

CIR

docket report

Fall 2019

A Victory for Guam and for the Constitution

CIR's big victory this summer in *Davis v. Guam* probably puts an end to Guam's effort to hold a race-exclusive referendum on the question of whether Guam should remain part of the United States.

But only probably. As detailed on page seven, late in October and after an important court deadline had passed, activists in Guam apparently pressured the Governor to hire her own attorney to pursue a last-minute appeal to the U.S. Supreme Court.

The case illustrates one of the great incongruities of modern politics. Although the activists in Guam made much of the importance of self-determination, everything they did seemed guaranteed to make self-determination impossible. Instead of organizing an honest referendum of *all* Guam voters, they engineered a sham referendum that stoked racial division and prevented a decisive expression of island sentiment.

CIR's lawsuit seemed to become another prop for the agitators. The Ninth Circuit Court of Appeals decision in July was not the end of it, but set the stage for a new round of political acrimony that now has the Governor sidelining the Attorney General in order to petition the Supreme Court on her own -- fracturing not just the island's political will but its executive branch.

One might ask what a legal victory means in a case where our opponents use every stage of the litigation to further the political goal of permanent stalemate. The answer is that the precedent we have set will last long after Guam's current group of overzealous agitators have given up. Though the politics on Guam may not change, future fights will be constrained by the fact that political questions can be settled by a full and fair vote, rather than a vote rigged to disenfranchise two thirds of the voters.

The precedent we set in *Davis v. Guam* will last long after the heated politics of 2019 have passed from the scene and not just in Guam -- but wherever the U.S. Constitution rules, whether in a territory in the Pacific or in political battlefield state on the mainland. That is the tangible result of your support for CIR.

2019 marks CIR's thirtieth anniversary. As our fight in Guam makes clear, CIR will go to great lengths to defend the Constitution's guarantees. Though our opponents see our cases as partisan politics by another means, we see even the most partisan of fights as an opportunity to restore the fundamental rights that make politics more than simply partisan.

-Terence J. Pell, President

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Victory: *Davis v. Guam*

Cooperating Counsel: Gibson, Dunn & Crutcher LLP

Dave Davis was a resident and citizen of Guam. So, it was a surprise to him to learn that he would not be allowed to vote in a plebiscite regarding the future of Guam's relationship with the United States. Why was he prohibited from voting? Guam's plebiscite law restricted voting to "native inhabitants of Guam." What soon became clear was that the term "native inhabitant of Guam" was a substitute for "Chamorro People," a racial group of which Davis was not a member.

Davis was one of many people disenfranchised by Guam's plebiscite law. The Chamorro People are only one of the many ethnic groups that call Guam their home. The rest of Guam's population consists of white, black, Korean, Chinese, and Filipino people, all of whom would be excluded from the right to vote in the plebiscite.

With the help of CIR, Davis pursued his right to vote in the federal courts, and on July 29, he was vin-

dicated. In a unanimous decision, a three-judge panel for the Ninth Circuit Court of Appeals found that Guam's plebiscite law was racially discriminatory in violation of the Fifteenth Amendment to the Constitution.

The Fifteenth Amendment states that "The right of citizens of the United States to vote shall not be denied or abridged... on account of race." As Judge Berzon's opinion notes, the language of the amendment is "universal." It applies to all U.S. citizens, period.

The right to vote is fundamental to American liberty. It is the first and most effective way for people to influence the course of politics. Laws that limit who may exercise this right deprive citizens of the ability to influence public life.

How did Guam's legislature think it could get away with passing such a race-restrictive law? The language of Guam's plebiscite law did not limit the vote to the Chamorro People by name. Instead, the definition of "native inhabitants of Guam" was

carefully structured to exclude almost everyone *other* than members of the Chamorro People.

The court was unwilling to pretend that this neat fit was a happy accident. Judge Berzon's opinion recognized that "classifications that are race neutral on their face but racial by design or application violate the Fifteenth Amendment." Any law that restricts the right to vote along racial lines will be held unconstitutional, even if it is cleverly worded to avoid racial language.

