

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT
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5 ROGER C.S. LIN, et al.,

6 Appellants,

7 v.

No. 08-5078

8 UNITED STATES OF AMERICA

9 Appellee.
10 -----

11 Thursday, February 5, 2009

12 Washington, D.C.

13 The above-entitled matter came on for oral
14 argument pursuant to notice.

15 BEFORE:

16 CIRCUIT JUDGES HENDERSON, BROWN AND GRIFFITH
17

18 APPEARANCES:

19 ON BEHALF OF THE APPELLANTS:

20 CHARLES H. CAMP, ESQ.

21 ON BEHALF OF THE APPELLEE:

22 MELISSA PATTERSON, ESQ. (DOJ)
23
24
25

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MELISSA PATTERSON, Esq. (DOJ) On Behalf of the Appellee	19

1 P R O C E E D I N G S

2 THE CLERK: Case number 08-5078, Roger C.S. Lin, et
3 al., Appellants v. United States of America. Mr. Camp for the
4 Appellants, Ms. Patterson for the Appellee.

5 THE COURT: Mr. Camp, Good morning.

6 MR. CAMP: Good morning. May it please the Court, I
7 am Charles Camp on behalf of plaintiffs/appellants.

8 This is a treaty interpretation case. We're asking
9 the District Court to interpret the San Francisco Peace Treaty
10 and determine whether the plaintiffs have any rights under the
11 U.S. Constitution.

12 THE COURT: That's why the issue is before is, isn't
13 it, whether it's a treaty interpretation case or some other
14 case. Doesn't your claim turn on whether the United States
15 exercises some form of sovereignty over Taiwan, isn't that the
16 gravamen of your argument?

17 MR. CAMP: The Court would have to examine
18 sovereignty, but not determine sovereignty. For example, in
19 the Boumediene case, they looked at the fact, the Supreme
20 Court looked at the fact that Cuba exercises --

21 THE COURT: You mean the Boumediene case, I'm sorry.

22 MR. CAMP: Yes --

23 THE COURT: Okay.

24 MR. CAMP: The Supreme Court looked at the fact that
25 Cuba has ultimate sovereignty -- that was their words -- over

1 Guantanamo Bay, but the U.S. exercises complete control and so
2 they examined sovereignty to determine what constitutional
3 rights the people at Guantanamo Bay have.

4 THE COURT: Your claim is that the United States
5 exercises sovereignty over Taiwan.

6 MR. CAMP: Under this San Francisco Peace Treaty, it
7 says that the United States is the principal occupying force
8 over Taiwan. And so the question then is what rights, if any,
9 do my clients have under the Constitution.

10 THE COURT: And they have no rights unless the
11 United States exercises sovereignty over Taiwan, right?

12 MR. CAMP: They have to look at sovereignty, but
13 they don't determine sovereignty.

14 THE COURT: Do your clients have any rights if the
15 United States has no sovereignty over Taiwan?

16 MR. CAMP: If the U.S. is not the principal
17 occupier --

18 THE COURT: I'm using the word sovereignty, that's
19 the word. Answer my question.

20 MR. CAMP: Sovereignty.

21 THE COURT: If the United States exercises no
22 sovereignty over Taiwan, do your clients have any claims, any
23 rights?

24 MR. CAMP: If they control it. For example, in
25 Cuba, in Guantanamo Bay, the U.S. controls Guantanamo Bay. I

1 don't know if that means they have sovereignty or not, but
2 they control it and they have in essence, I would consider it
3 to be de facto sovereignty because of their control. And the
4 control --

5 THE COURT: So does the United States control
6 Taiwan?

7 MR. CAMP: They don't control it. Our position is
8 they have sovereignty de jure (phonetic sp.) as a matter of
9 law under the San Francisco Peace Treaty because they are the
10 principal occupier.

11 THE COURT: Which branch of government does the
12 Constitution give the power to determine who's sovereign over
13 a --

14 MR. CAMP: There's no determination of sovereignty
15 that's necessary. The fact --

16 THE COURT: You just said they have sovereignty de
17 jure.

18 MR. CAMP: Yes, and that's --

19 THE COURT: Which branch of government decides who
20 has sovereignty de jure over land?

21 MR. CAMP: The U.S. has a relationship with Taiwan
22 as set forth in the treaty. That's been decided as a
23 political matter years ago.

