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Lawyers Seeing Red Over Lobster Case

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A dispute that began with a shipment of Honduran lobsters into Alabama has turned into an international incident that is now before the Supreme Court, complete with high-powered law firm and interest group participation.

At its Feb. 20 private conference, the Court will consider whether to add *McNab v. United States*, No. 03-622, and *Blandford v. United States*, No. 03-627, to its docket. The cases raise delicate issues of federal court interpretation of foreign law at a time when the Supreme Court itself is taking a fresh look at the importance of international law in its own jurisprudence.

Honduran citizen David McNab, a lobster fleet owner, and Robert Blandford and two other American seafood importers were arrested in Alabama in 1999 for importing 70,000 pounds of Caribbean spiny lobsters, a few of which were undersized and all of which were in plastic bags — in violation of a Honduran regulation that required shipment in cardboard boxes.

The four were indicted in federal court in Alabama for violations stemming from the Lacey Act, which prohibits the import of fish or wildlife taken or sold in violation of U.S. or "any foreign law." The fact that the shipment violated Honduran regulations was the predicate for a range of criminal charges, including money laundering. McNab, Blandford, and a third defendant were convicted and sentenced to eight years in prison. The fourth was sentenced to two years.

Meanwhile, as part of their legal battle, the importers successfully challenged the validity of the regulations in Honduras.

On appeal in the U.S. courts, the lobstermen claimed that the change in Honduran law dictated reversal of their U.S. convictions. The government of Honduras filed a brief in the appeal, asserting that the laws had no force at the time of the arrest, but the U.S. Court of Appeals for the 11th Circuit affirmed the convictions by a 2-1 vote.

The 11th Circuit acknowledged that a nation's own officials are "among the most logical sources" for interpreting that nation's laws. But the court concluded that, when a foreign government changes its position about those laws, the United States is not bound by the new interpretation. Heeding the new interpretation, the 11th Circuit majority stated, would lead to the "endless task of redetermining foreign law."

The 11th Circuit also suggested that future defendants with "means and connections" in a foreign country could lobby that country's officials to invalidate their laws as a way of undermining U.S. prosecutions. Circuit Judge Charles Wilson wrote the opinion,

joined by Judge Frank Hull.

In dissent, Senior Judge Peter Fay said the current Honduran interpretation should prevail, adding that the process of legal change criticized by the majority "occurs routinely in our country."

Former D.C. Circuit nominee Miguel Estrada, a Honduran native who is a D.C. partner at Gibson, Dunn & Crutcher, represents McNab in his appeal to the Supreme Court. "The 11th Circuit is alone among the courts of appeals in refusing to accord deference to the construction of foreign law adopted by the authorized representatives of the foreign states," Estrada tells the Court.

Former Solicitor General Seth Waxman, now a D.C. partner at Wilmer, Cutler & Pickering, filed a brief in the case for the Honduran government. "Mr. McNab's actions did not violate any valid or enforceable law in Honduras," Waxman says in the brief, also noting that Honduras "desires to protect its citizens from misapplication of Honduran law."

The lengthy prison term for seemingly minor trade violations, as well as the appeals court's decision to not follow Honduran legal authority, has given the case high visibility in Honduras. And it has been framed in the United States as an international criminal law equivalent of the McDonald's too-hot coffee cup — an example of laws and punishment run amok.

"It's a classic case of over-criminalization — honest people being sent to prison for eight years for using plastic instead of cardboard," says Paul Kamenar, senior counsel at the Washington Legal Foundation, which filed the petition on behalf of Blandford.

An unusual coalition of groups — including the National Association of Criminal Defense Lawyers and the National Association of Manufacturers — also filed a brief, bemoaning the increasing use of criminal law to enforce economic regulations when no criminal intent is shown.

In a brief by Paul Rosenzweig, a lawyer at the Heritage Foundation, the groups tell the Supreme Court that the elimination of criminal intent requirements "allows the government to engage in grotesque over-charging such as that demonstrated here — pyramiding trivial civil infractions of uncertain (and now disavowed) foreign law into smuggling and money laundering offenses that carry astronomical and unjust domestic criminal penalties."

The Justice Department defends the conviction before the high court.

"If the laws were valid in Honduras during the time period covered by the indictment, the defendants violated the Lacey Act," the government's brief states. "Whatever changes in the laws occurred after the lobsters were imported into the United States illegally have no effect on the defendants' convictions."

Deputy Solicitor General Paul Clement signed the brief, which notes that Solicitor General Theodore Olson is recused in the McNab case. Before becoming solicitor general in 2001, Olson was a partner at Gibson, Dunn, the firm that represents McNab.