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## The Rights and Liberties of the Palau Constitution

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# The Rights and Liberties of the Palau Constitution

*Kevin Bennardo*\*

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## INTRODUCTION

In the nearly thirty years since the Constitution of the Republic of Palau went into effect, the constitutional jurisprudence of the Supreme Court of Palau has grown to such a quantum that it now primarily refers to its own case law without the need to look to other jurisdictions for guidance. Collection and analysis of these cases is therefore appropriate, if not overdue. This article collects and reviews cases interpreting and applying the Palau Constitution through the sixteenth anniversary of Palau's independence (October 1, 2010). It focuses on the provisions of the Constitution that most directly affect the people: citizenship, suffrage, right to due process, equal protection of the laws, criminal procedure rights, and the like. Some higher-level issues (such as the designation of territory and states and the roles granted to traditional leaders) are included as well, but the focus of this paper is on individual rights and liberties.

Although by no means a history text, a small dose of history and geography is helpful to place the following analysis in context. The Republic of Palau, an independent country, comprises an archipelago of nearly 300 islands at the western end of Micronesia, approximately situated between Guam and the Philippines. After a history of relative isolation, Palau entered the colonial era in 1886 under Spanish (and then German) control before emerging from World War I as a Japanese possession. After its liberation (or, to some, capture) by Allied forces, the United Nations took control of Palau in the wake of World War II.

In 1947, the United Nations and the United States signed the Trusteeship Agreement for the Former Japanese Mandated Islands. This agreement assigned to the United States the administering authority over Palau and the other Trust Territories of the Pacific Islands. While still a Trust Territory, Palau's Constitution went into effect on January 1, 1981. After Palau and the United States agreed on a Compact of Free Association, Palau gained its full independence on October 1, 1994 when the United Nations terminated its trusteeship.

Even a cursory review of the Palau Constitution reveals that it was modeled—with some noteworthy departures—on the United States Constitution. The Palau Constitution splits the government into three branches and enumerates rights and liberties of the people of Palau. Since its enactment in 1981 it has been altered by twenty-seven amendments. Aside from the text of the Constitution, the constitutional decisions of the Supreme Court of Palau are the most significant guideposts setting forth the meaning of the Constitution. This article analyzes the Supreme Court of Palau's case law interpreting the Constitution to discern the extent—and limitations—of the rights and liberties granted by the Constitution.

## I. SUPREMACY AND AUTHORITY OF THE PALAU CONSTITUTION

### A. *Supremacy of the National Constitution*

As stated by its own text: “This Constitution is the supreme law of the land.”<sup>1</sup> Or, in the words of Associate Justice (now Chief Justice) Ngiraklsong, “I see the Constitution as perhaps the best living expression of what the people of Palau want.”<sup>2</sup> Before Palau's independence in 1994,

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<sup>1</sup> ROP CONST. Art. II, § 1. The Constitution is published in both Palauan and in English. Although both are “equally authoritative[,] in case of conflict, the Palauan version shall prevail.” ROP CONST. Art. XIII, § 2 & amend. 25. Prior to the enactment of the Twenty-Fifth Amendment in 2008, this section directed that in cases of conflict the English version of the Constitution prevailed.

<sup>2</sup> *ROP v. Ngiraboi*, 2 ROP Intrm. 257, 275 (1991) (Ngiraklsong, J., concurring) (writing separately to emphasize that the Palau Constitution sets forth the supreme law of the land). Citations to the opinions of the Appellate Division of the Supreme Court of Palau are styled “\_\_ ROP \_\_ (year)” or “\_\_ ROP Intrm. \_\_ (year),” while citations to the Trial Division of the same court will include the designation “Trial Div.” within the

it was a Trust Territory of the United Nations administered by the United States. As such, a Trusteeship Agreement between the United Nations and the United States governed its administration. However, the Palau Constitution went into effect in 1981, creating a period of overlap between the Constitution and the Trusteeship Agreement. Justice Ngiraklsong stated that no conflict could be found between the Constitution and the Trusteeship Agreement because the primary purpose of the Trusteeship Agreement was to provide self-governance to the people of Palau and the Constitution is the best expression of the Palauan people's self-governance.<sup>3</sup> Justice Ngiraklsong confirmed that the Constitution's self-declared "supremacy" in Article II, Section 1 was to be respected by the courts even in cases of conflict with the Trusteeship Agreement.<sup>4</sup>

Although Article II, Section 1 clearly sets forth the "supremacy" of the national Constitution, Section 2 of that article spells out some of the Constitution's subordinates: "Any law, act of government, or agreement to which a government of Palau is a party, shall not conflict with this Constitution and shall be invalid to the extent of such conflict."<sup>5</sup> Statutes, treaties, or state constitutions that conflict with the Constitution may be found void to the extent of the conflict under either Section 1 or Section 2 of Article II.<sup>6</sup>

Conflicts between legislation and the Constitution must be resolved in favor of the Constitution.<sup>7</sup> Justice Hefner found national legislation void for unconstitutionality because it capped the residency

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parenthetical as well as a parenthetical identifying the Justice who issued the opinion. Citations to the decisions of the United States Supreme Court are to the Supreme Court Reporter, as it is the only such reporter available in Palau.