24 THE COURT: That's not my question. I'm asking
25 about more general principle, principles of law by which we

1 have to decide this case. Which branch of government
2 determines who has sovereignty de jure over a piece of land?

3 MR. CAMP: Well, it is for the political branches to
4 determine who has sovereignty. But we're not asking for a
5 determination of sovereignty. There's an examination of
6 sovereignty.

7 THE COURT: I'm asking questions about principles.
8 We'll get to your case.

9 MR. CAMP: Okay.

10 THE COURT: But it is for the political branches to
11 decide who has sovereignty de jure over a piece of land,
12 right?

13 MR. CAMP: Well it's already been determined and the
14 treaty is our position.

15 THE COURT: Yes, I understand that's your position,
16 but it's for the political branches to make the determination
17 who has sovereignty de jure, right? And you say the treaty
18 here --

19 MR. CAMP: It's already been decided, yes, correct.
20 And so therefore the question is it is for the courts to
21 decide -- well because the U.S. is the principal occupying
22 force over Taiwan, it is therefore for the courts to determine
23 what rights do people living there have under the
24 Constitution. Courts decide what the laws are. Courts
25 decide --

1 THE COURT: In the red brief in page 3, the
2 Government says, "In 1954 the United States and the Republic
3 of China signed a Mutual Defense Treaty wherein the United
4 States recognized the Republic of China as the Government of
5 China and recognized Taiwan to be one of its territories." Is
6 that accurate?

7 MR. CAMP: No, that's not accurate.

8 THE COURT: It's not? What's wrong with it?

9 MR. CAMP: That was for a very limited purpose
10 there. The legislative history for the Mutual Defense Treaty
11 which is cited in my reply brief makes clear that the Mutual
12 Defense Treaty made no change whatsoever in who has
13 sovereignty over Taiwan. The Republic of China oversees
14 Taiwan.

15 THE COURT: But the United States recognized the
16 Republic of China to govern Taiwan.

17 MR. CAMP: Well the Republic of China oversees it
18 administratively. That's what the legislative history makes
19 clear. It is that it is an administrative overseeing of
20 Taiwan that the Republic of China does.

21 THE COURT: Does the Republic of China issue
22 passports to its citizens?

23 MR. CAMP: It issues passports, but those are not
24 recognized by a lot of places because there are a lot of
25 places don't --

1 THE COURT: The Republic of China itself issues
2 passports for its citizens.

3 MR. CAMP: That's my understanding.

4 THE COURT: Is there any passport that's issued by
5 the Taiwanese Government? I know this case involves the
6 plaintiffs seeking U.S. passports.

7 MR. CAMP: Yes, they were like non-U.S. citizen
8 passports.

9 THE COURT: What type of identification or what do
10 they travel on now?

11 MR. CAMP: They get a travel document, but it's not
12 recognized by countries that don't recognize Taiwan. It's a
13 discretionary matter. That is the problem that the people
14 from Taiwan have is they can't go to countries that don't
15 recognize their travel documents. It's like showing up with a
16 passport issued by Maryland, you know, they just go well
17 what's this? This is not a country.

18 THE COURT: And does the Taiwanese Government issue
19 these travel documents?

20 MR. CAMP: Yes.

21 THE COURT: Okay.

22 THE COURT: Assuming that you're right, you agree
23 that the political branches decide this question of
24 sovereignty and you think that we did that in the Treaty of
25 San Francisco.

1 MR. CAMP: Yes.

2 THE COURT: But there have been other actions by the
3 political branches, namely the Executive, which have
4 articulated this idea of strategic ambiguity. Can the Court
5 simply ignore those later actions?

6 MR. CAMP: None of those later actions changed the
7 treaty. And there have been no later treaties to amend. It
8 was left, who owns Taiwan was left purposefully as an open
9 question when they signed the San Francisco Peace Treaty
10 included in the appendix or documents pertaining to the
11 negotiation of the San Francisco Peace Treaty. And it's very
12 clear that it was left open because they wanted the option to
13 decide what happened to Taiwan at a later time. There was no
14 agreement that could be reached among the allied forces in
15 Japan as to who gets Taiwan. And that question is still open
16 and the Executive cannot issue something that modifies a
17 treaty. Now the treaty is the supreme law of --

18 THE COURT: In your answer, haven't you just
19 acknowledged what the Government's position here is, is that
20 whoever has sovereignty over Taiwan, it isn't the United
21 States. It's an open issue. That's been the policy of the
22 Executive for 50 years or so.

