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# Does the Participation of a Non-Article III Judge Render a Circuit Court Panel's Judgment Invalid?

by Jay E. Grenig

PREVIEW of United States Supreme Court Cases, pages 333-337. © 2003 American Bar Association.

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## ISSUE

Was the Ninth Circuit's judgment vitiated by the participation of a non-Article III judge?

## FACTS

After a drug-detector dog at the Guam Main Postal Facility alerted to an express mail parcel addressed to "Linda Phan" at a post office box, law enforcement officials obtained a search warrant and took the parcel to the Guam Customs Contraband Enforcement Team office. A customs officer X-rayed the parcel and found it contained five cylindrical objects. An officer opened the parcel and discovered methamphetamine (meth) placed in five small canisters. The officers replaced the crystal meth with rock salt and wired the package so that it would send a radio signal when opened. They restored the parcel to its original wrapping and arranged with the postal agents to make a controlled delivery.

After a notice of Express Mail was placed in the post office box, Tuyet

Mai Thi Phan (Phan) retrieved the notice, presented it to a postal clerk, and received the package. She signed for the package as "Lin Da Phan." Phan left the post office and got in a car driven by Tina, the younger sister of Phan Phuong Nguyen (Nguyen). They then took the package to Nguyen's apartment.

After the agents were alerted by the radio signal that the package had been opened, they approached Nguyen's apartment. They observed Phan leave another apartment and enter Nguyen's apartment. Without a warrant, the agents then entered Nguyen's apartment and found Phan and Nguyen in the living room. They saw parts of the opened parcel and some of its contents inside the front bedroom. They found three cylindrical objects in the bathtub and two in the toilet bowl. Nguyen and Phan were then arrested.

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NGUYEN V. UNITED STATES  
AND  
PHAN V. UNITED STATES  
DOCKET NOS. 01-10873  
AND 02-5034

ARGUMENT DATE:  
MARCH 24, 2003  
FROM: THE NINTH CIRCUIT

# Case at a Glance

This case began as a drug case but ended up presenting the issue of whether a judgment of the U.S. Court of Appeals for the Ninth Circuit is invalid because the panel of judges deciding the case included a non-Article III judge.

When the agents had previously unpacked the parcel, they installed a "clue spray" that would be revealed under black light if it later showed up on somebody's hands. When arrested, Nguyen's hands showed evidence of the spray. Phan's hands were clean. Phan said she had been in her kitchen cooking lunch when the package was opened. Although Nina was not indicted, her hands had a trace of the clue material on one of her fingers.

The package in which the meth had been shipped contained an address in Garden Grove, California. A police investigation there turned up a man named Thanh Phuong Nguyen (Thanh), whose driver's license listed the same address as the address on the package, although he did not in fact live at that address. Thanh turned out to be Nguyen's brother and Phan's nephew.

On the first day of the trial of Nguyen and Phan, the defendants objected to any introduction of evidence regarding Thanh's connection to the defendants. The district court overruled the objection, stating that the evidence was relevant because the address on Thanh's driver's license was the same as that listed on the return address of the parcel.

On March 29, 2000, Nguyen and Phan were convicted in the U.S. District Court for the District of Guam of conspiracy to import meth, knowingly aiding and abetting transportation of meth, and attempting to possess over 50 grams of meth with intent to distribute. Each was sentenced to 212 months on each count, to be followed by five years of supervised release.

On appeal, the defendants argued that the trial court had abused its discretion in admitting evidence of the consanguinity (family relation-

ship) between themselves and Thanh and that there was insufficient evidence to support their convictions.

A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit, including a territorial judge from the District Court for the Northern Mariana Islands sitting by designation, held that the evidence of consanguinity connecting the defendants' brother and nephew to the defendants was not irrelevant and unfairly prejudicial. 284 F.3d 1086 (9th Cir. 2002). The court also held that the evidence was sufficient to support their conviction. The defendants did not object to the participation of the chief district judge in the decision.

The United States Supreme Court thereafter granted Nguyen's and Phan's petitions requesting review of the Ninth Circuit's decision. 123 S.Ct. 512 (2002); 123 S.Ct. 513 (2002). The two cases were then consolidated for hearing.

### CASE ANALYSIS

Article III of the U.S. Constitution provides that the judicial power of the United States is vested "in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." Federal courts have long been characterized as being either constitutional courts of the United States or legislative courts in the territories created by an act of Congress. See *Callwood v. Callwood*, 127 F.Supp. 179, 181 (D.V.I. 1954). The district courts in the 50 states, the District of Columbia, and Puerto Rico are constitutional courts, that is, courts established under Article III of the U.S. Constitution. See the districts listed in 28 U.S.C. §§ 81-131. The concept of a "legislative court" derives from the opinion of Chief Justice Marshall in *American Insurance Co. v. Canter*, 1 Pet. 511

(1828). Concluding that Article III of the Constitution did not apply to the territories, Chief Justice Marshall wrote:

Courts in the territories of the United States are not constitutional Courts in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respect to the territory belonging to the United States. 1 Pet. at 546. See also *Glidden Co. v. Zdanok*, 370 U.S. 530, 544-45 (1962).

