

FILED

JAN 13 1987

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

By [Signature] Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 JUNG SIK LEE,)
)
 Defendant.)

No. A86-132 Cr.

RECOMMENDATION RE
MOTION TO DISMISS COUNT I

Defendant Jung Sik Lee has moved this court to dismiss Count I of the Indictment on two grounds. First, that the Indictment fails to state facts sufficient to constitute an offense against the United States since Jackie Heinricher, the victim named in Count I, is not an employee of the United States nor is her employment position within those protected under 18 U.S.C. §§ 111 and 1114. Second, the defendant contends that the court lacks jurisdiction to try this matter because the offense alleged in Count I did not occur within the criminal jurisdiction of the United States.

(31)

Count I of the Indictment charges that the defendant assaulted a female United States fisheries observer, in violation of 18 U.S.C. §§ 111 and 1114. Count I alleges:

That on or about October 22, 1986, JUNG SIK LEE, the defendant did, on board the vessel Shin Yank Ho, a Korean stern trawler, while the vessel was on the high seas and out of the jurisdiction of any particular State or district, forcibly assault, resist, oppose, impede, intimidate, or interfere with Jackie Heinricher, a United States fisheries observer acting for the Secretary of Commerce in the performance of her official duties. The District of Alaska is the federal district in which the defendant was first brought following commission of the aforesaid offense; All in violation of Title 18, United States Code, Sections 111, 1114, and 3238.

Section 111 of Title 18, U.S.C. provides that: "whoever forcibly assaults, resists, opposes, impedes, intimidates or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be [guilty of an offense against the United States]. Thus, § 111 provides for criminal liability for the offense of assault on persons designated in 18 U.S.C. § 1114. Among those designated in § 1114 is any officer or employee of the . . . Department of Commerce," Section 1114 was amended in 1978 by Public Law No. 95-616 to extend the coverage of that section to "the Department of Commerce." See 92 Stat. 3110 (November 8, 1978).

FAILURE TO CHARGE AN OFFENSE

The Affidavit of Daniel O. Stewart submitted by the government in support of its criminal complaint against Jung Sik Lee avers that Jackie Heinricher was employed while on board the vessel Shin Yang Ho as a supplementary observer by a government

contractor, Frank Orth and Associates. The defendant argues that Heinricher was not an employee of the United States for purposes of the federal statute prohibiting assaulting, resisting, or impeding certain officers or employees as codified in 18 U.S.C. § 111. In support of this argument, the defendant maintains that the United States government through the Department of Commerce retains very little actual control over the individual supplementary observers other than to decertify them pursuant to 50 C.F.R. § 611.8(j) since the observers are hired and fired by the contractor and payment for services rendered as well as other employee benefits are provided to the supplementary observers by the contractor, not the federal government. The defendant contends that the contractual relationship of the United States is with the contractor and not the observer, and that Jackie Heinricher while on board the vessel Shin Yang Ho was solely an employee of Frank Orth and Associates and not a federal employee within the application of 18 U.S.C. § 111.

The Magnuson Fishery Conservation and Management Act (MFCMA) was enacted on April 13, 1976 initially under the name of the Fishery Conservation and Management Act of 1976. This Act establishes a comprehensive federal program to manage the fisheries resources of the United States within a conservation zone extending two hundred miles from the coast of the United States. The program is based upon obtaining the best scientific information available including fishery research, administration, enforcement and management to manage the fisheries resources under the exclusive authority of the United States. See

18 U.S.C. §§ 1801(c), 1812. See also United States v. Kaiyo Maru No. 53, 503 F.Supp. 1075, 1078-1081 (D. Alaska 1980). The MFCMA authorizes the placement of U.S. observers on foreign fishing vessels permitted in the U.S. Fishery Conservation Zone. Thus, in order for foreign fishermen to receive a permit for fishing in the conservation zone, the Act provides that United States fisheries observers are to be placed on board the foreign fishing vessels. 16 U.S.C. § 1821(i). The observers verify the vessel's catch and production logs for compilation of scientific data and to ensure that the various nations operating within the Fisheries Conservation Zone stay within their catch allocations. The observers also monitor the catch and return of important prohibited species of fish.

Congress amended the MFCMA effective January 1, 1984 to provide for a supplemental observer program to ensure full coverage of the fishing activities of foreign vessels within the Fishery Conservation Zone. 16 U.S.C. § 1821(i)(6). By this Amendment, the United States was able to achieve full observer coverage on each foreign fishing vessel without requiring an increase in the size of or the appropriations for the Department of Commerce.¹

¹50 C.F.R. § 611.8(e) provides:

In the event funds are not available from Congressional appropriations of fees collected to assign an observer to a foreign vessel, the appropriate Regional or Center Director will assign a supplementary observer to that vessel.

