WITHIN THE TERRITORIAL JURISDICTION OF THE UNITED STATES: ANTARCTICA - A LAWLESS LAND?

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This paper focuses on two main issues of contention over the 46 year old International Antarctic Treaty: 1) the different interpretations of Article VIII of the Treaty, which requires people living on Antarctica to be held accountable by the laws of their host country, and 2) the key debate surrounding the renewal of the Antarctic Treaty between 1988 and 1991.

With the signing of the Antarctic Treaty in 1959, international leaders were seemingly able to lay the framework for the rules and laws that would govern Antarctica. Delegates from the United States, the Soviet Union, Great Britain, New Zealand, and other countries signed a document that was roughly a page and a half in size that established a framework for resolving legal disputes on the continent. And yet, over the last forty-five years the meaning of the Antarctic Treaty has become increasingly clouded and ambiguous. This paper will examine the two very different interpretations of international jurisdiction with regard to Article VIII of the Antarctic Treaty. The first highlights the interpretation of Article VIII in the Supreme Court Ruling in *Smith v. United States* in 1993. The second evaluates the contrasting opinion of the New Zealand Government after the crash of Air New Zealand flight TE 901 on Mt. Erebus, Antarctica in 1979. This paper will also highlight the fight over national sovereignty and jurisdictional influence on the continent in the debate over the renewal of the Antarctic Treaty between 1988 and 1991. The contrasting court rulings in *Smith v. United States* and of the New Zealand courts coupled with fervent international disagreement on the renewal of the Antarctic Treaty have revealed in the last forty-five years that the remote continent was not as easy to govern as was originally thought.

After two recent Supreme Court cases regarding the

Law and Society Journal at UCSB, Volume IV (2005).

enemy combatant status of Jose Padilla and the Guantonamo Bay Detainees, the issue of jurisdiction of American courts and laws beyond the borders of the United States has gained significant media attention. The issue of American jurisdiction and the status of civil suits beyond American borders also came under scrutiny in *Smith v. United States*, an obscure Supreme Court Case eleven years ago regarding a wrongful death civil suit for a death that occurred in Antarctica. *Smith* actually established legal precedent for civil suits brought against the United States Government for events that occur outside the territorial jurisdiction of the United States, and was referenced in an amicus brief in the 2004 Supreme Court Case regarding the enemy combatant status of Jose Padilla[1]. In the cases of Jose Padilla, the Guantonamo Bay detainees, and in *Smith,* the key issue was whether or not American courts and federal law had jurisdiction over events that occurred outside the territorial boundaries of the United States.

In *Smith* the Supreme Court issued its ruling without consideration of the provisions outlined in Article VIII of the Antarctic Treaty. Article VIII requires that all persons on Antarctica be governed by the laws of their host country. The *Smith* case originated when the widow of John Smith, a carpenter at the McMurdo Base, brought suit against the American government for the wrongful death of her husband. Sandra Jean Smith, the plaintiff, claimed that the United States government was liable for not informing her husband about the danger of encountering and falling into a deep crevasse. The exposure after the fall and the injuries incurred during the fall led to his death. At the time of his death Mr. Smith was working for a company that was under contract to the federal government. Under the Federal Tort Claims Act American citizens have the right to sue the government in certain instances of negligence. Although the Supreme Court ultimately affirmed for the respondents, the United States, the court didn't weigh the issue of the cause of death, or the claim that the United States had a duty to warn Mr. Smith about the crevasse, but rather addressed the issue of jurisdiction. Upon appeal from a circuit court, the Supreme Court addressed the

issue of whether or not federal laws could apply to Antarctica based upon the intent of congress at the time that the Federal laws were passed. The Supreme Court effectively ignored Article VIII of the Antarctic Treaty. Article VIII was not quoted even once by Chief Justice Rehnquist in his majority opinion in *Smith*[2].