23 MR. CAMP: No, but as a matter of law, we are the
24 principal occupying force, and that is the status as a matter
25 of law today. And from that rights flow, and that is for the

1 courts to decide what rights flow from that status. The
2 status of the U.S. being the principal occupying force.

3 THE COURT: Can you cite me any examples in history
4 where the United States has been the principal occupying force
5 of a territory and the residents of that territory were
6 entitled to passports from the United States or other rights.

7 MR. CAMP: Yes, the Philippines is one example. In
8 fact, there was a point in time when we were the principal
9 occupying force over the Philippines. After following World
10 War II, the same situation, the people, I'm sorry, the people
11 in the Philippines had rights to U.S. passports that had been
12 recognized. So they had passports and then there was a time
13 when we were turning over the sovereignty for the Philippines
14 to its own people, to its own government. And there was a
15 delay before the new government would issue passports. And so
16 during that gap when we were there and the government became
17 effective, you couldn't get passports and somebody there went
18 all the way to the Supreme Court and said it's cruel and
19 unusual punishment for people not to be able to get a passport
20 and the Supreme Court agreed. The people in limbo had no
21 rights to passports, and they said --

22 THE COURT: But that's never been done for the
23 people in Taiwan.

24 MR. CAMP: No, this issue has not come up on Taiwan
25 before.

1 THE COURT: Has it ever been attempted by anyone in
2 Taiwan before?

3 MR. CAMP: No, no.

4 THE COURT: Let me ask you about the claim that your
5 clients are non-citizen nationals. Does that depend on this
6 determination of sovereignty or is that a separate basis on
7 which you are arguing?

8 MR. CAMP: Whether they are nationals, first of all,
9 is a question for courts to decide. The immigration statute
10 makes it clear that decisions on nationality are for the
11 courts to decide. And the courts will decide on the basis of
12 the relationship of the territory where the people live to the
13 United States. You examine the relationship just like in the
14 Guantanamo Bay case, they examined the relationship between
15 the U.S. as control of Guantanamo Bay and here. And then they
16 examined the relationship and then decided what the rights
17 were. It's the same thing. You examine the relationship that
18 exists, that previously and has existed for years between the
19 U.S. and Taiwan and then you decide from there what flows from
20 that, what rights flow from that. And non-citizen nationality
21 is one of the things that we are seeking.

22 THE COURT: I guess my specific question is are you
23 focusing on this idea of permanent allegiance to the United
24 States which courts have generally rejected or are you making
25 a different argument?

1 MR. CAMP: Yes, it is for courts to decide, just one
2 point. It is for courts to decide whether there's this
3 permanent allegiance. That's a judicial decision and not an
4 Executive or political decision. You have to look, yes, what
5 is the legal relationship? What is the relationship between
6 the U.S. and Taiwan and that is set forth in the San Francisco
7 Peace Treaty and then from that you decide what rights they
8 have. Are they nationals or not? But that's a substantive
9 issue that, you know, we basically want our day in court on.
10 You know, we don't believe this is a political question case
11 and we want our day in court. That's obviously why we're
12 appealing. We don't think the political question doctrine
13 applies. There's not a single case that the Government cites
14 that says that the political question doctrine has ever
15 prohibited a court from interpreting a treaty or determining
16 the existence of constitutional rights. In fact, the
17 Government's own brief says that all the cases we have cited
18 in our briefs, in the appellants' briefs are in opposite it
19 says because all the cases involve judicial interpretation of
20 statutes or treaties. Well that's precisely correct. All of
21 our cases do involve the interpretation of a statute or a
22 treaty and the determination of the constitutional rights.

23 THE COURT: So you are not arguing that Boumediene
24 actually does away with the political question doctrine. You
25 are just arguing that it doesn't apply in this circumstance.