(Footnote Continued)

According to a report by the Comptroller General of the United States, dated August 12, 1985, (Exh. "C" to Docket Entry No. 26), the Fisheries Service uses contract observers in Northwest and Alaska Regions because the agency personnel ceilings did not permit the use of federal employees. Initially, full-time federal employees were used as observers, but since there was rapid rotation of employees for these positions in the Civil Service Commission Register the list of qualified applicants was exhausted, and the Fisheries Service officials decided that observers would be obtained by contract. In Fiscal Year 1983, Frank Orth and Associates, Inc., a private natural resources consulting firm, was awarded a contract to provide observers to the Fisheries Service. In addition to the use of observers through a contract arrangement, the United States has federal employee observers who handle assigned work loads in the United States. Comptroller General's Report, supra, at 25. This report concludes that the contractual arrangement between the Fisheries Service and the private contractors has created an employer-employee relationship between the government and the contract observers. Id. at 26.

For purposes of the Motion to Dismiss, it is not disputed that the defendant Jung Sik Lee was a master of a Korean fishing vessel, the Shin Yang Ho, which was engaged in a

(Footnote Continued)

The costs of supplementary observers will be paid for by the owners and operators of foreign fishing vessels as provided for in paragraph (h) of this section.

commercial fishing operation within the Fishery Conservation Zone (FCZ) of the United States at or about the time of the alleged offense charged in Count I. Title 16 United States Code § 1821(i)(1) requires that every foreign fishing vessel operating within the FCZ have on board a "United States observer" to monitor compliance with the United States laws. United States fisheries observers are placed on board foreign fishing vessels within the FCZ to gather scientific data and to monitor compliance with the U.S. fishing regulations. Jackie Heinricher was engaged in such a function aboard the Shin Yang Ho when the alleged offense was committed by the defendant. The compliance monitoring consisted of activities such as verification of the vessel's catch data, and inspection of the fish haul and its contents for the catch, retention, and return of prohibited species. In addition to the verification of regulatory compliance by the foreign fishing vessel, Ms. Heinricher was also assigned the tasks of gathering and verifying accurate scientific fisheries data on behalf of the United States.

According to a contract between NOAA (National Oceanic and Atmospheric Administration) and Frank Orth and Associates, Inc., the latter private third party in effect acted as an administrative personnel service for the United States for 1985-86. See Exhibit "A" to Opposition to Motion to Dismiss Count I (Docket Entry No. 26). Under the cost-reimbursement contract, the private contractor serves as a recruiter of qualified individuals to act as United States fisheries observers. The United States certifies and accepts an observer candidate into

the program. The private contractor establishes health and accident insurance for the supplemental observers and pays them a salary based on the federal contract suggested rate. Id. See 50 C.F.R. § 611.8(g)(2). The United States has established a Foreign Fishing Observer Fund in the Treasury of the United States to pay salaries or wages to observers. See 16 U.S.C. § 1827(e). The ultimate funding for this arrangement and the observer's salary and benefits are borne by the foreign fishing vessels as part of the requirement of their MFCMA fishing permit. 16 U.S.C. § 1827(f)(1)(B); 50 C.F.R. §§ 611.8(e) and (g).

Engaging in any fishing activity within the FCZ without a U.S. observer aboard the foreign fishing vessel is prohibited unless the requirement has been waived by the appropriate regional director. 50 C.F.R. § 611.7(a)(8). Section 611.8(f) (1985) addresses the supplementary observer authority and duties. It states in pertinent part as follows:

(1) A supplementary observer aboard a foreign fishing vessel has the same authority and must be treated in all respects as an observer who is employed by NMFS [National Marine Fisheries Service] either directly or under contract.

(2) The duties of supplementary observers and their deployment and work schedules will be specified by the appropriate Regional or Center Director.

(3) All data collected by supplementary observers will be under the exclusive control of the Assistant Administrator.

The owners and operators of such foreign fishing vessels are charged by NMFS the costs of certifying applicants for the position of supplementary observer, equipment to perform the duties of a supplementary observer as specified by the Regional

or Center Director and costs for communications and monitoring the supplementary observer program. See 50 C.F.R. § 611.8(g)(3). Supplementary observer contractors must obtain approval from the Assistant Administrator of the NMFS.