The tremendous outcome was the result of many years of hard work by longtime CIR-friend and Gibson Dunn partner Doug Cox, his partner Lucas Townsend and other Gibson attorneys, plus Christian Adams of the Election Law Center -- all of whom donated their time *pro bono*.

The Governor of Guam has launched a late effort to petition the Supreme Court for review, which is still pending. *You can read about this development on page seven...*



*CIR Client
Dave (and
Noni) Davis*



America and Guam

Guam is an American territory in the western Pacific Ocean. The small island was ceded to the U.S. in 1898, at the close of the Spanish-American War. Since that time, it has become a home to nearly 170,000 people of various ethnic and national backgrounds.

In recent years, left-wing historians have tried to build a narrative that would tarnish America's reputation in Guam. The story goes that in the seventeenth century, the Spanish Empire conquered Guam and cruelly dominated the island's indigenous Chamorro people for two hundred years. In 1898, America seized control of Guam for its own exploitative purposes. Gradually, the Chamorro people have grasped some political

freedom, but their efforts have been resisted every step of the way by American colonial power.

This story does not hold up to scrutiny.

By the time of the Spanish-American War, Spain was more indifferent than oppressive. When U.S. ships approached Guam, Spanish officials were not even aware that a war had been waged between the two nations—evidently, preserving dominion over the island was not a priority for Spain. In short order, Spain peacefully relinquished control of the territory.

During the first decades of American governance, Guam was led by the U.S. Navy. The Navy's leadership was responsive to the inhabitants' needs, and it earned their loyalty.

In 1941, Japanese forces conquered Guam.

Japan subjected the island's inhabitants to rape, torture, and imprisonment, but through it all, Guamanians remained loyal to the U.S., and the U.S. to them.

The U.S. Army liberated the island in 1944—suffering nearly 8,000 casualties in the process. The demonstrated mutual loyalty of the war initiated a new era of Guam-U.S. relations.

Since World War II, the U.S. has invested heavily in Guam, economically, militarily, and politically. In 1950, Congress passed the Guam Organic Act, which established a local civil government and granted citizenship to the people of Guam, ensuring that their constitutional rights would be secured by the U.S. legal system. In the ensuing decades, further political reforms were implemented to give the people of Guam greater

control over their government.

Guam has come a long way since the days of Spanish rule. The small island now boasts a ~5 billion dollar GDP. It has a public education system, an accredited university, and modern public and private hospitals. Indeed, Guamanians enjoy the best of modern life.

Activist groups have not been satisfied with these reforms. They have used the language of "Chamorro self-determination" to build a political movement around the racial identity of the indigenous Chamorro people. They have distinguished the Chamorro people—to the exclusion of all other citizens of Guam—as the "self" in their "self-determination" efforts, in an attempt to place the future of Guam solely in the hands of the Chamorro.

Salvatore Davi: Punished for a Post

Saying the wrong thing on Facebook can be enough to change the course of a person's life, even when there is nothing provocative about what is said. That is what Salvatore Davi learned when he was suspended without pay from his job at New York's Office of Temporary and Disability Assistance over comments that he made in a private Facebook conversation.

book group praising certain welfare programs for their success in increasing the number of people receiving benefits. In response, Davi expressed his personal views on welfare policy. Namely, he commented that welfare programs should be judged by measuring "how many people or families they get back on their feet" and that such programs should not be permanent. In short, he said what



CIR Client Salvatore Davi

passed over for a promotion.

CIR stepped in to help Davi defend his First Amendment right to freedom of speech. Public employees have the right to express their political opinions without fear that their jobs will be put in jeopardy

a clear picture of Davi's work ethic at the OTDA has emerged.

During the five years during which Davi had worked as a hearing officer, he had received consistently satisfactory reviews. There were no findings of bias or other misconduct.