The U.S. district courts are listed in 28 U.S.C. §§ 81-131. The district courts for Guam, the Northern Mariana Islands, and the Virgin Islands are not included in this list. The district courts listed in 28 U.S.C. §§ 81-131 are created under Article III of the Constitution. *Mookini v. United States*, 303 U.S. 201, 205 (1938). In *Mookini*, the Supreme Court said that the term "'District Courts of the United States,' as used in the [Criminal Appeals Rules], without an addition expressing a wider connotation, has its historic significance. It describes the constitutional courts created under article 3 of the Constitution. Courts of the Territories are legislative courts, properly speaking, and are not District Courts of the United States." The Court concluded that "vesting a territorial court with jurisdiction similar to that vested in the District Courts of the United States does not make it a 'District Court of the United States.'" See also 28 U.S.C. § 451.

The district judges who sit as judges in the U.S. district courts are

appointed pursuant to Article III of the U.S. Constitution. See 28 U.S.C. § 133. It enumerates the districts contained within all 50 states, the District of Columbia, and Puerto Rico. Guam, the Virgin Islands, and the Northern Mariana Islands are not on this list. As Article III judges, the judges in the districts listed in § 133 “hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” U.S. Const., Art. III.

Article IV judges, on the other hand, occupy judgeships created under Congress’s power under Article IV of the Constitution “to dispose of and make all needful rules and regulations respecting the Territory or other Property belonging to the United States.” Judges in the District of Guam and the District of the Northern Mariana Islands are Article IV judges. Unlike judges appointed under Article III of the Constitution, Article IV judges are not protected by tenure or salary guarantees.

There have been few occasions for the courts to interpret the term “districts” as used in Section 451. In *Government of the Virgin Islands v. Gereau*, 502 F.2d 914 (3d Cir. 1974), the Third Circuit considered whether the federal trial court in the Virgin Islands was a “district” for purposes of Title 28 of the U.S. Code. The Third Circuit concluded that the trial court in the Virgin Islands was not a “district court” for purposes of Title 28.

In *Mookini v. United States*, 303 U.S. 201 (1938), the Supreme Court held that the then-territorial District Court of Hawaii was not a “United States District Court” for purposes of the Criminal Appeals Rules. See also *Talbot v. McCarrey*, 218 F.2d

565, 566 (9th Cir. 1954) (then-territorial Alaska District Court not a “court of the United States”); *Wells v. United States*, 214 F.2d 380 382 (5th Cir. 1954) (District Court for the Canal Zone was not a “district court”).

Appeals from the District Court of Guam (a legislative court) must be taken to the U.S. Court of Appeals for the Ninth Circuit (an Article III, constitutional court). 28 U.S.C. § 1294(4). The Chief Judge of the Ninth Circuit may assign “district judges within the circuit to sit upon the court of appeals whenever the business of that court so requires.” 28 U.S.C. § 292(a). Section 451 of Title 28 of the U.S. Code defines the term “district” as meaning “the districts enumerated in Chapter 5 of [Title 28].” The districts enumerated in Chapter 5 are listed in §§ 81-131.

In response to the petitioners’ argument that the assignment of the chief judge of the District of the Northern Mariana Islands to the panel violated § 1294(4), the government says that the passage of § 1294(4) did not expand the petitioners’ constitutional rights. Furthermore, the respondent argues that nothing in Article III precludes its judges from adjudicating territorial cases in conjunction with an Article IV judge.

The petitioners argue that the Ninth Circuit’s designation of an Article IV judge was unauthorized by 28 U.S.C. § 292. They assert that the plain meaning of 28 U.S.C. § 292(a) precludes the designation of a judge from the District Court for the Northern Mariana Islands to sit on the Ninth Circuit. The petitioners suggest that, even if the question presented could not be so easily answered by simple reference to §§ 292 and 451, the Court should construe § 292 to forbid the type of des-

ignation made here in order to avoid the constitutional difficulties that would result from a contrary interpretation.

Even if the designation were permitted by 28 U.S.C. § 292, the petitioners argue that the designation violates the constitutional command that Article III judicial power be vested in judges with life tenure and a guaranteed salary. They claim that when a case is to be decided by an Article III court, the Constitution requires that it be decided by Article III judges with the full panoply of Article III protections.

The government agrees with the petitioners’ assertion that Title 28 does not expressly authorize, as a matter of statutory law, the designation of territorial judges to sit on the federal courts of appeals. However, the respondent argues that the petitioners abandoned their statutory objection to the composition of the Ninth Circuit panel. According to the government, the petitioners forfeited their statutory objection to the composition of the panel by failing to raise it before the Court of Appeals. The respondent points out that the petitioners did not challenge the composition of the court of appeals at any time before filing their petitions for review by the Supreme Court—petitioners filed no objection to the composition of the panel before oral argument, petitioner Nguyen made no objection at oral argument, and the petitioners never requested a rehearing or a rehearing *en banc*.