The Code of Federal Regulations specifies the certification and training for supplementary observers. Each such observer must be a citizen or a national of the United States, possess the education or experience equivalent to that required of persons used as observers by NMFS as either federal personnel or contract employees, and satisfactorily complete a course of training approved by the appropriate Regional or Center Director as equivalent to that received by persons used as observers by the NMFS. The observers must agree in writing to abide by the standards of conduct as set forth in the Department of Commerce Administrative Order 202-735. See 50 C.F.R. § 611.8(i)(2)(ii).

The Department of Commerce is responsible for final acceptance of the observer personnel, establishing observer vessel schedules, assigning tasks to observers and regulating their work activities, arranging for observers' embarkation and disembarkation from vessels, supplying them with sampling equipment, maintaining communications with them at sea, debriefing observers upon return from sea assignments, editing and analyzing observer data, evaluating the performance of observers and responding to their reports of violations. See 50 C.F.R. § 611.8. The presence of supplementary observers on foreign fishing vessels is essential to the United States program

to ensure compliance with U.S. fishing regulations according to the Affidavit of David C. Flannagan, Deputy Special Agent in Charge of the Law Enforcement Division, Alaska Region, National Marine Fisheries Service, dated December 18, 1986, ¶ 9.

In United States v. Feola, 420 U.S. 671 (1975), the Supreme Court had occasion to discuss the purposes of § 111. The Court found the purposes to include protection of both federal officers and federal functions and that of ensuring a federal forum for trial of offense involving federal officials. Id. at 677. In recounting the history of the statute, the Supreme Court stated that § 111 has its origin in § 2 of the Act of May 18, 1934, c 299, 48 Stat. 781. The Statute as originally promulgated would have prohibited an attack on "any civil official, inspector, agent or other officer or employee of the United States." Id. at 681-82, citing H.R. Rep. No. 1455, 73rd Cong., 2d Sess. 1 (1934). Congress intended § 111 to ensure a federal forum for the trial of offenses involving federal officers. Id. at 683-84.

Reported cases provide only a general framework for considering what is meant by "officer or employee." For example, Officers of Border Patrol performing duties relating to immigration were held to be "immigration officers" within § 1114 of Title 18 U.S.C. in Bennett v. United States, 285 F.2d 567 (5th Cir. 1960), cert. denied, 366 U.S. 911. In Pipes v. United States, 399 F.2d 471 (5th Cir. 1968), reh'g denied, 402 F.2d 271, cert. denied, 394 U.S. 934, a supervisor of laundry who was employed by the Bureau of Prisons was determined to be within the

persons covered by § 111 protecting "officers and employees of the United States." The victim assaulted need not be a federal employee with official federal duties where that person assists revenue agents in the performance of their official duties. United States v. Chunn, 347 F.2d 717 (4th Cir. 1965) (state employee on loan to Internal Revenue Service) where Act protects an "employee or agent of the [IRS] or any person in the service of the internal revenue." See also United States v. Heliczer, supra, (city detective acting in cooperation with federal officers); Armstrong v. United States, 306 F.2d 520 (10th Cir. 1962) (soil scientist employed by Indian Field Service engaged in performance of official duties arising out of lawfully authorized functions of Commissioner of Indian Affairs). Compare United States v. Tijerina, 407 F.2d 349 (10th Cir. 1969), cert. denied, 396 U.S. 843, 867 (Secretary of Agriculture designating officers and employees of Forest Service). The particular act upon which the federal agent is engaged need not be specifically enumerated in an act of Congress if the alleged official act is governed by a lawful requirement of the Department under whose authority the officer is acting and the particular act is responsive to a particular requirement of federal authority rather than under a general policy of mutual cooperation with the federal government. Whipp v. United States, 47 F.2d 496 (6th Cir. 1931).

The United States relies upon United States v. Schaffer, 664 F.2d 824 (11th Cir. 1981), wherein the court found that an employee of a privately owned security service which was under contract to the United States Marshals Service was

protected by 18 U.S.C. §§ 111 and 1114. The Schaffer Court rejected the contention that such a designation was limited to persons directly employed by the United States. That case is not directly on point because § 1114 specifically designates "any United States Marshal or Deputy Marshal or person employed to assist such Marshal or Deputy Marshal" (emphasis added) in the execution of his duties. No similar language appears in § 1114 with respect to assisting officers or employees of the Department of Commerce.