<sup>3</sup> *See id.*

<sup>4</sup> *Id.* at 276 ("I accept and recognize, as I believe we must, the supremacy of the Palau Constitution.").

<sup>5</sup> ROP CONST. Art. II, § 2.

<sup>6</sup> Although Article II is entitled "Sovereignty and Supremacy," none of the sections of Article II grants sovereignty to Palau. Sovereignty is granted to the Republic in the amended Article I, Section 1 ("The Republic of Palau shall have jurisdiction and sovereignty over its territory . . .") as it was in the original form of that section. For more discussion of this constitutional provision, see Section II.A, *infra*.

A criminal defendant picked up on the lack of discussion of sovereignty in Article II and argued that Article II forbids sovereign immunity (as codified in 14 PNC § 502(e)) because the text of the Article fails to mention it. *See Tell v. Rengiil*, 4 ROP Intrm. 224, 227 (1994). The Court was nonplussed, stating that the failure to mention sovereign immunity in Article II (or elsewhere in the Constitution) does not diminish the existence of sovereign immunity, a privilege inherent to sovereign governments. *See id.*

<sup>7</sup> *See Mechol v. Soalablai*, 1 ROP Intrm. 62, 63 (Trial Div. 1982) (Hefner, J.) ("It is further not subject to argument that the Constitution is the supreme law of the land and prevails over any statutes passed by the Olbiil Era Kelulau."), (citing ROP CONST. Art. II, § 1).

requirement that a state could impose for voting in a state election at fifty days, whereas Article VII of the Constitution grants states full autonomy to set length of residency requirements for voting in state elections.<sup>8</sup>

Similarly, the Constitution trumps municipal ordinances, as explained by Chief Justice Nakamura in *Silmai v. Magistrate of Ngardmau Municipality*.<sup>9</sup> The ordinance at issue in *Silmai* granted a seat on the Municipal Council of Ngardmau State to the representative(s) of Ngardmau to the Olbiil Era Kelulau.<sup>10</sup> That portion of the ordinance was voided for its conflict with Article IX, Section 10 of the Constitution, which prohibits members of the Olbiil Era Kelulau from holding other public offices or otherwise engaging in public employment during their tenure in the national legislature.<sup>11</sup> Chief Justice Nakamura further found that the Presiding Judge of the Community Court could not be seated on the Municipal Council of Ngardmau State (as was provided for by ordinance) because the establishment of the constitutional courts pursuant to Article X of the Constitution did not provide for community courts.<sup>12</sup> Therefore, community courts were repealed by implication on December 23, 1981 (the date of the establishment of the constitutional court system) pursuant to Article XV, Section 3(a) of the Constitution.<sup>13</sup>

A conflict between the national Constitution and a state law is also decided in favor of the national Constitution. Chief Justice Ngiraklsong found that an Airai State law prohibiting the use of eminent domain power only when the expropriated land is used “for the *sole* benefit of a foreign entity” (emphasis added) was invalid to the extent that it attempted to grant a broader eminent domain power to the state than was provided for in Article XIII, Section 7 of the Constitution (which provides that the eminent domain power “shall not be used for the benefit of a foreign entity”).<sup>14</sup>

#### B. *Delegation of Governmental Powers Including Authority Over Harmful Substances*

Article II, Section 3 permits the Republic to delegate “major governmental powers” to another sovereign nation or international organization. Such “major governmental powers” include national

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<sup>8</sup> *See id.*

<sup>9</sup> *See Silmai v. Magistrate of Ngardmau Municipality*, 1 ROP Intrm. 47, 51 (Trial Div. 1982) (Nakamura, C.J.).

<sup>10</sup> *See id.* The Olbiil Era Kelulau is the national legislature of Palau.

<sup>11</sup> *See id.*

<sup>12</sup> *See id.* at 51-52.

<sup>13</sup> *See id.* at 52.

