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## Case Digest

Law Review Staff

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# CASE DIGEST

This CASE DIGEST provides brief analyses of cases that address current transnational legal issues. The Digest includes cases that set forth new legal principles and cases that apply established legal principles to new factual situations. The cases are grouped in topical categories and references are given for further research.

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### I. ADMIRALTY/SEARCH AND SEIZURE

MARITIME DRUG LAW ENFORCEMENT ACT IS APPLICABLE TO ALIENS ON FOREIGN VESSELS OUTSIDE THE TERRITORY OF THE UNITED STATES—FOURTH AMENDMENT HELD INAPPLICABLE TO SEARCHES AND SEIZURES ON THE HIGH SEAS, *United States v. Davis*, 905 F.2d 245 (9th Cir. 1990).

In 1987, a Coast Guard cutter spotted the defendant's sailing vessel approximately thirty-five miles southwest of Point Reyes, California. The defendant's vessel, the *Myth of Ecurie*, was approximately fifty-eight feet in length and was heading towards San Francisco. The Coast Guard cutter's crew suspected that the *Myth* was transporting contraband because its name appeared on a list of vessels suspected of drug smuggling. Furthermore, the *Myth* appeared to be carrying cargo and was sailing in an area where sailing vessels seldom travel.

The Coast Guard requested permission to board the *Myth*. The defendant, however, denied the request and stated that the Coast Guard lacked authority to board his vessel because it was of British registry and was on the high seas. The Coast Guard requested and obtained permission from Britain to board the vessel in accordance with a 1981 agree-

ment between the United States and Britain. The boarding officer went below deck and discovered over 7,000 pounds of marijuana.

Defendant Davis, who was not a United States citizen, was arrested and the United States District Court for the Northern District of California found him guilty of violating the Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 1903(a), (j) (Supp. V 1988). Davis appealed, and the Ninth Circuit Court of Appeals addressed the following questions: "1) whether Congress has constitutional authority to give extraterritorial effect to the Maritime Drug Law Enforcement Act; [and] if so, 2) whether the Constitution prohibits the United States from punishing Davis' conduct in this instance; and, if not, 3) does the Maritime Drug Law Enforcement Act apply to Davis' conduct?" *Davis*, 905 F.2d at 247-48.

The Ninth Circuit *Held: Affirmed*. The court held that Congress has constitutional authority to grant extraterritorial effect to the Maritime Drug Law Enforcement Act under the United States Constitution, article I, section 8, clause 10, which grants Congress the power to define and punish maritime felonies. The court noted that there are two restrictions on this legislative power: 1) Congress must clearly express its intent that a statute has an extraterritorial effect; and 2) the application of the statute must not violate the due process clause of the fifth amendment. The due process clause requires a nexus between the defendant and the United States such that the application of the statute to the defendant would be neither unfair nor arbitrary. The court noted that when a criminal defendant's actions are aimed at causing criminal acts to occur within the United States, sufficient basis exists for the United States to exercise its jurisdiction. The court concluded that the defendant's smuggling attempt clearly fell within this standard.

Defendant Davis maintained that his vessel was not within United States customs waters and that the Maritime Drug Law Enforcement Act did not apply to its actions. The court, however, pursuant to 19 U.S.C. § 1401(j) (1982), noted that a foreign vessel is within "customs waters" when the United States is enabled by a treaty or other arrangement with the foreign sovereign to board, search, and seize the vessel, even if the seizure occurs on the "high seas." Verbal consent by a vessel's flag state is enough to bring the vessel within "customs waters." Hence, the court concluded that the 1981 agreement between Britain and the United States and the verbal consent given by the British government brought the vessel within "customs waters." The Coast Guard's search and seizure was conducted pursuant to the agreement.

In addition, the court held that the search and seizure of the vessel did not violate the fourth amendment. The Ninth Circuit cited the recent

Supreme Court case of *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, *reh'g denied*, 110 S. Ct. 1839 (1990), which held that the fourth amendment does not apply to searches and seizures of nonresident aliens in foreign countries, for the proposition that the fourth amendment provides no protection for noncitizens on the high seas. *Significance*—The Ninth Circuit holds that Congress has constitutional authority to grant extraterritorial effect to the Maritime Drug Law Enforcement Act and that the fourth amendment does not apply to searches of noncitizens on the high seas.