"When a government agency decides that someone is not fit for public service based solely on an internet post that expresses a political view, there is a serious constitutional violation."

Davi had been working as a hearing officer for the OTDA for five years. His job was to conduct hearings to determine whether welfare recipients had been wrongfully deprived of their benefits. In that time, he worked diligently to get to the bottom of his cases, always making sure to treat the parties before him fairly and impartially.

In October of 2015, one of Davi's friends posted an article in a private Face-

conservatives—and some liberals—have been saying for decades.

What Davi did not know was that one person in the private conversation was angry enough about his comments to file an anonymous complaint with the OTDA. Davi's supervisors promptly initiated disciplinary proceedings against him. As a result, Davi was suspended for six months without pay, reassigned to a less desirable position, and

if they have wrong beliefs.

The OTDA alleged that Davi's comments revealed a bias against welfare recipients, but there is no basis for that conclusion in Davi's professional history. Any meaningful investigation into Davi's background would have revealed an exemplary record of impartiality and professionalism.

After months of discovery, holding almost a dozen depositions, and reviewing thousands of documents,

Far from biased against welfare recipients, Davi strove to reach the right result in each of his cases. When an investigation revealed that one of New York's welfare agencies had failed to follow their own rules, Davi found in favor of the welfare recipient, even restoring their benefits when it was warranted.

Davi's comments could

continued on page seven

Meet Sal Davi

Salvatore Davi has always had a strong belief in the importance of justice. After earning his bachelor's degree in criminal justice from St. John's University, Davi simultaneously pursued a master's degree from St. John's and a J.D. from the City University of New York School of Law. He went on to earn his LL.M. from the Cardozo School of Law, focusing on intellectual property.

Davi's first legal jobs were as special assistant to the Kings County District Attorney and attorney for the United States Department of Justice. After a year of service, Davi was discouraged by what he saw as a politicization of the Department of Justice, and he sought work elsewhere.

In 2010, he began working for New York's Office of Temporary and Disability Service as a hearing officer. Davi's job was to review decisions to rescind welfare payments and make recommendations as to whether the cases were properly decided.

For the first five years of his service at the OTDA, Davi performed his work with the same characteristic professionalism that had defined his career to that point, and he had a spotless record to show for it. His work ethic caught the attention of his supervisors who praised him as an exemplary employee.

More than just professional, Davi took care to ensure that the people who came before him were treated fairly. For him, it was "fulfilling to hear their stories" and apply the law properly to the facts of their cases. His supervisors took note of his impartiality.

It came as a blow, then, when after five years of exemplary service, Davi was accused of harboring bias against welfare recipients. In short order, he was suspended from his job without pay for six months, and told that he could not be entrusted with the same responsibilities when he returned. As a consequence, he also lost seniority and insurance benefits. His supervisors tried to fire him, but an arbitrator decided that was too harsh.

Davi's supervisors based their decision on one anonymous complaint about Facebook comments that Davi had made about

welfare policy in his off-hours. The comments did not reference any specific case or client. They were general statements of his personal views.

As it turns out, the complaint came from a former law school classmate, who had long resented Davi for his political beliefs and determined to ruin his career. As Davi explained, "this was cancel culture; we don't like you so we're going to get you fired."

Davi brought this case to ensure that government employees would be treated equally, regardless of their political views. Despite his mistreatment from OTDA supervisors, Davi wants to pick up where he left off, performing his job for the agency. In Davi's words, the fight is to be treated "the same as everybody else."

*ODTA Commissioner
Sam Roberts*



Meet Evan Bolick



CIR is pleased to welcome Evan Bolick as our first-ever Director of Litigation. Since 2011, Evan has worked as an attorney with Arizona's Rose Law Group, where he has practiced in areas as far-reaching as sports law, family law, land use, and constitutional law. In his time at the Rose Law Group, he has litigated cases before administrative boards, Arizona's Supreme Court, and the Ninth Circuit Court of Appeals.