<sup>14</sup> *See Airai State Gov't v. Ngkekiil Clan*, 11 ROP 261, 262 n.1 (Trial Div. 2004) (Ngiraklsong, C.J.).

security and foreign affairs. Delegation of major governmental powers requires the approval of a two-thirds majority of the legislature and a simple majority of the citizens in a nation-wide referendum. The wrinkle in Section 3 is that a super-majority vote of three-fourths of the citizens voting in a nation-wide referendum is required to approve any such agreement “which authorizes use, testing, storage, or disposal or nuclear, toxic chemical, gas or biological weapons intended for use in warfare.”<sup>15</sup>

As the capstone to what Justice Hefner referred to as the “long road the Palauan people have taken to determine their future political destiny,” Palau and the United States entered into a Compact of Free Association on August 26, 1982.<sup>16</sup> Part of the Compact of Free Association would permit the United States to store nuclear, chemical, or biological materials within Palau’s territory, thus requiring approval by 75% of the popular votes.

The proposed wording on the referendum ballot sought a “yes” or “no” response to the question: “Do you approve the agreement under Section 314 of the Compact which places restrictions and conditions on the United States with respect to radioactive, chemical and biological materials?”<sup>17</sup> Justice Hefner found this language to be misleading, as it could be understood to mean that a “yes” vote would place greater restrictions on the storage of such prohibited materials while in reality a “no” vote would maintain the Constitution’s total prohibition.<sup>18</sup> The Court ordered that the ballots be re-worded to more clearly set forth the issues for the voting public.<sup>19</sup>

The issue persisted before Justice Hefner in *Gibbons v. Remeliik*.<sup>20</sup> The result of the referendum was a 53% “yes” vote to the question, “Do you approve of the Agreement concerning radioactive, chemical and biological materials pursuant to Section 314 of the Compact of Free Association?”<sup>21</sup> The vote fell short of the 75% affirmative vote required

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<sup>15</sup> Similarly, Article XIII, Section 6 provides:

Harmful substances such as nuclear, chemical, gas or biological weapons intended for use in warfare, nuclear power plants, and waste materials therefrom, shall not be used, tested, stored, or disposed of within the territorial jurisdiction of Palau without the express approval of not less than three-fourths (3/4) of the votes cast in a referendum submitted on this specific question.

ROP CONST. Art. XIII, § 6.

<sup>16</sup> See *Koshiba v. Remeliik*, 1 ROP Intrm. 65, 65 (Trial Div. 1983) (Hefner, J.).

<sup>17</sup> *Id.* at 67.

<sup>18</sup> See *id.*

<sup>19</sup> See *id.* at 75-76.

<sup>20</sup> *Gibbons v. Remeliik*, 1 ROP Intrm. 80 (Trial Div. 1983) (Hefner, J.).

<sup>21</sup> See *id.* at 80-81.

by Article II, Section 3. The specific issue before the Court in *Gibbons* was whether the “harmful substances” provision was severable from the greater Compact, and therefore whether the Compact had been passed minus that provision.<sup>22</sup> Justice Hefner ruled that the referendum had been split into two questions (one regarding the Compact as a whole and one regarding the harmful substances provision specifically) only to comply with the requirement in Article XIII, Section 6 of the Constitution, requiring that a referendum be held on the “specific question” of harmful substances.<sup>23</sup> Therefore, the rejection of the harmful substances provision meant that the larger Compact of Free Association had been rejected as well.<sup>24</sup>

Approval of the Compact again came to the Court after the third referendum failed to garner 75% voter approval.<sup>25</sup> The second referendum garnered a 67% approval vote and the third a 72.19% approval vote.<sup>26</sup> After the third referendum, the Compact was sent to the United States Congress for consideration (despite its failure to muster the requisite votes in Palau).<sup>27</sup> The *Gibbons v. Salii* plaintiff sued for declaratory judgment and injunctive relief, alleging that the Compact conflicted with Article II, Section 3 and Article XIII, Section 6 of the Constitution by permitting the United States (or its designees) to bring nuclear substances (including nuclear weapons and nuclear-propelled ships and aircraft) into Palau’s territory without first obtaining the constitutionally-required 75% voter approval.<sup>28</sup> The plaintiff also complained that the Compact defined Palau’s territory as smaller than the constitutionally-defined territory, thus permitting unchecked nuclear activity by the United States in the area not included in the Compact.<sup>29</sup>

The Appellate Division, per Chief Justice Nakamura, traced the history of the constitutional prohibitions against nuclear materials in Palau.<sup>30</sup> The enacted Constitution was the result of the third constitutional plebiscite, after the second constitutional plebiscite only garnered 31% support for the proposed constitution.<sup>31</sup> That second proposed constitution

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<sup>22</sup> *See id.* at 81.