The government suggests that, at least with respect to petitioner Nguyen, the objections belatedly raised before the Supreme Court were knowingly waived in the lower courts. Respondent says that counsel for Nguyen approached the two Ninth Circuit judges at a meeting of

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the Guam Bar Association the day before oral argument and mentioned there might be a problem with the chief judge of the District of the Northern Mariana Islands sitting on the panel because he was not an Article III judge.

The petitioners assert that Congress's plenary power over the territories does not diminish the force of the Article III principles. Recognizing that it is quite possible that, given Congress's power over territorial courts, Congress constitutionally could have provided a different, more limited, right of appeal and might even have created an amalgamated court such as the panel that heard the petitioners' cases, the petitioners argue that Congress did not create such a court and instead specifically provided (in 28 U.S.C. § 1294(4)) that appeals from the District Court of Guam will be heard by the Ninth Circuit, an Article III court.

The government replies that the protections of Article III are inapplicable to cases arising within the territories. The respondent quotes from *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), in which the Supreme Court stated that in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article; courts, that is, having judges of limited tenure and entertaining business beyond the range of conventional cases and controversies. 370 U.S. at 544-45 (plurality opinion) (footnote omitted). The respondent asserts that residents of the territories have no independent right to adjudication in a constitutionally proper forum under Article III.

The Appointments Clause of Article II of the Constitution provides that

the president, with the advice and consent of the Senate, has the power to appoint "principal officers" of the United States. Judges of the federal circuit courts are "principal officers" and must therefore be appointed by the president and confirmed by the Senate. The petitioners argue that the designation of an Article IV judge to sit on an Article III court violates the Appointments Clause.

According to the petitioners, because judges on the federal courts of appeals are "principal officers" for purposes of the Appointments Clause, they may only be appointed by the president. The petitioners claim that allowing a member of the judiciary to place judges on Article III courts would subvert the very purpose of the Appointments Clause.

The government responds that the Supreme Court has never held that the Appointments Clause applies to the governance of the United States territories. It is the respondent's position that the petitioners are not within the class of persons protected by the Appointments Clause and that a transgression of that clause, if any, cannot invalidate the judgments affirming their convictions in a territorial court. In addition, the government argues that the limited designation of a territorial judge to sit within a territory and hear appeals in cases from territorial courts does not violate the Appointments Clause.

The Federal Rules of Criminal Procedure provide that "plain errors" or defects affecting "substantial rights" may be noticed even if they were not brought to the attention of the court by the parties. Under the plain error rule, an appellate court may correct an error not raised below whenever there is (1) an error, (2) that is plain, and

(3) that affects substantial rights, so long as the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

It is the petitioners' position that the designation of the chief judge of the District of the Northern Mariana Islands violated the plain meaning of 28 U.S.C. § 292 and was forbidden by both Article III and the Appointments Clause. They say the error was so manifest as to be "plain." The petitioners contend that the error both affected their substantial rights and calls into question the fairness, integrity, or public reputation of the judicial proceeding.

The government disagrees that the designation of the chief judge of the District of the Northern Mariana Islands to the Ninth Circuit panel was plain error. First, it says that no plain error occurred because nothing in Title 28 expressly precludes the designation of territorial district judges to sit on court of appeals panels. The respondent points out that no authority specifically addressed, let alone forbade the designation.

Second, the respondent contends that the petitioners' substantial rights were not affected. The government notes that the appeal was heard and decided by two Article III judges, in addition to the chief judge of the District of the Northern Mariana Islands, and that both of the Article III judges agreed that petitioners' challenges to the district court's evidentiary rulings were without merit. The government declares that the petitioners cannot simply presume prejudice from the fact that the chief judge of the Northern Mariana Islands was present on the panel and during deliberations.

Third, the respondent states that any error that occurred did not affect the Ninth Circuit's jurisdiction. It says there is no question that, under the relevant statutory provisions, the Ninth Circuit had subject matter jurisdiction over the appeal. The government observes that Congress has already determined that the presence of two Ninth Circuit judges on a panel is sufficient to empower that court to exercise jurisdiction. See 28 U.S.C. 46(d) (two judges constitute a quorum for a court of appeals panel).

Fourth, the respondent argues that any error did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. It points out that there are no allegations of actual unfairness, partiality, or lack of judicial acumen directed at the chief judge of the District for the Northern Mariana Islands.

### **SIGNIFICANCE**

The petitioners say that this case has "profound implications" for our constitutional system of governance and presents grave and sensitive questions about the intersecting powers of the judicial, legislative, and executive branches of government under Articles II, III, and IV of the Constitution. The government, on the other hand, states that this case at most involves an isolated, one-time mistake in statutory construction by a single member of the judiciary.

### **ATTORNEYS FOR THE PARTIES**

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**For Tuyet Mai Thi Phan** (Rawlen T. Mantanona (671) 472-3666)

**For the United States** (Theodore B. Olson, Solicitor General, U.S. Department of Justice (202) 514-2217)

### **AMICUS BRIEFS**

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