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MARINE MAMMAL PROTECTION ACT NOT APPLICABLE IN FOREIGN WATERS

INTERNATIONAL LAW: Provisions in the Marine Mammal Protection Act prohibiting the capture of dolphins and other marine mammals by American citizens held not to apply in waters controlled by sovereign nations other than the United States. *United States v. Mitchell*, 553 F.2d 996 (5th Cir. 1977).

In the case of *United States v. Mitchell*,¹ the Fifth Circuit Court of Appeals was faced with the task of determining what geographic limitations there are, if any, in the application of the Marine Mammal Protection Act (MMPA).² Specifically the court had to determine whether the provisions of the act applied to an American citizen capturing dolphins in the territorial waters of a foreign state with the permission of that nation.

The defendant, Jerry Mitchell, was an American citizen employed by George Curtis Johnson, a citizen of the Bahamas and owner of a marine attraction called Seafloor Aquarium in Nassau, Bahamas. Johnson obtained for Mitchell from the Bahamian government a permit to capture dolphins. Mitchell received \$800 from Seafloor for each dolphin captured. It was apparently the intent of Johnson to then export the dolphins to Great Britain.

The National Marine Fisheries Service (NMFS) of the Department of Commerce became aware of the plans and cautioned Mitchell that a moratorium provision of the MMPA prevented any American citizen from capturing marine mammals, regardless of where the capture took place. Mitchell was advised to consult a lawyer as well as the Washington office of the NMFS. And he was informed that because Seafloor "is located in a foreign country," it would not be issued a United States permit to capture dolphins under §1371 of the MMPA.

Mitchell contacted an agent for the NMFS to inquire about receiving the necessary permit to capture dolphins. He was told that he would need a permit to capture dolphins but that the commission which considered and approved applications for permits had not yet been appointed.

1. 553 F.2d 996 (1977).

2. 16 U.S.C. § 1361 *et seq.* (1975 Supp.).

On consultation with his attorney, Mitchell was told that his planned operation in the Bahamas would be lawful. Because his lawyer had advised him that he was not subject to United States jurisdiction if his dolphin capturing activities took place in the Bahamian territorial waters, he proceeded with the operation.

Subsequently, Mitchell was arrested and charged with capturing, possessing and selling the dolphins. Mitchell admitted taking the dolphins and was convicted and sentenced. Appeal was then taken. Although Mitchell appealed on three grounds, the court considered only the "question of the extraterritorial scope of the statute."

The purpose of the MMPA is to prevent depletion and extinction of certain marine mammal species which now "are, or may be, in danger of extinction or depletion as a result of man's activities. . . ." ³ Section 1371 of the act establishes a moratorium which is defined in § 1362(7) as a "complete cessation of the taking of marine mammals . . . and marine mammal products, except as provided. . . ." Provision is made in the act for permits to be issued in certain circumstances for various purposes such as "public display," provided the applicant receives a favorable recommendation from the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals, both of which were established by the act. ⁴ After examining the provisions relating to the moratorium, the court found no clear reference within the act relating to the geographic extent to which the moratorium provisions were to apply.

In addition to the moratorium provisions, § 1372 provides for a series of "specific prohibitions" dealing with the capture, possession and sale of marine mammals. Unlike the moratorium provisions, the prohibitions make specific reference to their geographic scope. The prohibitions make it illegal for a "person subject to the jurisdiction of the United States" to capture, etc. a marine mammal "on the high seas or from the waters or on lands subject to the jurisdiction of the United States." The court thereby concluded that the prohibitions were not meant to apply to the capture of marine mammals in foreign waters.

The court next sought to determine whether the moratorium provisions of the MMPA were meant to have broader territorial application than the prohibitions. After examining the legislative history of the MMPA and finding no clear answer to the question, the court analyzed other aspects of the act in order to arrive at a conclusion. The opinion makes it clear that, in the court's mind, Congress does have the power to exercise jurisdiction over United States citizens in

3. *Id.* §1361.