The Supreme Court of the United States has declared as a fundamental canon of statutory construction that unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. Perin v. United States, 444 U.S. 37 (1979). The defendant has referred to the Restatement (Second) of Law, Agency, § 220 (1958), which provides a common definition of the term "employee" as follows: ". . . a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." The government argues that the definition of employment is even broader than the common-law master-servant relationship. The United States has cited Brandeis v. United States, 783 F.2d 895 (9th Cir. 1986), wherein the court considered the definition of the term "employee" in determining whether the claimant was an "employee of the government" for purposes of the Federal Tort Claims Act. The Ninth Circuit defined the common usage of the term "employee" as "one employed

by another, usually in a position below the executive level and usually for wages." Id. at 897, citing Webster's Third New International Dictionary, 743 (1976).

In my opinion, elements of control and benefit conferred are relevant to a determination of whether Heinricher was an officer or employee of the United States for purposes of coverage under 18 U.S.C. § 1114. Using the common meaning of the term "employee," I find that Jackie Heinricher was hired as a qualified biologist to provide services to the United States as qualified U.S. Observer for the mutual benefit of the United States and the contractor. However, the United States is the sole beneficiary of the fruits of the supplementary observer's labors, and it exercises control over her day-to-day operations.

The compliance manual for observers is published by the National Marine Fisheries. Frank Orth & Associates, Inc., was awarded a contract by NOAA to provide the Northwest and Alaska Fisheries Center (NWAFC) with qualified biologists to serve as observers aboard foreign fishing vessels operating within the U.S. 200-mile Fishery Conservation Zone for the purpose of monitoring foreign and joint-venture fisheries. The contract specifically states that: "[w]hile employed as observers, the individuals are representatives of the U.S. government aboard the foreign vessels. Accordingly, supplemental observers and their respective employer are subject to the same rules and regulations pertaining to conduct and the treatment of confidential data while under contract as are federal employees. All data and information collected by observers become the exclusive property

of the U.S. government." The government has furnished a copy of a letter sent to the Tax Office Manager for the Employment Security Department, State of Washington, dated May 29, 1985, from Robert L. Ahlstedt, Contracting Officer for NOAA, for the above contract who states that the observers are considered employees of the United States since such observers are predominantly under the control of NOAA and the data produced by them is likewise for the exclusive benefit of NOAA and not the private contractor.

I find highly relevant the Supreme Court's determination that a purpose of § 111 is to protect federal functions and to ensure a federal forum for trial of offenses involving federal officials. Heinricher was assigned the task of performing inspections and information gathering duties relating to monitoring compliance with federal laws. For purposes of a motion to dismiss, this court must assume that the government will be able to present sufficient facts to support a finding that Heinricher was engaged in the performance of investigative, inspection or law enforcement functions assigned to her on behalf of the Secretary of Commerce during the time the alleged offense occurred.

Congress has protected the integrity of the Fisheries observer program by designating observers as U.S. representatives and by providing authority for the Secretary of Commerce to certify and regulate the observers' activities. The Secretary's promulgation of regulations setting up a supplemental observer program to implement fully the congressional mandate in the MFCMA

in light of the fiscal constraints on the hiring of federal personnel was a reasonable response to the legislative intent to use federally controlled U.S. citizens to manage the National Fisheries resources. Considering the legislative purpose of the MFCMA, the United States did not intend to permit punishment of those who assault observers during the performance of their duties to depend upon the manner in which the observers were hired.²

I find that the supplemental observers are employees of the Department of Commerce within the context of 18 U.S.C. § 1114 even though their recruitment may be through a separate contractor. In enacting § 1114 "Congress was clearly concerned with the safety of federal officers as it was tied to the efficacy of law enforcement activities." Compare Feola, at 681. Observers and supplemental observers are involved in the pursuit of law enforcement since their observations and collected data form the basis for criminal and civil proceedings against the foreign fishing vessel owners and operators who fail to comply

²Section 3(b) of Public Law No. 95-616 provides that the Secretary of Interior and the Secretary of Commerce may each utilize by agreement the personnel, services and facilities of any other federal or state agency to the extent it is deemed necessary and appropriate for effective enforcement of any federal or state laws under the respective jurisdictions which are administered or managed for fish and wildlife purposes and for enforcement of any laws administered by that Secretary relating to fish and wildlife. Persons so designated by either Secretary who are not employees of another federal agency "shall be considered to be officers or employees of the Department of the Interior or the Department of Commerce, as the case may be, within the meaning of sections 111 and 1114 of Title 18, United States Code.

with the MFCMA. The inclusion of supplemental observers as employees of the Department of Commerce satisfies the jurisdictional requirement by the existence of facts tying the proscribed conduct to the area of federal concern delineated by the assault statute. Compare Feola at 695. Accordingly, Count I of the Indictment is not subject to dismissal for failure to charge an offense.