Evan received his J.D. from the University of North Carolina Chapel Hill. During his time at law school, he interned with the Goldwater Institute, served as the president of the UNC

chapter of the Federalist Society, and worked as a research assistant for the accomplished constitutional scholar Michael J. Gerhardt. Prior to his career as a litigator, he clerked for Judge Winthrop of Arizona's Court of Appeals.

Evan fills a new position at CIR. The Director of Litigation will oversee the development of new lawsuits at CIR — both in its traditional areas of interest as well as new areas where individual rights become threatened. Evan's skills and experience make him a valuable addition to CIR's litigation team that will help us to intensify our fight for individual rights.

Meet Zane Lucow

Zane Lucow is one of the newest team members of CIR. A recent graduate of the Antonin Scalia Law School, Zane's path to the world of public interest litigation may come as a surprise.

Zane grew up in White Rock, a seaside city on the west coast of Canada, five miles from the U.S.-Canada border. Growing up, he made frequent trips to northern Washington to spend time with relatives. His time spent with family in small town America ingrained in him a love for the country. By the time he was in college, he was certain that he would move south after he graduated.

Zane attended Simon Fraser

University, a college in western British Columbia. In 2016, he graduated with a Bachelor's degree in English literature and philosophy. Through his studies, he developed a passionate interest in classical liberal philosophy and the legal principles behind the Constitution.

After graduating, he moved east to pursue a J.D. from the Antonin Scalia Law School at George Mason University. During that time, Zane interned with the Cato Institute and contributed to *The Federalist*. In 2019, he received his J.D.

Zane joined CIR's team in October of 2019. He serves as CIR's Director of Legal and Public Affairs.



More from Guam: Strange? Yes. Extraordinary? Apparently.

Things have taken a strange turn in Guam.

After years of litigation, CIR secured a big victory in the Ninth Circuit Court of Appeals, invalidating Guam's racially restrictive plebiscite law as a violation of the Fifteenth Amendment. But that was not the end of the story. Guam's governor, Lou Leon Guerrero, was not going down without a fight.

Governor Guerrero was determined to challenge the Ninth Circuit decision at the Supreme Court. There was just one problem. By the time she hired an attorney to represent Guam in its appeal, the deadline to file a petition with the Supreme Court was only a few days

away, and the deadline to apply for an extension had already passed.

Late requests for extensions can be filed but only if the applicant can show that there were "extraordinary circumstances."

When Guam's newly hired attorney, Michael Phillips, heard that Guam missed the deadline, he expressed doubts that the Supreme Court would grant an extension. Accordingly, he said that he would not even try to get an extension unless he found facts showing that there truly were "extraordinary circumstances" preventing a timely filing.

On October 28,—the last day on which Guam could petition the Supreme Court

for review—Phillips mailed a request for an extension to Justice Kagan's office. So what facts did Phillips find? That is hard to say.

The application was filled with vague language and provided almost no facts to explain why it was late. Indeed, the only concrete fact provided as an explanation was that "neither the Governor nor Attorney Phillips were aware of the past [sic] deadline to request an extension" at the time Phillips was hired.

Naturally, the Supreme Court rejected this application... or so it seemed.

On November 6, Guam's governor announced that the Supreme Court rejected

Guam's application. The announcement was picked up by all of Guam's major newspapers. But the announcement was premature. In fact, the Supreme Court had only rejected an electronically submitted copy of the application, not the mailed application itself.

In a twist that took just about everyone by surprise, Justice Kagan granted Guam's request for an extension. Phillips will now have until December 26 to file a petition for review of the Ninth Circuit decision.

These certainly are strange twists. Whether they are "extraordinary" is another question.

Demoted for a Post, *continued from page four*

not have even created the appearance of bias. His comments were part of a private Facebook conversation with a limited group of people. Davi's supervisors could not even access the comments for themselves to verify their content, much less could the general public.

The only conclusion one can reach is that the OTDA did not like what Davi was saying. Davi's excellent work record demonstrates

that he had been a diligent and impartial public servant. He should not be punished for expressing his views on a matter of public policy.

