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## Case Digest

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# CASE DIGEST

This CASE DIGEST provides brief analyses of cases that represent current aspects of transnational law. The Digest includes cases that establish 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. FIRST AMENDMENT

McCARRAN-WALTER ACT PROVISIONS ALLOWING FOR THE DEPORTATION OF ALIENS WHO ADVOCATE WORLD COMMUNISM VIOLATE THE FIRST AMENDMENT, *American-Arab Anti-Discrimination Committee v. Meese*, 1989 U.S. Dist. LEXIS 1327 (C.D. Cal. Jan. 26, 1989)

The Immigration and Naturalization Service (INS) commenced deportation proceedings against eight aliens in 1987 under the McCarran-Walter Act, sections 241(a)(6)(D), (F)(iii), (G)(v), and (H). The Government claimed the plaintiffs should be deported because of their membership in or affiliation with the Popular Front for the Liberation of Palestine (PFLP), an organization that advocates the economic, international and governmental doctrines of world communism. The INS later abandoned the proceeding on these charges. The Government subsequently brought McCarran-Walter Act charges against two of the plaintiffs in the United States District Court for the Central District of California, however, and the remaining six were charged with non-ideological immigration violations under 8 U.S.C. §§ 1251(a)(2) and 1251(a)(9) (1983). The plaintiffs challenged both the deportation proceedings and the constitutionality of the McCarran-Walter Act provisions. The district court found the matter nonjusticiable because (1) two

of the plaintiffs had not exhausted their administrative remedies with the INS, and (2) a direct review of the statute was available through mandamus to the Court of Appeals for the Ninth Circuit. In 1988, the court of appeals affirmed the decision and refused to review the statute until all administrative remedies were exhausted.

In 1989, the United States District Court for the Central District of California granted standing to six of the aliens and to the Arab-American Anti-Discrimination Committee to challenge the McCarran-Walter Act provisions. The court held the provisions overbroad and thus violative of the first amendment. In reaching its decision, the court found that aliens within the United States are protected by the first amendment which is not restricted by the United States plenary immigration power. The court reasoned that lowering the degree of first amendment protection for aliens in the deportation setting would seriously curtail the overall first amendment rights of aliens. The court reviewed the McCarran-Walter Act provisions under the standard of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which limits prohibitions on free speech only in instances that incite imminent lawless action. In applying this standard, the McCarran-Walter Act provisions were found to proscribe activity protected by the first amendment. The court stated that to write, publish, display, or possess material advocating or teaching communism could not be held to be the advocacy of imminent, unlawful action.

While recognizing the Government's interest in preserving national security and promoting foreign policy in the exercise of its immigration power, the court held that the Government must tailor the laws to limit deportation to only those aliens who advocate imminent lawless action and whose speech is likely to induce such action. *Significance*—This decision extends the protection of the first amendment to aliens who face possible deportation, requiring Congress to tailor deportation laws to conform to the traditional first amendment framework.

## II. ACT OF STATE DOCTRINE

PHILIPPINE ACTION AGAINST FORMER PRESIDENT MARCOS NOT BARRED BY ACT OF STATE DOCTRINE AND INJUNCTION ALLOWED TO FREEZE ASSETS WORLDWIDE—*Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988) (en banc).

The Republic of the Philippines (Republic) brought suit against former president Ferdinand Marcos, his wife Imelda, and others in the United States District Court for the District of Hawaii, alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68 (1982), and pendant claims. On Febru-

ary 7, 1986, a special presidential election was held in the Philippines. Following an overwhelming Marcos victory, the Philippine people protested in massive demonstrations. On February 25, 1986, Marcos and his wife left the Philippines and moved to the United States, bringing with them numerous crates filled with currency, jewels, precious metals, and negotiable instruments. These crates were impounded by the United States Customs Service. Other assets allegedly belonging to the Marcoses, or held for their benefit, were later discovered in other locations.

In its action for damages and injunctive relief, plaintiffs alleged that the Marcoses had abused their authority and deprived the Philippine Government and its citizens of \$1.5 billion worth of converted property. The Republic brought three RICO claims grounded on federal law and eight pendant claims. The federal RICO claims charged the defendants with (1) conducting a RICO enterprise; (2) investing funds produced by racketeering into two "enterprises," a Beverly Hills property and two Lloyds Bank accounts; and (3) conspiring to conduct a RICO enterprise and invest the funds improperly.

The Republic also sought a preliminary injunction to prevent the Marcoses, or anyone acting on their behalf, from transferring any of the disputed property. The district court held that RICO established a basis for federal jurisdiction and the pendant claims entitled the Republic to an injunction. The court granted the preliminary injunction based solely on the pendant claims, finding a substantial likelihood that the Republic would prevail and seeking to insure that the Republic would not be irreparably harmed by the moving of the Marcoses' assets.

The United States Court of Appeals for the Ninth Circuit vacated and remanded. The court held that: (1) the district court had jurisdiction to entertain the plaintiffs' RICO claims; and (2) the action was barred by the act of state doctrine, the political question doctrine, or both, because United States courts lack judicially manageable standards to review the legality of actions of a foreign dictator under a reign of martial law. After a rehearing en banc, the court of appeals, *held: Reversed*. The court affirmed the district court's ruling and held that: (1) the district court had jurisdiction over the RICO claims; (2) the district court had subject matter jurisdiction over the pendant claims; (3) the suit was not barred under the act of state or political question doctrines; and (4) the district court did not abuse its discretion in granting a preliminary injunction.