## II. ALIENS AND CITIZENSHIP

EXECUTIVE ORDER AUTHORIZING NATURALIZATION FOR ALIENS SERVING IN DESIGNATED GEOGRAPHICAL AREAS DURING GRENADA CAMPAIGN STRUCK DOWN—PRESIDENT REAGAN HELD TO HAVE EXCEEDED HIS AUTHORITY—SEVERABILITY OF ORDER IMPOSSIBLE AS PRESIDENT DID NOT INTEND THAT ALL ALIENS SERVING IN UNITED STATES FORCES AT TIME OF CAMPAIGN BECOME CITIZENS—*Reyes v. United States Dep't of Immigration & Naturalization*, No. 89-55403 (9th Cir. 1990).

Arthur Reyes was born in the Philippines in 1958 and has served in the United States Navy from 1981 until the present. He sought to become a naturalized citizen of the United States, but his request was denied. Reyes subsequently sought naturalization pursuant to § 329 of the Immigration and Naturalization Act, 8 U.S.C. § 1440(a) (1988) (Immigration Act) because he was in the military at the time of the Grenada campaign.

The Immigration Act grants citizenship to alien members of the armed forces who served honorably through periods of military hostilities, but applies only through executive order. After the Grenada campaign, President Reagan ordered that those aliens who actively served in the campaign be granted citizenship under the Immigration Act. Reyes had not served actively in Grenada and requested that the geographical limitation be struck from Reagan's order. Reyes maintained that Reagan's executive power did not allow him to limit his order to those who served in a particular geographic region.

The United States District Court for the Southern District of California agreed, but struck down the President's entire order rather than striking only the geographic limitation. The Ninth Circuit *Held: Affirmed*. The court concluded that the Immigration Act does not allow the President to limit an order granting citizenship to specific geographic regions. By the same token, the court reasoned that it was extremely

unlikely that the President would have signed the order without the geographic limitation. The court added that the legislative records of the Immigration Act indicated that the President may apply the citizenship provision of the Act only by designating the time periods to which it applied (*e.g.*, between September 1, 1939 through December 31, 1946 for World War II veterans). The court noted that the Immigration Act had never been applied to a conflict that was shorter than five years. Hence, the court found that the President could invoke the Immigration Act's citizenship provision only by specifying time periods within a prolonged conflict. *Significance*—The Ninth Circuit limits the President's power to grant citizenship under the Immigration Act to aliens serving in the United States military to occasions of prolonged conflict, and then only when the President specifies time periods within the conflict.

### III. CONSTITUTIONAL LAW

PROVISION OF NORTHERN MARIANAS ISLANDS CONSTITUTION THAT RESTRICTS LAND OWNERSHIP TO PERSONS OF NORTHERN MARIANAS DESCENT HELD CONSTITUTIONAL UNDER UNITED STATES CONSTITUTION IN EQUAL PROTECTION CHALLENGE, *Wabol v. Villacrusis*, 908 F.2d 411 (9th Cir. 1990).

The Northern Marianas Islands (NMI), located in the Micronesian area of the South Pacific, have been part of a United States Trust Territory since the end of World War II. *See Willens & Seimer, The Constitution of the Northern Marianas Islands: Constitutional Principles and Innovation in a Pacific Setting*, 65 Geo. L.J. 1373 (1977) (lawyers who helped draft the NMI Constitution describing the NMI land situation and the need for the restriction in land alienation). President Carter approved the NMI Constitution in 1972, pursuant to the Trust Territory covenant between NMI and the United States.

Article XII of the NMI Constitution, which was reprinted as amended in the notes following 48 U.S.C. § 168 (1982), provides that the sale of a freehold or leasehold interest exceeding forty years, including renewal rights, to an individual not of NMI descent is void *ab initio*. Plaintiffs, who were of NMI descent, brought an action in the NMI Commonwealth Trial Court to void a lease agreement for a fifty year term (including an option to renew) with defendants, who were not of NMI descent. The defendants argued that the NMI Constitution's land ownership restriction violated the equal protection clause of the United States Constitution.

The United States District Court for the NMI upheld the NMI Constitution's land restriction, but redrew the lease on equitable grounds.