Article VIII of the Antarctic Treaty claims that, "[persons on Antarctica] shall be subject only to the jurisdiction of the Contracting Party of which they are nationals in respect of all acts or omissions occurring while they are in Antarctica for the purpose of exercising their functions[3]." In spite of the fact that this language indicates that the laws of the host country apply to each nation's proxy, in *Smith* the court claimed that the federal laws could not have jurisdiction over Antarctica for the purpose of the wrongful death civil suit, and chose to invoke a portion of the Federal Tort Claims Act (FTCA), which exempted claims against the United States Government in other countries. When delivering the majority opinion of the court, Chief Justice Rehnquist likened Antarctica to a country, claiming, "The Court turns to Webster's New International Dictionary for a generic definition of country and finds that Antarctica falls within the definition[4]."

The key problem with the majority opinion in *Smith* is that it creates a contradiction under American law. The U.S. Antarctic Conservation Act of 1978 allows American citizens to be punished for violations of American law in Antarctica, a status that is unique to Antarctica. Due to the absence of any court system in Antarctica, the U.S. Antarctic Conservation Act of 1978 imposes the American judicial system on Americans living in Antarctica. If an American commits murder, robbery, or even petty misdemeanors while in Antarctica, prosecution ensues in an American court. While there are some limited instances in which Americans can be prosecuted for committing terrorist acts or treason against the United States while in other foreign countries, there is no other place beyond the territorial jurisdiction of the United States where Americans can be punished for

breaking any federal law. Under the Antarctic Conservation Act of 1978, Americans can be held accountable for breaking any one of hundreds of federal laws. And yet, in spite of the U.S. Antarctic Conservation Act of 1978, the Supreme Court's decision in effect claims that American laws cannot be enforced beyond the territorial jurisdiction of the United States[5].

Under chapter 28 section 2680(k) of the Federal Tort Claims Act (FTCA) passed by congress in 1942, the United States is exempt from liability in "any claim arising in a foreign country (28 USC 2680(k))." Rehnquist's opinion in effect seemed to negate the provisions of the U.S. Conservation Act of 1978 and the somewhat unique non-country status of Antarctica. The opinion set a precedent that would essentially prohibit future lawsuits being heard in American courts for issues or actions that occurred on Antarctica. Since the opinion issued in 1993, the issue of jurisdiction in Antarctica has not been brought before the Supreme Court.

In contrast to the American Courts, the New Zealand Courts did permit financial penalties to be levied against the New Zealand Government for actions that occurred on Antarctica. In 1979 a DC-10 Air New Zealand plane crashed into Mt. Erebus on Ross Island at around 1,500 ft. The plane was flying low because it was on a sightseeing trip. The crash killed all 257 passengers on board[6,7]. In a judgment written by Justice Mahon of the New Zealand High Court, Air New Zealand was found to be liable and forced to pay damages for the crash of the Air New Zealand plane.

Justice Mahon's ruling in 1981 was particularly pertinent with regard to Article VIII of the Antarctic Treaty due to the fact that at the time of the 1979 crash Air New Zealand was not a private company but was nationalized by the New Zealand Government. When Justice Mahon ordered the airline to pay $150,000 in fines, he was essentially holding the government of New Zealand liable for the crash on Mt. Erebus[8,9].

The fact that the venue for the inquiry and the punitive action taken against New Zealand Air was the New Zealand

Courts, affirms Article VIII of the Antarctic Treaty. The New Zealand government and the international community could have launched proceedings before an international court at the Hague, however, the scope of the proceedings in the New Zealand High Court occurred within the guidelines of Article VIII. After the Air New Zealand Plane crashed in 1979 there were a number of ways that the relatives of the passengers of the flight could have preceded with court proceedings. The methodology and philosophy behind the New Zealand Court inquiry ultimately repudiated the idea that Antarctica was "a country" as the Supreme Court of the United States would later claim. Typically when an international jetliner crashes in route on foreign soil, the country where the crash took place conducts an investigation and launches court proceedings. This was the case when a Pan-Am flight crashed in Scotland. The British government conducted inquiries and proceedings. In the case of Air New Zealand Flight TE 901 the collective nations residing on Antarctica did not initiate judicial proceedings, and instead, the matter was left up to the host country of the citizens involved in the crash.