<sup>23</sup> *See id.*

<sup>24</sup> *See id.* at 82.

<sup>25</sup> *See Gibbons v. Salii*, 1 ROP Intrm. 333 (1986).

<sup>26</sup> *See id.* at 334 and n.1.

<sup>27</sup> *See id.* at 335.

<sup>28</sup> *See id.*

<sup>29</sup> *See id.*

<sup>30</sup> *See id.* at 339-44.

<sup>31</sup> *See id.* at 343-44.

included language permitting an exception for the “transit and port visits of ships, and transit and overflight of aircraft” from the nuclear-materials ban.<sup>32</sup> The third draft constitution deleted this exception for nuclear craft in transit, but was otherwise substantially similar to the second draft constitution. It was that third draft constitution that was approved by 78% of the voters on July 9, 1980 and went into effect as the Constitution on January 1, 1981.<sup>33</sup> Drawing reasonable inferences from this constitutional-drafting history, the Court found that “use” and “store” in Article II, Section 3 included the operation of nuclear vessels as contemplated by the Compact.<sup>34</sup> Going further, the Court stated, “[W]e hold that the four verbs, ‘use, test, store or dispose of,’ in the nuclear control provisions were meant to be a brief summation of all that could possibly be done with nuclear substances—in short, a general prohibition against the introduction of nuclear substances in Palau.”<sup>35</sup> Because the third Compact referendum only received 72.19% of the vote, the Compact, with its provisions permitting the United States to operate nuclear-capable vessels within Palau’s territory, was not effective.<sup>36</sup>

The Court’s interpretation in *Gibbons v. Salii* that the prohibition against “use, testing, storage, or disposal of” harmful substances in the nuclear-control provisions of the Constitution is, in actuality, a prohibition against anything that could possibly be done with those substances. While expansive, this interpretation seems to comport with the rationale behind the nuclear-control provisions. And, given the amount of litigation surrounding the issue, it was likely an attempt by the Court to cut off even more protracted litigation and settle the issue at once, rather than reach the same conclusion on an *ad hoc* basis.

The issue again came before the Appellate Division after a referendum to amend the Constitution to suspend the nuclear-control provisions (Article II, Section 3 and Article XIII, Section 6) of the Constitution insofar as they applied to the Compact.<sup>37</sup> The Court found that, because the negotiated Compact was inconsistent with the nuclear-control provisions, amendment of the Constitution was possible through

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<sup>32</sup> See *id.* at 343, n.8.

<sup>33</sup> See *id.* at 344.

<sup>34</sup> See *id.* at 348.

<sup>35</sup> *Id.* at 348.

<sup>36</sup> See *id.* at 351. The Court did not find a constitutional problem with the Compact’s diminutive territorial definition of Palau because the Compact did not define the area to which it applied; therefore, the Court found that the Compact limitations applied no matter where the United States attempted to exercise its authority. See *id.* at 350-51.

<sup>37</sup> See *Fritz v. Salii*, 1 ROP Intrm. 521, 522 (1988).

the mechanism laid out in Article XV, Section 11.<sup>38</sup> Article XV, Section 11 permits amendment of the Constitution to avoid conflict with the Compact by a simple majority of voters in at least three-fourths of the states.<sup>39</sup> The First Amendment to the Constitution was written and enacted specifically to avoid inconsistencies between the Compact and the nuclear-control provisions of Article II, Section 3 and Article XIII, Section 6.

The Court again reviewed the constitutionality of the Compact in *Wong v. Nakamura*.<sup>40</sup> The challenge in *Wong* was that the national legislature needed to vote again (and reach a two-thirds majority approval under Article II, Section 3) before Palau could enter into the Compact.<sup>41</sup> The appellants argued that the Compact had been altered since the legislature had approved it in 1986, but the Court found that the legislature had approved the Compact again in 1993 after the alterations.<sup>42</sup>

Although permitting approval of the Compact with its nuclear provisions with less than three-fourths popular approval seems an end-round around Article II, Section 3 and Article XIII, Section 6, the Constitution does permit such amendment, either by the Compact-specific amendment provision in Article XV, Section 11 or the general amendment provision in Article XIV.<sup>43</sup> Whenever a constitutional amendment can be effected by a lesser majority than a different limitation in the constitution, that limitation is effectively reduced to only requiring the majority needed for amendment.<sup>44</sup> Although the result may have been an oversight in

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<sup>38</sup> *See id.* at 534.