4. *Id.* § §1401-07.

foreign nations and that citizenship alone is usually sufficient to establish this jurisdiction. Thus, the court recognized the issue not as being whether Congress has the authority to extend its jurisdiction to American citizens overseas but whether in this particular instance meant to so extend it.

Following the case of *United States v. Bowman*,⁵ the court applied two principles of statutory construction to determine the extent to which Congress intended the MMPA to apply. First, the law is examined to determine whether the nature of the offense calls for extraterritorial application. If the nature of the law does not call for such an application, then there is a presumption against such an application. In order to overcome the presumption, it must be shown that there was a clear congressional intent that the statute was to have extraterritorial application.

The court concluded that the nature of the acts prohibited by the MMPA does not compel its application in foreign waters. It was noted that the MMPA is a conservation statute and that by its nature it is based on the proposition that a sovereign has control of the natural resources within its boundaries.

Support for this analysis was found in various authorities relating to international law such as the United Nations resolution on "Permanent Sovereignty over Natural Resources."⁶ The court felt that the Congress certainly recognized the power of nations to exercise dominion over their own resources when the MMPA was enacted. Note was also taken of § 1378 of the MMPA which directs the Secretary of State to start negotiations with foreign states in order to obtain agreements to protect marine mammals. For these reasons, the court inferred that the MMPA by its nature was not meant to apply in the "territories of other sovereigns."

With respect to the second principle of statutory construction, the court stated that neither the statute on its face nor the legislative history provide a clear expression of an intent that the MMPA should be applied other than on the high seas or in waters under the control of the United States. The government argued that by definition the moratorium should be absolute—that there should be a complete ban on the taking of marine mammals. This argument was rejected by the court, relying on *Foley Brothers, Inc. v. Filardo*.⁷ There the Supreme Court decided that a United States law which prohibited workers employed by a firm engaged in United States government contract work from laboring more than eight hours a day did not apply to

5. 260 U.S. 94 (1922).

6. United Nations Resolution on "Permanent Sovereignty Over Natural Resources," G.A. Res. 1803, U.N. GAOR 1193-1194 (1962).

7. 336 U.S. 281 (1949).

Americans engaged in such work in Iraq and Iran. The fact that § 1372 of the MMPA defined the prohibitions as extending only to United States waters and the high seas allowed "the reasonable inference that Congress concluded the prohibitions should not extend extraterritorially."⁸

The court also took note of § 1373 and § 1374, which establish the permit system to allow the taking of marine mammals. Permits are to be issued only in conformance with regulations, which are to be based in large part upon scientific evidence. Because the court felt that scientific data could not be readily gathered in foreign waters, they concluded that the permit system was only meant to apply to United States waters and the high seas.

Finally, the court examined the legislative history of the Act and noted discussion of the hunting of baby harp seals off the Canadian coast. In this regard only a ban on the import of the sealskins was mentioned in the record. A prohibition on Americans participating in the hunt was not discussed, although the court felt Congress had the power to make such a prohibition. Also, the placement of the moratorium in the Act was viewed as providing marine mammals with additional protection. However, the court did not view this protection as an intention to extend the territorial jurisdiction of the Act, but only to prevent the issuance of permits except in very controlled and limited situations.

For these reasons, the court concluded that the MMPA was not intended by Congress to apply to the waters controlled by other sovereign nations, stating that:

It is no small matter when, in effect, this nation countermands a permit of another nation allowing the permittee to work in the territorial waters of the foreign country. We cannot say that the interests of the United States in preserving dolphins outweighs the interest of the Commonwealth of the Bahamas in preserving its character as a tourist attraction by the issuance of a limited number of permits for the capture of dolphins within its narrow band of territorial waters.⁹

Because the court concluded that the MMPA was only intended to apply to the takings of marine mammals in the waters of the United States and on the high seas, Mitchell's conviction for taking dolphins in Bahamian waters under a Bahamian permit was reversed.

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8. *Supra* note 1, at 1004.

9. *Id.*