1 MR. CAMP: I'm arguing that in that case the courts
2 looked at the relationship between the U.S. and Guantanamo
3 Bay. They examined the sovereignty basically, the control.
4 What was the situation? In Downes v. Bidwell in 1901, the
5 Supreme Court said that the determination of what particular
6 provision of the constitution is applicable in all cases
7 involves an inquiry into the situation of the territory and
8 its relationship to the United States. And that was the case
9 relied on in the Guantanamo Bay case and the Boumediene case.
10 You know, you can examine the situation.

11 THE COURT: Now you realize that we are reluctant
12 followers of Boumediene, so we don't get a lot of warm
13 fuzzies.

14 MR. CAMP: Okay, I --

15 THE COURT: But we are followers.

16 MR. CAMP: Yes, but, so I'm not asking -- there's no
17 determination of sovereignty we're asking for. We're only
18 asking that you examine the situation as was done in the
19 Boumediene case and as was done in 1901, Downes v. --

20 THE COURT: If we were to find that later Executive
21 action somehow altered the San Francisco Peace Treaty, your
22 case really turns on San Francisco Peace Treaty being governed
23 wrong today, right?

24 MR. CAMP: Correct, if the San Francisco Peace
25 Treaty doesn't exist in its current form, then we're done.

1 But the treaties are spring law of the land and can't be
2 changed except by another treaty, or we can withdraw.

3 THE COURT: Wouldn't you acknowledge that the
4 Executive has taken since the treaty positions that are
5 contrary to yours?

6 MR. CAMP: No, no.

7 THE COURT: The Executive has taken the position
8 that the United States does not have sovereignty or control
9 over Taiwan.

10 MR. CAMP: It hasn't actually done that. It has
11 basically said we are not changing --

12 THE COURT: It's a surprise to the State Department
13 to hear they haven't done that.

14 MR. CAMP: No, they have never said we are no longer
15 the principal occupying force of Taiwan. I mean they have
16 never been, if they had specifically intended to say we are no
17 longer the principal occupying force of Taiwan, they have
18 never used those words. There's never any document that the
19 Executive or the legislative branch has ever said we are no
20 longer the principal occupying force of Taiwan and there have
21 been no decisions by the Executive Branch or Congress that
22 people in Taiwan are not nationals. This is just an area that
23 hasn't been decided.

24 THE COURT: Let me ask you about the Treaty of
25 Taipei which was between the Republic of China and Japan and

1 at least in that treaty, the Republic of China said in Article
2 10 that the inhabitants and former inhabitants of Taiwan and
3 the Pescadors (phonetics sp.) are nationals of the Republic of
4 China. Now what do we do about that treaty if we say well,
5 they are U.S. nationals as well? I mean what weight do we
6 give that treaty where the Republic of China has and probably
7 in other places too, I don't know, but declared the people of
8 Taiwan to be nationals of the Republic of China?

9 MR. CAMP: Well, I'll admit I have not ever read
10 those words in that treaty that indicate that the people of
11 Taiwan are nationals. That it's agreed that they are
12 nationals of the Republic of China.

13 THE COURT: Well what it says in Article 10 is
14 nationals of the Republic of China shall be deemed to include
15 all the inhabitants and former inhabitants of Taiwan, Formosa
16 and Penhu, the Pescadors and their descendants.

17 MR. CAMP: That doesn't change our treaty that says
18 that we are the principal occupying force of Taiwan.

19 THE COURT: Well it may not change the treaty but
20 what do we --

21 MR. CAMP: I think that would be, frankly, I think
22 that would be a political decision to decide what effect does
23 that treaty have on our Government. But, I guess courts are
24 only charged with interpreting treaties so you can argue that
25 either way. But I am unaware --

1 THE COURT: Let me ask you, if I understand your
2 arguments, you're relying on a phrase in the treaty, principal
3 occupying power, right, United States is principal occupying
4 power.

5 MR. CAMP: Correct.

6 THE COURT: You're saying that from that language
7 flows rights to citizens of Taiwan. What are the limits of
8 those rights? So they receive all the constitutional rights
9 of a citizen of the United States?

