

Marcos Litigation

What were Judge Fong's rulings?

1. He assumed 9th Circuit would follow Filartiga.
2. Head of State Immunity? He rules clearly on 86 that Marcos was not the current head of state, following the executive branch's decision to recognize the Aquino government. Was a contrary decision possible?
3. Former Head of State Immunity? [Compare to the decision in In re Doe v. United States (2d Cir. 1988) ~~527~~, where the court ruled that respectable authority existed to reject the claim, but that in any event it had been waived by the Philippine government.] Fong rules that the judicial branch does not have the power independently to accord an immunity to a former head of state, although it would follow the lead of the executive branch if it were to make such a determination. ~~87-88~~. Good approach?
4. Act of State Doctrine? Yes, it bars the suit, because the plaintiffs' theory would require the court to examine the claim that Marcos "instructed his agents to engage in murder, torture, arbitrary arrest and detention in violation of the tenets of the law of nations." And he thinks this is inappropriate because "It is beyond that capacity of function of the federal courts to subject the official acts or policies of the head of a foreign state to traditional standards of judicial review." Good approach? Consistent with Kirkpatrick?

Note the issues Judge Fong reserved?

1. Forum non conveniens [discuss-compare to Saumell].
2. Personal jurisdiction.
3. Statute of limitations. 91.

What did the Ninth Circuit do? [note long delay--argued June 1987; decided July 10, 1989--mention property dispute.]

Found the Act of State Doctrine to be inapplicable because the claim was against a "deposed ruler," and neither the "present government of the Republic of the Philippines nor the United States government objects to judicial resolution of these claims, or sees any resulting potential embarrassment to any government." ~~97~~

Note that it reserves judgment on the "difficult question of jurisdiction under 28 U.S.C. sec. 1350..."

Should there be an international law exception?