EXTRATERRITORIAL APPLICATION OF 18 U.S.C. § 111

The United States acknowledges that the alleged offense occurred outside the special maritime jurisdiction of the United States. The United States is not asserting that jurisdiction over the criminal offense exists merely because the crime is alleged to have occurred within the 200-mile Fisheries Conservation Zone/Exclusive Economic Zone of the United States. Congress has not explicitly stated that §§ 111 and 1114 are to be applied extraterritorially.

The Supreme Court has recognized that Congress need not have specified in criminal statutes the locus to include the high seas and foreign countries, rather permitting such to be inferred from the nature of the offense. United States v. Bowman, 260 U.S. 94, 97-98 (1922). This applies where the purpose and nature of the statute appears to so warrant. Thus, courts infer that Congress meant to reach those extra-territorial acts which are proscribed by statute where the prohibitive conduct protects the interests of the United States. United States v. Layton, supra, at 218, citing Bowman, supra, at 98, and Skiriotes v. Florida, 313 U.S. 69, 73-74 (1941). Section 3238 of Title 18, U.S.C.

provides in pertinent part that [t]he trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district shall be in the district in which the offender . . . is arrested or is first brought"

The power of Congress to attach extraterritorial effect to its penal statutes has been recognized by courts of the United States. Blackmar v. United States, 284 U.S. 421, 437 (1932); United States v. King, 552 F.2d 833, 850-51 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977). Clearly, Congress has the constitutional power to assert such jurisdiction, particularly where that jurisdiction is based on the protection of the interests and integrity of the United States or the jurisdiction is based on the nationality of the victim. See discussion in United States v. Layton, 509 F.Supp. 212 (N.D. Cal. 1981).

Under the law of this circuit, extraterritorial application of penal laws may be justified where jurisdiction is based on the nationality or national character of the victim or where the national interest is injured. Chua Han Mow v. United States, 730 F.2d 1308 (9th Cir. 1984), cert. denied, 105 S.Ct. 1403 (1985); United States v. King, 552 F.2d 833, 850 (9th Cir. 1976), cert. denied, 430 U.S. 966. Applying United States v. Bowman, 260 U.S. 94 (1922), the courts have held extraterritorial application of federal penal laws appropriate in order to protect the United States against obstruction of justice. See, e.g., United States v. Layton, 509 F.Supp. 212 (N.D. Cal. 1981) (applying extraterritorially 18 U.S.C. § 351 which prohibits

murder of a member of Congress). See also United States v. Benitez, 741 F.2d 1312 (11th Cir. 1984), cert. denied, 105 S.Ct. 2679 (1985) (foreign defendant charged with assault and attempted murder of DEA special agent in Columbia, South America).

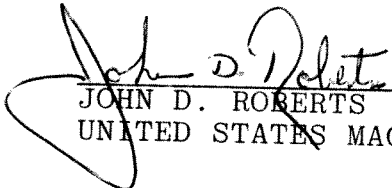
An assault upon a National Marine Fisheries observer certainly has a potentially adverse effect upon the Congressionally declared interests of the United States in the FCZ and the integrity of this Country in the enforcement of its laws. To limit the application of the assault statute to violations within the territorial limits would greatly curtail the scope and usefulness of the Observer Program as enacted by the Congress and leave vulnerable U.S. citizens who are representing the United States aboard foreign fishing vessels on the high seas. Jackie Heinricher is a citizen of the United States.

In the instant case, the Shin Yang Ho was fishing within the FCZ under permit from the United States whereby it agreed to abide by the applicable federal law implementing the observer program. It is reasonable to infer that the United States intends to protect its certified supplemental observers as well as its observers while outside the territorial limits of the United States performing the tasks for which they were hired. The exercise of extraterritorial jurisdiction in the instant case is consistent with international law. Chau Han Mow, supra, at 1311.

For the foregoing reasons, I RECOMMEND:

That the defendant's Motion to Dismiss Count I of the Indictment be DENIED.


DATED this 13th day of January, 1987 at Anchorage, Alaska.



JOHN D. ROBERTS
UNITED STATES MAGISTRATE

Pursuant to Magistrate Rule 12(C), a party seeking to object to this proposed finding or recommendation shall, within 3 days after the date of service of a copy of the recommendation, file written objections with the Clerk of the U.S. District Court or else the right to further appeal may be waived. Responses to the objections shall be filed within 2 days after receipt of the objections. The parties shall otherwise comply with the provisions of Magistrate Rule 12(C).

cc: U.S. Attorney (Joseph W. Bottini, AUSA)
Dan E. Dennis (DENNIS, KIBBY & MOSS)
Judge Holland

 cnsl called G.P.