10 MR. CAMP: Well there are, the Insular Cases back
11 from the turn of the century, 1900 dealt with the issue of
12 what rights apply. In fact, in that case -- I've got it right
13 here -- the question was in Downes v. Bidwell again, it says
14 the determination of what particular provision of the
15 Constitution is applicable involves an inquiry, okay. The
16 real issue in the Insular Cases was not whether the
17 Constitution extended to the Philippines or Puerto Rico -- you
18 had asked for other examples, the Philippines -- when we went
19 there but which of its provisions were applicable.

20 THE COURT: Well right now you're asking for
21 passport rights, right? But on the force of your reasoning,
22 habeas corpus extend that? I mean you've been talking about
23 the Boumediene case.

24 MR. CAMP: Well, I would, I mean the cases say
25 fundamental personal rights declared in the Constitution.

1 That's what the cases support. That's Torres v. Puerto Rico
2 and the --

3 THE COURT: That's what the case supports --

4 MR. CAMP: Fundamental --

5 THE COURT: So what's some of the fundamental
6 rights, American constitutional rights that citizens of Taiwan
7 are entitled to under your reasoning? You're saying get a
8 passport, that's one of them.

9 MR. CAMP: Sure, well it's in the declarations that
10 I sought which are in the complaint. The first two
11 declarations have to do with requiring that they are non-
12 citizen nationals. The ones that they are the Fifth Amendment
13 Right against life, liberty and property without due process
14 of law. The Fourteenth Amendment, same thing. The Fifth
15 Amendment, right to travel without due process of law which
16 requires notice and hearing, in other words, right to a
17 passport. The Supreme Court held that it's, you know, it's
18 cruel and unusual punishment to not allow somebody to have a
19 passport.

20 THE COURT: And your argument is ever since the San
21 Francisco Peace Treaty, the citizens of Taiwan have been
22 entitled to these --

23 MR. CAMP: Fundamental personal rights under the
24 Constitution, correct, as well as the Eighth, Fourteenth and
25 the First Amendment right to petition the Government for

1 redress. So, but those are substantive questions.

2 THE COURT: So citizens of Taiwan who complain under
3 the First Amendment, who do they bring that against? Do they
4 bring that against the Republic of China or they bring that
5 against --

6 MR. CAMP: No --

7 THE COURT: -- the United States --

8 MR. CAMP: The United States, the United States. If
9 they have fundamental rights --

10 THE COURT: So all the government actors in Taiwan
11 right now are agents of the United States?

12 MR. CAMP: The Republic of China is holding Taiwan
13 basically in trust.

14 THE COURT: Miranda rights, so I'm a citizen of
15 Taiwan and I'm arrested and the arresting authority doesn't
16 read me my Miranda rights, I now come to federal district
17 court --

18 MR. CAMP: We haven't asked for that. We haven't
19 asked for that. It's just fundamental rights and what that
20 means is --

21 THE COURT: Jury trial?

22 MR. CAMP: We're not asking for that. We're not
23 asking for that. I mean it's --

24 THE COURT: I'm trying to understand the force to
25 get to your --

1 MR. CAMP: Sure, I mean that's a substantive
2 question in terms of precisely what rights --

3 THE COURT: It's breathtaking what you're asking for
4 is quite breathtaking.

5 MR. CAMP: Well, it might be, but that's what the
6 law supports and that's what the facts support. And courts
7 are the ones charged with determining what constitutional
8 rights exist and we'd like our day in court to have the court
9 determine what constitutional rights exist.

10 THE COURT: All right, thank you.

11 MR. CAMP: Thank you very much.

12 THE COURT: Thank you.

13 THE COURT: Ms. Patterson.

14 MS. PATTERSON: May it please the Court, Melissa
15 Patterson on behalf of the United States.

16 Your Honors, we ask this Court to affirm the
17 District Court's dismissal of the action here either on the
18 grounds that in order to resolve the United States de jure
19 sovereignty over Taiwan would involve a political question or
20 if this Court construes the complaint here to only assert that
21 plaintiffs are nationals under the United States under the
22 Immigration and Nationality Act. I think that can be exposed
23 just simply on the merits on the statutory grounds to be a
24 national is defined within that act as persons born in the
25 outlying possessions of the United States which are limited to

1 America, Samoa and Swains Island.

2 THE COURT: What is the Government's position about
3 status of the San Francisco Peace Treaty, particularly the
4 language that United States is the principal occupying power?
5 Is that good law?

