946) 73 F. Supp. 860 at 861] that the applicability of the FLSA depended upon a political question of the existence of sovereignty, and therefore that the ruling of the executive branch of the government [39 OP. ATTY. GEN. 484 at 485 (1941)] to the effect that sovereignty over the leased areas remained in Great Britain, necessarily determined that the FLSA did not apply to the Bermuda base.

[11] In footnote 11 to his dissenting opinion, Justice Jackson listed a great number of federal statutes employing this term as a territorial limitation, Vermilya-Brown Co. v. Connell, supra, note 6, at 398.

[12] The court makes reference to more or less analogous areas held by the United States under varying degrees of control at the date of enactment of the FLSA, June 25, 1938, but fails to demonstrate Congressional intention to make the FLSA applicable to the areas referred to. Vermilya-Brown Co. v. Connell, supra, note 6, at 383-85. Next the Court makes the negative argument that administrative rulings had made the FLSA applicable to such possessions as Samoa, Guam, Puerto Rico and the Virgin Islands, which areas had economies differing greatly from that of the continental United States, thus showing that Congress need not have intended to exclude these leased bases from the FLSA because of differences in domestic economy. Vermilya-Brown Co. v. Connell, supra, note 6 at 388. Then the Court pointed out that, since the enactment of the FLSA, Congress had extended the benefits of other labor legislation to bases acquired since January 1, 1940, but no definite conclusions are attempted by the Court after making this reference.

the FLSA was enacted before these leased bases were even contemplated.[13] Apparently, the factor relied upon most heavily by the Court was the general notion that the FLSA was desirable legislation which Congress would naturally desire to apply broadly;[14] but this is indeed a hazy concept, for Congress presumably approves of all general legislation which it enacts. The second case, *Foley Bros. v. Filardo*,[15] involved another employee's suit for additional compensation, this time by a cook employed by a government contractor at a United States base in Iran, an area not subject to a leasehold in favor of the United States. The basis of suit was the so-called Eight Hour Law,[16] requiring additional compensation for work in excess of eight hours per day. Here the crucial question was whether statutory language making the statute applicable to employment under "every contract . . ."[17] let by the United States, indicated Congressional intent to extend the benefits of the statute to this Iran employment. The Court's answer was no, and the general rationale of decision offered was the proposition that, unless Congress expresses a contrary intent, it will be presumed that the statute was intended to apply only within the "territorial jurisdiction" of the United States,[18] the Court concluding that Iran was not such an area. It is suggested that this decision exhibits two noteworthy features. Initially, the Court goes beyond the literal "every contract" language of the statute to avoid applying it to this extra-sovereign area, while in the *Vermilya* case the Court labored somewhat to achieve the opposite result on the basis of language offering less literal justification than that of the *Foley* case.[19] Is it not a possibility that the Court's ardor for broad territorial application of labor legislation had cooled somewhat since the *Vermilya* case? Secondly, we find the Court in the *Foley* case resorting to a general presumption against Congressional intent to make federal statutes applicable beyond the "territorial jurisdiction" of the United States, an approach conspicuous by its absence in the *Vermilya* case. We must add a caveat to this presumption, however, namely, what does the term "territorial jurisdiction" mean? Two earlier Supreme Court decisions, one of which was considered by the Court in the *Foley* case, suggest when read together that "territorial jurisdiction" and areas subject to "sovereignty" are geographically co-extensive terms.[20] On the other hand, after

[13] The FLSA was enacted on June 25, 1938; the Executive Agreement resulting in the lease of the Bermuda base was executed on March 27, 1941.

[14] The majority opinion stresses the general purpose of the FLSA to improve labor conditions on three separate occasions. Vermilya-Brown Co. v. Connell, supra, note 6, at 387 (including footnote 13 on that page), 389 and 390 (the final sentence of the Court's opinion on page 390 stresses the remedial purpose of the FLSA).

[15] 336 U.S. 281, 69 S.Ct. 575 (1949). For a discussion of this case, see note, 47 MICH. L. REV. 1230 (1949).

[16] 27 Stat. L. 340, §1 (1892), as amended by 37 Stat. L. 137, c. 174 (1912) and 54 Stat. L. 884, §303 (1940), 40 U.S.C.A. §§321-326.

[17] 27 Stat. L. 340, §1 (1892), as amended by 37 Stat. L. 137, c. 174, 40 U.S.C.A. §324.

[18] Foley Bros. v. Filardo, supra, note 15, at 285.

[19] It is not suggested that the Court's reference to legislative history was not convincing. See the discussion in Foley Bros. v. Filardo, supra, note 15, at 287-288.

[20] The opinion in the Foley case cites Blackmer v. United States, 284 U.S. 421 at 437, 52 S.Ct. 252 (1931); the Blackmer case in turn cites American Banana Co. v. United Fruit Co., 213 U.S. 347 at 357, 29 S.Ct. 511 (1909).

stating the territorial jurisdiction presumption, the *Foley* opinion uses language negatively suggesting that areas subject to United States "territorial jurisdiction" are not necessarily subject to United States sovereignty.[21] The formal reasoning of the principal case is, in the language of Justice Frankfurter's concurring opinion, ". . . mechanical jurisprudence at its best."[22] The application of the FTCA to plaintiff's suit turned on the question of whether the Newfoundland ninety-nine year lease base was a "foreign country" within the meaning of the FTCA which excluded claims arising therein. The answer given was yes, because a foreign country was one subject to foreign sovereignty, and the *Vermilya* case had declared these leased areas to be subject to British sovereignty.[23] But perhaps the most significant feature of the principal case was the reliance of the majority opinion on the presumption stated in the *Foley* case, that Congress presumptively intended federal statutes to apply only within the territorial jurisdiction of the United States.[24] Clearly, the majority viewed the Newfoundland base as being outside of United States territorial jurisdiction, and this view is significant for two reasons. First, it further defines what the Court means by that term; at least, the presumption against application of federal statutes now extends to leased bases over which the United States does not have sovereignty. Secondly, in this respect the principal case seems directly contra to the *Vermilya* case, which totally ignored any such presumption in dealing with another of these leased areas. It is probably too early to state that the *Vermilya* case, with its broad implications of applying statutes territorially on a basis of presumed Congressional fondness for the statutory purpose, is limited to its facts. But it seems clear that the Supreme Court, in the *Foley* case and the principal case, is retreating toward a presumption that Congress did not intend to make federal statutes applicable beyond the geographic limits of United States sovereignty; indeed, it is possible that the Court has already arrived at such a position.[25]

Thomas L. Waterbury, S.Ed.

[21] "There is no language in the Eight Hour Law here in question that gives any indication of congressional purpose to extend its coverage beyond places over which the United States has sovereignty *or has some measure of legislative control.*" 336 U.S. 281 at 285, 69 S.Ct. 575 (1949). Italics supplied.

[22] Principal case at 223.

[23] Vermilya-Brown Co. v. Connell, supra, note 6, at 380.

[24] Principal case at 222. Although this language appears at the end of the majority opinion, it can fairly be read as declaring the presumption to be the actual basis of the decision in the principal case.

[25] If the Court wishes to reach this conclusion, it may resort to language used in the majority opinion in the Vermilya case, Vermilya-Brown Co. v. Connell, supra, note 6, at 381, which can be read as equating "territorial jurisdiction" and "sovereignty."