Judges Shroeder and Amby, concurring in part and dissenting in part, agreed that federal subject matter jurisdiction existed under the RICO claims, but disagreed that an injunction worldwide in scope should be allowed since pendant jurisdiction over claims to all the Marcoses' assets

had not yet been established. Judge Fletcher, concurring specially in Judge Schroeder's opinion, disagreed with both the minority's limited view of pendant jurisdiction and the majority's expansive view and determined that the scope of injunction should be reconsidered. *Significance*—In this decision, the court did not allowed the act of state doctrine to bar a suit against a former foreign sovereign and permitted injunctive relief which is unprecedented in its worldwide application.

### III. FOREIGN SOVEREIGN IMMUNITY

THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976 PROVIDES THE SOLE BASIS FOR OBTAINING JURISDICTION OVER A FOREIGN STATE, *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S. Ct. 683 (1989).

On June 8, 1982, an Argentinian military plane attacked a Liberian-owned and leased shipping vessel en route from the Virgin Islands to Alaska. The bombing occurred during the Falkland Islands dispute between Argentina and Great Britain. After unsuccessfully attempting to gain recovery from the Argentine Government for the extensive damage to the ship, the plaintiffs brought suit in the United States District Court for the Southern District of New York. The plaintiffs based their claims on the Alien Tort Statute, 28 U.S.C.A. § 1350 (West 1976), and general admiralty and maritime jurisdiction, 28 U.S.C.A. § 1333 (West 1966). The district court held that the claims did not come within the jurisdictional grant of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C.A. §§ 1602-11 (West 1973), and thus dismissed the case for lack of subject matter jurisdiction. The Court of Appeals for the Second Circuit reversed the case in a widely publicized opinion, holding that the district court had jurisdiction under the Alien Tort Statute because the action was based in tort and alleged a violation of international law. The court of appeals determined that the FSIA was not exclusive and did not preclude the use of remedies previously existing in the federal courts for violations of international law.

The Supreme Court *Held: Reversed*. The FSIA is the sole basis of jurisdiction over a foreign state in United States courts and the district court properly dismissed the action. The Court determined that the FSIA entitled foreign sovereigns to complete immunity from suit in the courts of the United States unless the specific facts came under one of the five enumerated immunity exceptions. The specific facts presented by the plaintiffs in the instant case did not fit within any of these named exceptions. The Court stated that because Congress chose to protect specific rights under international law by creating exceptions to foreign sovereign

immunity, the otherwise absolute immunity contemplated in the FSIA applied to all other areas of international dispute, including claims under the Alien Tort Statute. The Court determined that the clear and express language in the FSIA made it unnecessary for Congress to amend all other general subject matter statutes to include immunity for foreign sovereigns.

In addressing the specific factual allegations that the plaintiffs claimed put them within at least one of the exceptions to the FSIA, the Court held that the exceptions were misapplied by the plaintiffs. The Court found that the event did not take place even arguably within boundaries of the United States; therefore, the exception for noncommercial torts occurring in the United States was inapplicable. Similarly, the Court held that any international agreements signed by the Argentine Government and in effect at the time of enactment of the FSIA did not create a private right of action outside the provisions of the FSIA. *Significance* — This decision clearly establishes that jurisdiction over a foreign sovereign may be obtained only if the facts of the plaintiffs' claim satisfy one of the narrow exceptions to immunity set forth in the FSIA.

#### IV. IMMIGRATION

ASYLUM APPLICANT WHO FAILS TO APPEAR AT ASYLUM HEARING WITHOUT JUSTIFICATION CAN BE HELD TO HAVE ABANDONED CLAIM, *Reyes-Arias v. Immigration and Naturalization Service*, 866 F.2d 500 (D.C. Cir. 1989).

Upon the institution of deportation proceedings, the petitioner, a native of El Salvador, sought asylum by claiming that leftist guerrillas had killed his wife and sought to kill him. The petitioner failed to appear at his initial asylum hearing and also at the second hearing after continuance due to his absence from the first hearing. His counsel appeared at both hearings. At the second hearing the immigration judge denied the petitioners application for asylum, and on appeal, the Bureau of Immigration Appeals refused to reopen the case because the petitioner had failed to appear without adequate justification.

The United States Court of Appeals for the District of Columbia Circuit held on direct appeal from the Board of Immigration Appeals (BIA), that even though every claimant is entitled to a hearing on an asylum claim, nothing in the immigration statute prevents the hearing judge from dismissing the claim if the claimant does not appear. The court held that the judge dismissed the claim in the instant case for failure to prosecute, which indicated that the petitioner had decided to abandon his asylum claim. The court also held that the petitioner's alleged

lack of familiarity with the English language did not excuse actual knowledge of scheduled hearings or that his presence would be required.

The court held that because his counsel was present, the petitioner had the capacity to know when the hearings were scheduled. The court also noted that the determination of the BIA that the petitioner did not furnish adequate justification for his failure to appear, could only be overturned for an abuse of discretion. The court held the facts did not indicate an abuse of discretion because the BIA was simply following established procedures. The court further held that allowing aliens to circumvent the BIA proceedings by bringing suit in federal court would introduce a great deal of uncertainty and a lack of finality into deportation procedures. *Significance* — An immigration judge has the discretion to determine that a deportee who fails to appear at an asylum hearing without justification has abandoned his claim for asylum.