<sup>39</sup> Article XV, Section 11 states:

Any amendment to this Constitution proposed for the purpose of avoiding inconsistency with the Compact of Free Association shall require approval by a majority of the votes cast on that amendment and in not less than three-fourths (3/4) of the states. Such amendment shall remain in effect only as long as the inconsistency continues.

ROP CONST. Art. XV, § 11.

<sup>40</sup> *Wong v. Nakamura*, 4 ROP Intrm. 243 (1994).

<sup>41</sup> *Id.* at 244-45.

<sup>42</sup> *See id.* at 245.

<sup>43</sup> Article XIV, Sections 2 and 3 (as amended by the 15th Amendment in 2008) provide the general mechanism for amendments to the Constitution: a majority vote (including a majority in at least three-fourths of the states) is necessary to approve a proposed amendment, but a special election on a proposed amendment cannot be held either six months before or after a general election. The pre-amendment text of Article XIV, Section 2 required the vote on the proposed amendment to take place only on the next regularly-scheduled general election.

<sup>44</sup> For instance, consider a constitution that requires three-fourths popular approval to levy a certain tax, but only requires one-half popular approval to amend the constitution. The tax could be levied by a simple majority, because a simple majority could amend the constitution and nullify the three-fourths approval provision.

constitutional drafting (or perhaps not), the Court was bound to apply the Constitution as written. The First Amendment therefore effectively removed the three-fourths popular vote requirement on the harmful substances provision of the Compact and paved the way for its approval.

## II. TERRITORY AND LANGUAGE

### A. *Territory of Palau*

The Constitution begins, in Section 1 of Article 1, with a definition of Palau's territorial boundaries and the declaration that Palau shall have "jurisdiction and sovereignty" over its territory.<sup>45</sup> Palau's territorial boundaries, as described in Section 1, were changed by the Twenty-Sixth Amendment in 2008. This amendment split Section 1 into two sections and redefined the archipelagic baselines that dictate the boundaries of Palau's maritime zones.<sup>46</sup>

Section 2(a) of Article I (added by the Twenty-Sixth Amendment) grants the Republic the exclusive ownership of all living and non-living resources within its exclusive economic zone and mandates that the Republic shall exercise its sovereign rights "to conserve, develop, exploit, and manage at a sustainable manner" those resources in accordance with its treaties, international law, and practices.<sup>47</sup> When read literally, this clause destroys private property rights in Palau, instead deeding all "resources" to the national government. The more realistic meaning of this clause is that Palau—and no other foreign nation—lays claim to the resources within its territorial boundaries to the extent that those resources are not otherwise owned by private parties.

Palau is divided into sixteen states. Article I, Section 2(b) provides that each state has "exclusive ownership of all living and non-living resources, except highly migratory fish, within the twelve (12) nautical mile territorial sea, provided, however, that traditional fishing rights and practices shall not be impaired."<sup>48</sup> Justice Beattie applied the pre-amendment version of this section<sup>49</sup> to find that Koror State was the owner

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<sup>45</sup> ROP CONST. Art. I, § 1.

<sup>46</sup> In the only reported case to analyze section 1, a criminal defendant argued that, given the territorial definition in (pre-amendment) Article I, Section 1, the Airai International Airport (which does not physically lie on Palau's "border") is not a "border" for purposes of the "border search" exception to the warrant requirement. See *Republic of Palau v. Techur*, 6 ROP Intrm. 340, 342 (Trial Div. 1997) (Michelsen, J.). Citing American precedent, Justice Michelsen found that, for purposes the border search exception, the site of embarkation or disembarkation of passengers is the "functional equivalent" of the border. See *id.* This finding seems sensible because, although the Constitution defines Palau's territory, the international airport is the functional "border" for the majority of travelers to and from Palau (and the "border search exception" could—and perhaps should—just as easily be called the "functional border search exception"). For a constitutional criminal procedure analysis of *Techur*, see section VIII.B, *infra*.

<sup>47</sup> ROP CONST. Art. I, § 2(a).

<sup>48</sup> ROP CONST. Art. I, § 2(b).