6 MS. PATTERSON: I believe the treaty is in effect.
7 We have not taken a position on whether or not the United
8 States is, in fact, the principal occupying, I'm sorry, the
9 United States has not -- let me be clear. The United States
10 is not the principal occupying power over Taiwan.

11 THE COURT: What has changed, because that's the
12 language of the treaty, right?

13 MS. PATTERSON: Yes, but I think there have been
14 several pertinent changes if this Court is looking at de jure
15 sovereignty. First of all, there was the 1954 Mutual Defense
16 Treaty in which the United States recognized Taiwan to be
17 among the Republic of China's territories. In 1972 we began
18 talks with the People's Republic of China. In 1978, President
19 Carter announced that as of January 1, 1979 we would be
20 discontinuing diplomatic relations with the Republic of China
21 and opening up relations with the People's Republic of China.

22 THE COURT: But how is that inconsistent with the
23 language of the principal occupying power? That perhaps the
24 1954 Mutual Defense Treaty is recognizing a government, the
25 Republic of China.

1 MS. PATTERSON: Certainly, Your Honor.

2 THE COURT: Are there any other examples, or is that
3 sufficient?

4 MS. PATTERSON: I think that's sufficient, Your
5 Honor. Again we haven't offered up an interpretation of the
6 San Francisco Peace Treaty because we don't think it's
7 relevant here. What plaintiffs are arguing is that the San
8 Francisco Peace Treaty makes the United States the principal
9 occupying power and then they take in inferential leap to say
10 that means that the United States is the de jure sovereign and
11 then there's another leap to de jure sovereignty means that
12 they are nationalists.

13 THE COURT: What does that language mean though? I
14 mean it means something.

15 MS. PATTERSON: The principal occupying power?

16 THE COURT: Yes, right.

17 MS. PATTERSON: I believe that refers to the fact
18 that at the time the United States signed that treaty, it was
19 the principal occupying power of Japan. I'm a little hesitant
20 to offer a definitive, the United States definitive
21 construction of that treaty because again, we just don't think
22 it's relevant here. Plaintiffs are claiming that they have
23 rights that stem not simply under that treaty, but from the
24 fact that that treaty makes the United States the de jure
25 sovereign over Taiwan. And the United States has made it

1 very, very clear that whoever the de jure sovereign of Taiwan
2 is, it is not the United States.

3 Moreover, all of plaintiffs' claims are based --

4 THE COURT: If, in fact, the treaty, that language
5 of treaty creates the United States as the de jure sovereign,
6 can the United States walk away from that treaty? I don't
7 think they can.

8 MS. PATTERSON: Certainly, Your Honor, I think that
9 any questions about who the de jure sovereign is over a
10 territory are entirely within the province of the political
11 branches.

12 THE COURT: If a treaty is established that the
13 United States is the de jure sovereign --

14 MS. PATTERSON: I believe that --

15 THE COURT: -- would the Executive unilaterally
16 change that?

17 MS. PATTERSON: I'm a little shaky. In my
18 reflection of Goldwater v. Carter, but I believe that the
19 president can --

20 THE COURT: Let me help you, the answer is no.

21 MS. PATTERSON: Okay, but so I don't believe there's
22 anything in that treaty that would establish the United States
23 as the de jure sovereign, and I think that the extent to which
24 you need to look at that treaty here is somewhat informed by
25 this Court's statements about how you go about examining a

1 political question. And this Court in the Vanquill (phonetic
2 sp.) decision clearly and quoting Baker said you need to --

3 THE COURT: What's different here is if the language
4 of the treaty supports what counsel said. If, in fact, the
5 language principal occupying power means that the United
6 States is the de jure sovereign, you're in trouble.

7 MS. PATTERSON: Well --

8 THE COURT: You're in trouble.

9 MS. PATTERSON: Let me offer up the United States'
10 position that that is not what that treaty means. Whatever
11 else it may mean, it does not mean that the United States is
12 the de jure sovereign over Taiwan and I think in resolving
13 this question, this Court should look to perform that
14 discriminating analysis of the particular question posed here.
15 And the particular question posed here is not whether or not
16 the United States is the principal occupying power, but
17 whether or not plaintiffs are nationals of the United States
18 and further whether or not the United States is the de jure
19 sovereign over Taiwan, and on both of those questions,
20 plaintiffs' claims fail.