In 1988 national jurisdiction and access to Antarctica again entered the headlines. As the Antarctic Treaty came up for renewal in 1991, a series of talks began on the terms of the new treaty. At the Antarctic Minerals Convention in Wellington, New Zealand, thirty-three of the thirty-seven Antarctic Treaty Members outlined the proposal for the new treaty[10]. The key issue that was in dispute was drilling in Antarctica. Under the terms proposed at the 1988 conference, the new treaty would ban all drilling for fifty years, and, at the end of the fifty-year ban would require all twenty-six voting countries of the Antarctic Treaty to approve a decision to open Antarctica to drilling[11]. In effect, this proposal for the new treaty meant that one country could veto a decision to drill in Antarctica.

While many of the countries that were geographically close to Antarctica like Australia and Chile favored the idea of requiring all twenty-six countries to approve drilling, countries in the Northern Hemisphere that were highly industrialized,

like the United States, opposed this new provision[12]. Between 1988 and 1991 a battle ensued to eliminate the requirement that all twenty-six voting countries be required to approve drilling. The Bush Sr. Administration created a proposal that would allow a voting country to withdraw from the treaty if an amendment that was proposed was not approved within three years[13]. This proposal was rejected by the international community. Ultimately, all sides reached a compromise in October of 1991 by placing a provision in the new treaty that would require only 75% of voting nations to approve drilling in Antarctica at the end of the fifty year moratorium[14].

In the final analysis, the seemingly concise language of the 1959 Antarctic Treaty was more ambiguous than it originally seemed. The seemingly bland and continuous landscape of Antarctica that is virtually void of life belies a continent that has ignited some of the most contentious international "hot spots" over the last forty-five years. If the events surrounding the wrongful death civil suit in *Smith* and the inquiry surrounding the crash of Air New Zealand Flight TE 910 are an indication of the strife that may yet come, the world will have quite a stir in 2041 when the international community will have to confront another "hot spot": drilling in Antarctica.

Endnotes

[1]United States. United States Supreme Court. Donald Rumsfeld v. Jose Padilla and Donna R. Newman Amicus Brief filed by Cato Institute. Washington D.C.: April 9, 2004

[2]United States. United States Supreme Court. Smith v. United States. Washington D.C.: March 8, 1993

[3]www.scar.org/treaty/at_text.html. Scientific Committee on Antarctic Research. Antarctic Treaty

[4]United States.

Smith v. United States.

[6]Lone Jurist's Report Accepted 20 Years After Erebus Crash. Aviation Week and Space Technology. September 13, 1999

[7]New Zealand. High Court. Air New Zealand Ltd. v. Mahon October 20, 1983

[8]Aviation Week and Space Technology. Lone Jurist's Report Accepted 20 Years After Erebus Crash.

[9]New Zealand. Air New Zealand, Ltd. V. Mahon
[10]Scott, David Clark. Treaty Opens Up World's Last Untouched Continent to Mining.The Christian Science Monitor. June 7, 1988
[11]U.S. Raises Objections to Antarctica Pact. The New York Times. June 18, 1991
[12]Scott, David Clark.
[13]The New York Times
[14]Leary, Angela. Signing a reprieve for icy continent. The Advertiser. October 4, 1991

Works Cited

Leary, Angela. Signing a reprieve for icy continent. The Advertiser. October 4, 1991

Lone Jurist's Report Accepted 20 Years After Erebus Crash. Aviation Week and Space Technology. September 13, 1999

Luyendyk, Bruce. Lecture 15. University of California at Santa Barbara.

New Zealand. High Court. Air New Zealand Ltd. v. Mahon. October 20, 1983

Scott, David Clark. Treaty Opens Up World's Last Untouched Continent to Mining. The Christian Science Monitor. June 7, 1988

United States. United States Supreme Court. Smith v. United States. Washington D.C.: March 8, 1993

United States. United States Supreme Court. Donald Rumsfeld v. Jose Padilla and Donna R. Newman Amicus Brief filed by Cato Institute. Washington D.C.: April 9, 2004

U.S. Raises Objections to Antarctica Pact. The New York Times. June 18, 1991

www.scar.org/treaty/at_text.html. Scientific Committee on Antarctic Research. Antarctic Treaty