The Appellate Division of the District Court reversed the equity ruling and affirmed the NMI land restriction. The Ninth Circuit Court of Appeals, after addressing jurisdictional issues, *Held: Affirmed and remanded*. The court concluded that the equal protection clause of the United States Constitution did not apply to the NMI land restriction and that the lease could not be reformed under the NMI constitution. The court addressed the issue of "whether Congress could, under the territories clause, properly exclude the particular provision of the United States Constitution from operation in the Commonwealth. Put another way, did Congress exceed its powers under Article IV, Section 3 by insulating [the NMI Constitution] from the reach of the equal protection clause?" *Wabot*, 908 F.2d at 421. The court noted that it is well-established that the entire United States Constitution applies to a United States Territory only if the Territory is incorporated (intended for statehood from the beginning); otherwise, only fundamental constitutional rights apply. The court cited *Northern Marinas Islands v. Atalig*, 723 F.2d 682 (9th Cir.), *cert. denied*, 467 U.S. 1244 (1984) (holding that the sixth amendment right to jury trial does not apply in the *Atalig* as the controlling precedent) and noted that the NMI clearly were not intended for statehood from the beginning and that their status was unclear.

The court stated that land was scarce in the NMI and that the land preserved NMI's cultural and political stability. The court concluded, therefore, that the land ownership restriction was necessary to prevent the NMI people from selling their land heritage for short-term economic gain. The court added that the political union of the United States and the NMI would not have taken place without the land ownership restriction. The court proclaimed that "[t]he Bill of Rights was not intended to interfere with the international obligations of the United States . . . [or] operate as a genocide pact for diverse native cultures" and held that the right to freely acquire land under the equal protection clause did not apply in the NMI. *Significance*—The Ninth Circuit refused to extend fourteenth amendment equal protection to noncitizens in a United States Trust Territory.

#### IV. INTERNATIONAL TORT LIABILITY

REPUBLIC OF CHINA HELD LIABLE FOR WRONGFUL DEATH UNDER ENTERPRISE THEORY OF RESPONDEAT SUPERIOR WHEN DIRECTOR OF DEFENSE INTELLIGENCE BUREAU ORDERED GANG LEADER TO MURDER HISTORIAN AND GOVERNMENTAL CRITIC, *Liu v. Republic of*

*China*, 892 F.2d 1419 (9th Cir. 1989).

The Director of the Defense Intelligence Agency of the Republic of China (Taiwan) was found guilty in a Taiwan court of paying gang members US\$20,000 to murder a Taiwanese man in the United States. The court found that the director was motivated partly by nationalism and partly by personal reasons in ordering the murder. The decedent's widow sued for wrongful death in the United States District Court for the Northern District of California, but her claim was denied under the Act of State Doctrine, and she appealed her case to the Ninth Circuit.

The Ninth Circuit *Held: Reversed and remanded*. The court stated that the Foreign Sovereign Immunities Act (FSIA) holds foreign sovereigns liable for torts committed by its officials in the course of their official duties. The court explained that the tortfeasor must have committed an act that would result in liability under the principle of respondeat superior for the foreign sovereign to incur liability. The court noted that the state law determines whether the official's action is within the scope of respondeat superior, and held that the law of California would apply since the murder occurred in California. The court articulated the California theory for respondeat superior as the "enterprise theory," under which the employer's liability extends to "risks inherent in or created by the enterprise" under a two-pronged test. *Liu*, 892 F.2d at 1427. An employer is liable if: "1) the act was required or incident to the employee's duties or 2) the act was reasonably foreseeable to the employer." *Id.* (emphasis original). If an employee acts for purely personal reasons, the employer is not liable. The court concluded that finding that the director was motivated partly by nationalism was enough to hold the Republic of China liable for the director's act under California's respondent superior theory.

The court also considered the discretionary function exception to the FSIA and found that because the Republic of China has a law prohibiting murder, the court was unable to exercise discretion in this area. The court added that the Act of State Doctrine did not bar liability because the act occurred within the United States borders and could "hardly affront the sovereignty of a foreign nation." *Id.* at 1433. *Significance*—The Ninth Circuit denied immunity under the Foreign Sovereign Immunities Act to a foreign official committing a tort in the United States.