21 THE COURT: If the United States is the de jure
22 sovereign over Taiwan, would they be nationals?

23 MS. PATTERSON: Not necessarily, Your Honor.

24 THE COURT: Okay, so it's possible that those
25 questions are actually separate.

1 MS. PATTERSON: Yes, Your Honor. And as we --

2 THE COURT: Why is that? I don't --

3 MS. PATTERSON: Because national is a statutory term
4 defined in Immigration Nationality Act.

5 THE COURT: America, Samoa and Swain Islands --

6 MS. PATTERSON: Exactly, Your Honor. And I suppose
7 that plaintiffs are alleging that there is some non-statutory
8 route to national status and I think that there's a pretty
9 solid wall of precedent all eight circuit courts to have
10 examined whether or not you can become a national within the
11 meaning of the Immigration Act by any non-statutory routes.
12 They clearly said you cannot.

13 THE COURT: But what right --

14 THE COURT: Was that still true after Boumediene?

15 MS. PATTERSON: I --

16 THE COURT: I mean I think what Mr. Camp is arguing
17 is that if de facto sovereignty is enough, then if they have a
18 claim of de jure sovereignty, they're actually in a stronger
19 position.

20 MS. PATTERSON: I think that's simply not true, Your
21 Honor. All of the cases, Boumediene and the Insular Cases,
22 the Supreme Court made it clear that what they were examining
23 there was the United States objected to degree of controller
24 perhaps de facto sovereignty. And the Boumediene decision
25 explicitly noted the same language that the District Court

1 here noted from Vamiliar Brown (phonetic sp.) they declined to
2 question the Government's assertion that the United States was
3 not the de jure sovereign over Guantanamo Bay, just as this
4 Court should decline to question the Executive's assertion
5 that United States is not the de jure sovereign over Taiwan.
6 So in all of the plaintiffs' claims here rest on an assertion
7 of de jure sovereignty. They are not asserting nor could they
8 assert that the United States exercises any actual control
9 over Taiwan.

10 THE COURT: But doesn't that lead us to a sort of
11 odd result that de facto sovereignty is more powerful than de
12 jure sovereignty if that's what exists here?

13 MS. PATTERSON: That may be odd, but that's what the
14 Supreme Court said and actually I think there's a good reason
15 for that, Your Honor. In the Insular Cases, or at least in
16 the Boumediene decision discussing the Insular Cases, the
17 court said the issue there wasn't necessarily about the you
18 know, de jure reach of the Constitution over a particular
19 territory. It was what limitations in here and the United
20 States' actual exercise of power over people so that the
21 constitutional limitations follow an actual exercise of power
22 as opposed to a paper trail.

23 THE COURT: What rights would come to someone who
24 couldn't meet the statutory requirement for being a national
25 but lived in a territory over which the United States

1 exercises de jure sovereignty?

2 MS. PATTERSON: I don't know that that question's
3 ever been presented because I don't think it's ever been
4 explored if the United States holds simply de jure sovereignty
5 but doesn't exercise any actual control. I don't know what
6 rights we have there.

7 THE COURT: -- but what about in de facto
8 sovereignty, I'm just wondering other than the statutory right
9 regarding national which you say precludes, are there any
10 other rights that someone would have?

11 MS. PATTERSON: If the United States were
12 exercising, I think your question is de facto?

13 THE COURT: Yes.

14 MS. PATTERSON: Yes, I think the Insular Cases did
15 discuss what various rights would attend the United States
16 exercise of actual power of their objective degree or control.
17 And the court noted that it's a highly case specific type of
18 analysis that depends on the United States' particular
19 relationship. And I think in some of those Insular Cases, the
20 court indicated that the stronger the ties, the more the
21 control the United States had over the area. That could
22 change the shape of the constitutional limitations that went
23 with the exercise of that power. So I can't offer you up a
24 general laundry list of rights that might go along with an
25 exercise of de facto power.

1 THE COURT: So they don't include the right to a
2 passport.

3 MS. PATTERSON: I don't think they would include the
4 right to the passport, certainly, Your Honor. If there are no
5 further questions from the Court, the Government will rest.