<sup>49</sup> Before the 2008 amendment, Article I, Section 2 granted each state exclusive ownership of all living and non-living resources (except highly migratory fish) "from the

of a World War II Japanese Zero fighter plane (a “non-living resource”) sunk in the Palau Lagoon in *Toribiong v. Gibbons*.<sup>50</sup> Koror State’s contention was that, as the owner of the Zero, it could “do what [it] please[d]” with the aircraft and therefore it did not have to comply with the provisions of the national Lagoon Monument Act (19 PNC § 301, *et seq.*) prohibiting interference with Japanese aircraft sunk in the Palau Lagoon without a permit from the President.<sup>51</sup> The Court found that Koror State’s ownership rights over the Zero were subject, to some extent, to the legislature’s constitutional power, under Article IX, Section 5(12), to regulate the ownership, exploration, and exploitation of natural resources.<sup>52</sup> The focus of the Court’s inquiry, therefore, became to what extent the Olbiil Era Kelulau could regulate Koror State’s use of its Zero before the regulation became a “taking” requiring compensation pursuant to Article XIII, Section 7 of the Constitution.<sup>53</sup> But, because Koror State had not been denied a permit by the President (or even applied for one), the Court put off deciding such a “hypothetical question” for another day.<sup>54</sup>

The *Toribiong* opinion dodged the greater tension: Article I, Section 2 grants exclusive ownership rights to the states for all living and non-living resources within certain boundaries, but Article IX, Section 5(12) grants the national legislature the power to regulate the “ownership” of natural resources. The former grant of ownership is in direct conflict with the latter grant of power over regulation of ownership. Ownership power over natural resources should be granted either to the states or the national legislature, and the Constitution’s contradictory grant to both creates an uneasy strain.<sup>55</sup>

Section 3 of Article I grants to the national government the power “to add territory and to extend jurisdiction.”<sup>56</sup> Although this power is likely inherent in Article I, Section 1’s grant of “sovereignty and

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land to twelve (12) nautical miles seaward from the traditional baselines.”

<sup>50</sup> *Toribiong v. Gibbons*, 3 ROP Intrm. 419, 421 (Trial Div. 1993) (Beattie, J.).

<sup>51</sup> *See id.* at 420.

<sup>52</sup> *See id.* at 421.

<sup>53</sup> *See id.* at 422.

<sup>54</sup> *See id.* at 423-25.

<sup>55</sup> This tension has been magnified by the 2008 addition of Article I, section 2(a) providing “exclusive ownership” to the Republic over all resources within its exclusive economic zone and “over all mineral resources in the seabed, subsoil, water column, and insular shelves within its continental shelf.” Since the amendment, however, the Appellate Division has cited Article I, Section 2 for the proposition that the states hold authority over the land below the high water mark. *See House of Traditional Leaders v. Koror State Gov’t*, Civ. App. No. 09-004, slip op. at 9 (Feb. 10, 2010).

<sup>56</sup> ROP CONST. Art. I, § 3.

jurisdiction” to Palau, Section 3 clarifies that state governments cannot expand their territory without national approval. The final section of Article I states that nothing in Article I should be interpreted “to violate the right of innocent passage and the internationally recognized freedom of the high seas.”<sup>57</sup>

#### B. *Establishment of Permanent Capital*

The Constitution provides for continuation of the provisional capital of Koror, but mandates that the legislature shall designate a permanent capital in Babeldaob within ten years of the effective date of the Constitution (essentially, by 1991).<sup>58</sup> The Constitution only required the “designation” of a permanent capital within that time frame, not the actual establishment of one. But the capital has since been established in Ngerulmud, Melekeok State (on the island of Babeldaob), so this provision provides little fodder for future dispute. One remaining issue, however, is whether the constitutional designation of the capital as “permanent” means that it could never be moved, even to another location on Babeldaob.

#### C. *Official and National Languages*

Article XIII, Section 1 dubs Palauan and English the “official languages” and the “Palauan traditional languages” as the “national languages.”<sup>59</sup> The national legislature is to dictate the appropriate use of each, and the Constitution does not indicate the relevance of these titles.<sup>60</sup>

### III. SPECIAL RIGHTS OF PALAUANS

#### A. *Citizenship*

The Constitution affords special rights to Palauan citizens. Article III constrictively defines Palauan citizenship, although the requirements have become less stringent through amendments. Citizens of the Trust Territory at the time of the adoption of the Constitution who had “at least one parent of recognized Palauan ancestry” automatically became citizens of Palau per Section 1 of Article III.<sup>61</sup>

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<sup>57</sup> ROP CONST. Art. I, § 4.

<sup>58</sup> ROP CONST. Art. XIII, § 11.

<sup>59</sup> ROP CONST. Art. XIII, § 1. The traditional languages are not enumerated.

<sup>60</sup> Citing the “official language” status of Palauan and English, Justice Beattie denied a challenge to the ballots used in a presidential primary election based on the failure to translate the instructions into Japanese. *See Gibbons v. Republic of Palau*, 5 ROP Intrm. 353, 356 (Trial Div. 1996) (Beattie, J.).