Social media can be a place of intense, sometimes vitriolic, political debate. More often than not, there is no constitutional issue with the way people interact online. But when a government agency decides that someone is not fit for public service based solely on

an internet post about an issue of political concern, there is a serious constitutional violation. Earlier this year, CIR filed a motion for partial summary judgment; we are asking the judge to find that there is no genuine disagreement about the material facts, and that these facts show that Davi's constitutional rights have been violated. We expect to see Davi vindicated in the near future.

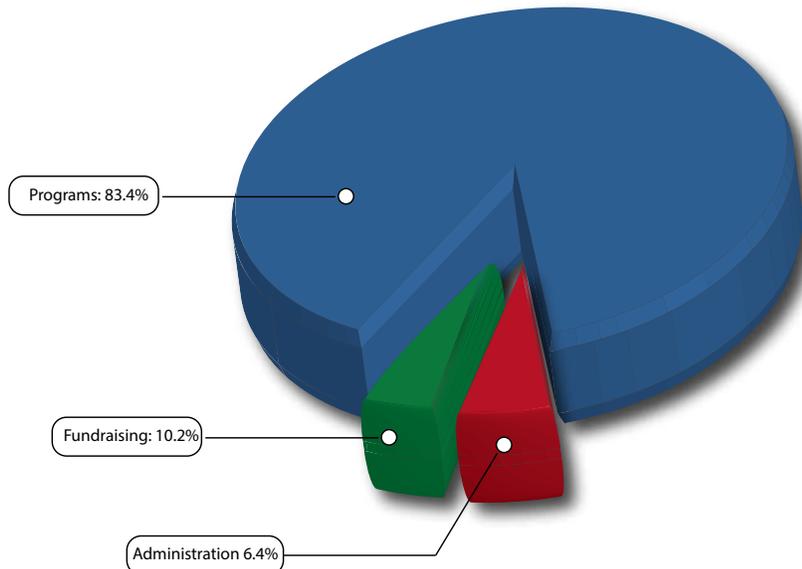
CIR Delivers Bang for Your Buck!

CIR has a proven record of efficiency. Charity Navigator, a charity assessment organization, has awarded CIR four stars, the highest possible rating, for our efficient and transparent use of contributions. Last year, CIR devoted over 83 percent of its expenses to its core missions: litigation and public education.

These figures come from CIR's IRS Form 990, based on its independent audit through March 31, 2019. The form and audit documents can be found and downloaded from CIR's website, www.cir-usa.org, or we can mail you copies upon request.

One reason for CIR's efficiency: much of our litigation is handled by top-flight members of the for-profit bar who donate their time pro bono to our cases. That means every dollar contributed to CIR results in legal work worth as much as one and half times that amount to promote our mission.

CIR has worked hard to stay lean and mean.



Taking Stock in CIR ...

CIR's precedent-setting legal victories are possible only through the generosity of thousands of supporters from across the nation. Their investment in the Center for Individual Rights provides the funds we need to move quickly when individual rights are at stake. Our recent victory against racially restrictive election laws in Guam (*Davis v. Guam*) wouldn't have been possible without the generous support of longtime CIR supporters.

Many of CIR's contributors choose to make stock gifts. You may be eligible to take an income tax deduction based on the full current value of your shares. In addition, you may be able to bypass capital gains tax that would otherwise be due. (Please consult your tax advisor for advice about your specific situation.)

We can accept gifts of stock electronically or directly through the mail. If you would like to arrange an electronic transfer, provide the Transfer Information to your broker, who will initiate the transfer to CIR's broker.

Please advise us when you make a stock transfer so that we can identify the transfer as yours and provide you with the appropriate tax receipt. To do so, call or email CIR's Director of Legal and Public Affairs, Zane Lucow at 202-833-8400 ext. 122 or lucow@cir-usa.org. He will be glad to answer any questions you might have.

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