6 THE COURT: Actually I do have a question.

7 MS. PATTERSON: Yes.

8 THE COURT: It's a minor point. In your red brief
9 at 18, you quote our decision in Boumediene that quote, "The
10 determination of sovereignty over an area is for the
11 legislative and Executive requirements." Do you agree with
12 that, is that a legislative function, determination of
13 sovereignty over an area? I would have thought that the
14 Government's position would be that that's exclusively for the
15 Executive. And the Constitution gives to the Executive the
16 right to recognize ambassadors (indiscernible).

17 MS. PATTERSON: Well certainly, Article 2 is rich
18 with delegations to the Executive Branch. To the extent that
19 the legislative powers hold a role here, I think that they've
20 clearly spoken in this case. I don't know if every case would
21 involve a legislative weighing in on the particular
22 sovereignty.

23 THE COURT: All right. Why don't you take two
24 minutes.

25 MR. CAMP: Thank you.

1 THE COURT: To respond to anything the Government
2 has said.

3 MR. CAMP: Yes, just very, very, briefly. I just
4 wanted to point out that in the Boumediene case it says it is
5 not altogether uncommon for a territory to be under the de
6 jure sovereignty of one nation while the plenary control or
7 practical sovereignty of another. This condition can occur
8 when the territory is seized during war as Guantanamo was
9 during the Spanish American War. And so, you know, we
10 conquered Japan. Japan gave up all right, title and claim and
11 territories including Taiwan. We are the principal occupying
12 force, therefore and so the Boumediene case does deal with
13 importance of de jure sovereignty and points out, of course,
14 that the Insular Cases are still effective today. Obviously
15 it says the century old doctrine informs our analysis in the
16 present matter. That being that when we have sovereignty over
17 a territory, there are guarantees to certain fundamental
18 personal rights declared in the Constitution.

19 And, yes, counsel for the Government pointed out
20 that there's this discriminating analysis of the six Baker
21 factors that has to be done and the District Court didn't do
22 that. She just sort of, you know, she didn't --

23 THE COURT: -- she identified two Baker factors.

24 MR. CAMP: But she --

25 THE COURT: You only need one.

1 MR. CAMP: Well, but I don't think she understood
2 and I don't think the -- I don't think she, she clearly didn't
3 understand that we were not seeking a declaration of
4 sovereignty. We were seeking a declaration of rights under
5 the Constitution following an interpretation of the treaty by
6 the court. So the court just sort of stepped off on the wrong
7 foot and then if you assume that we were seeking to have a
8 court decide who owns Taiwan, then the political act question
9 cases would apply and she would be right. The Government
10 would be right, but that's not what we're seeking. We're not
11 asking the Court to decide who owns Taiwan. We're asking the
12 Court to determine based on the language of the treaty, what
13 are the rights, the fundamental constitutional rights --

14 THE COURT: Because your argument is that the treaty
15 makes clear that the United States is the --

16 MR. CAMP: Principal occupying force.

17 THE COURT: With that comes the power, the right to
18 have a passport.

19 MR. CAMP: Correct, correct, correct. And just
20 one --

21 THE COURT: And other indicia of citizenship,
22 protection under the U.S. Constitution.

23 MR. CAMP: Yes, certain fundamental rights to be
24 determined. And I just wanted to point out, if I may, just
25 one --

1 THE COURT: All right.

2 MR. CAMP: -- more minute, nevertheless, whether my
3 clients owe permanent allegiance to the U.S. for purposes of
4 determining whether or not they qualify as nationals is a
5 question to be decided by federal courts. Congress in the
6 Immigration Act does not provide any explicit guidance as to
7 the circumstances under which a person owes permanent
8 allegiance to the U.S. This is from a Fourth Circuit case
9 (2006) Draggient v. Gonzalez (phonetic sp.). And there are
10 other similar cases. It is for the courts to decide
11 nationality and for the courts to determine permanent
12 allegiance. And there's nothing there that says that you have
13 to go to the statute. I think it's an open question.

14 THE COURT: All right.

15 MR. CAMP: Thank you very much.

16 THE COURT: Thank you. Call the next case.

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in black ink, reading "Caroline G. Gibson". The signature is written in a cursive style with a large initial "C".

Caroline G Gibson

February 8, 2009

DEPOSITION SERVICES, INC.