<sup>61</sup> ROP CONST. Art. III, § 1.

Section 4 of Article III, as modified in 2008 by the Seventeenth Amendment, states that a person born of at least one parent who is a citizen of Palau or “of recognized Palauan ancestry” is a citizen of Palau.<sup>62</sup> The Seventeenth Amendment also repealed Sections 2 and 3 of Article III and rendered the Second Amendment a nullity by permitting unrestricted dual-citizenship with the statement that “[c]itizenship of other foreign nations shall not affect a person’s Palauan citizenship.”<sup>63</sup>

The original text of Section 2 provided that a person born of at least one Palauan citizen was a Palauan citizen by birth “so long as the person is not or does not become a citizen of any other nation.”<sup>64</sup> The effect of Section 2 was then altered by the Second Amendment (enacted in 2004). Under this amendment, United States citizenship had no effect on Palauan citizenship and persons with recognized Palauan ancestry who were citizens of foreign nations could gain or retain Palauan citizenship. Section 3 provided that a person with dual Palauan and non-Palauan citizenship, who was under eighteen, must renounce her non-Palauan citizenship by her twenty-first birthday (or within three years of the effective date of the Constitution) or else be deprived of Palauan citizenship.<sup>65</sup>

Before the Seventeenth Amendment, Section 4 allowed for citizenship through naturalization *only* by a person born to at least one parent of recognized Palauan ancestry (and on the condition that the naturalized citizen renounce all other foreign citizenships). The Seventeenth Amendment struck all “naturalization” language from Article III—no longer explicitly permitting it, but also no longer restricting the requirements for naturalization. Therefore, citizenship by naturalization of persons not born to Palauan parents could be constitutionally implemented.<sup>66</sup>

The Appellate Division applied the Constitution to conclude that the appellee was a Palauan citizen—and thus entitled to acquire title to land<sup>67</sup>—in *Ucherremasech v. Hiroichi*.<sup>68</sup> Because the appellee was born to parents of Japanese ancestry, she was ineligible for citizenship under the

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<sup>62</sup> ROP CONST. Art. III, § 4 & amend. 17.

<sup>63</sup> ROP CONST. amend. 17.

<sup>64</sup> ROP CONST. Art. III, § 2.

<sup>65</sup> Such divestment was found in *Aguon v. Aguon*, 5 ROP Intrm. 122, 128 (1995). Had the Second Amendment been enacted and applied in *Aguon*, no divestment of Palauan citizenship would have been found, as the non-Palauan citizenship at issue was United States citizenship.

<sup>66</sup> Indeed, the legislature has the power to “establish a uniform system of naturalization.” ROP CONST. Art. IX, § 5(4).

<sup>67</sup> See section III.B, *infra*.

<sup>68</sup> *Ucherremasech v. Hiroichi*, Civ. App. No. 09-009 (May 14, 2010).

original version of Article III, Section 2 or the Seventeenth Amendment.<sup>69</sup> The question then became whether the appellee, who was adopted at the age of eight by a Palauan couple in 1944, qualified as a citizen under Article III, Section 1.

The Appellate Division found that an adoptive parent qualifies as a “parent” for the purposes of Article III, Section 1 because the plain meaning of the word “parent” includes adoptive parents.<sup>70</sup> Therefore, the appellee had “at least one parent of recognized Palauan ancestry” as required by Article III, Section 1. The Court found that the appellee satisfied Article III, Section 1’s second requirement for citizenship (that she was a citizen of the Trust Territory immediately prior to the effective date of the Constitution) without analysis, because that point was not argued before the Trial Divisions and had, in fact, been admitted by the appellants.<sup>71</sup>

Palauan citizenship brings with it certain “special rights,” including the right to acquire land, to vote, to freely migrate, to certain health care benefits, and to complimentary primary and secondary education. The equal protection clause also permits the “preferential treatment of citizens” by the government.<sup>72</sup>

#### B. Acquisition of Land

Acquisition of Palauan land or water is limited to Palauan citizens (or corporations wholly-owned by Palauans) by Article XIII, Section 8. It is important to note that this section does not prohibit *ownership* of land by non-Palauans, only acquisition.<sup>73</sup> The “affirmative obligation” to prove Palauan citizenship falls on the party claiming acquisition of land.<sup>74</sup> Inability to prove citizenship at the time of the acquisition voids the transfer.<sup>75</sup> Regarding corporations, it is the citizenship of a corporation’s owners, not its officers or directors that is pertinent for the constitutional inquiry.<sup>76</sup>

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<sup>69</sup> See *id.*, slip op. at 9.

<sup>70</sup> See *id.* at 10-11.

<sup>71</sup> See *id.* at 13-16.

<sup>72</sup> See section VI, *infra*.

<sup>73</sup> See *Aguon v. Aguon*, 5 ROP Intrm. 122, 127 (1995).

<sup>74</sup> See *Dalton v. Borja*, 8 ROP Intrm. 302, 303 n.2 (2001).

<sup>75</sup> See *Diaz v. Estate of Ngirchorachel*, 14 ROP 110, 111 (2007) (holding that a land transfer to a Palauan who had renounced his Palauan citizenship at the time of the transfer was void).

<sup>76</sup> See *Airai State Pub. Lands Auth. v. Seventh Day Adventist Mission*, 12 ROP 38, 42 (2004).

The bar against acquisition of land by non-Palauans extends to acquisitions via inheritance.<sup>77</sup> Even if an inheritress becomes a Palauan citizen before the formal distribution of the estate, she will be barred from inheriting land if she was not yet a Palauan citizen at the time of the decedent's death.<sup>78</sup>

Article XIII, Section 8 only limits land acquisition by non-Palauans, and cannot be used to bar acquisition by someone who is a Palauan at the time of the acquisition.<sup>79</sup> If a Palauan and a non-Palauan jointly seek to acquire Palauan land (e.g., as joint purchasers), the Appellate Division has stated that the acquisition by the Palauan would still be effective.<sup>80</sup> Such an interpretation safeguards situations in which Palauan and non-Palauan spouses jointly purchase Palauan land, but non-Palauans must be wary that entering into such joint tenancies will leave them with no legal claim to the land.

The Nineteenth and Twentieth Amendments to the Constitution, enacted in 2008, added two caveats to Article XIII, Section 8. First, “[f]oreign countries, with which Palau establishes diplomatic relations, may acquire title to land for diplomatic purposes pursuant to bilateral treaties or agreements.”<sup>81</sup> Second, non-citizen individuals or corporations may lease land in Palau for up to ninety-nine years.<sup>82</sup> Although a lease by a non-citizen for 100 years or greater is not explicitly prohibited, the implication of these amendments is that such a lease would constitute a de facto “acquisition” and therefore be rendered unconstitutional.

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<sup>77</sup> See *Tengadik v. King*, Civ. App. No. 08-039, slip op. at 7 (Nov. 4, 2009) (“[W]e hold that the phrase ‘acquire title to land’ in Article XIII, § 8 applies equally to inheritance and the distribution of a decedent’s estate as it does to other methods by which one can acquire such title.”).

<sup>78</sup> *Id.* at 6. Although land usually vests in an inheritor immediately upon the decedent’s death, the land at issue in *Tengadik* was not determined to be owned by the decedent until nineteen years after his death. *Id.* at 6-8. Therefore some question surrounded whether the time of death or time of determination of ownership was the relevant date to test the would-be inheritress’ citizenship. *See id.* But, because the would-be inheritress was not a Palauan citizen at either of those potentially relevant times, the Appellate Division deemed it unnecessary to determine which date controlled. *See id.* at 8.

<sup>79</sup> See *Anastacio v. Haruo*, 8 ROP Intrm. 128, 129 (2000) (“Article XIII cannot be read to prevent a Palauan citizen from acquiring title to land in Palau.”).

<sup>80</sup> *See id.* (“If a conveyance of title to land were made to a Palauan citizen and a noncitizen as tenants in common, nothing in Article XIII, Section 8, would prevent the Palauan citizen from becoming vested with title.”).

<sup>81</sup> ROP CONST., amends. 19-20.

<sup>82</sup> *Id.*

### C. Voting Rights

Although Article VII secures the right to vote “to all eligible citizens of Palau” in state and national elections,<sup>83</sup> it has also been read as a restriction barring non-citizens from voting in those same elections.<sup>84</sup> This right of citizens to vote, at least for “key public officials at both the national and state governments,” is “an essential democratic principle.”<sup>85</sup> Beyond citizenship, the Constitution mandates several voter requirements, one of which is that voters must be at least eighteen years old. The Constitution delegates the responsibility to prescribe a minimum period of residence and provide for voter registration to the national and state legislatures for their respective elections.<sup>86</sup>

Article VII goes on to state that “[a] citizen who is in prison, serving a sentence for a felony, or mentally incompetent as determined by a court may not vote.”<sup>87</sup> The language of the Constitution is ambiguous in this respect—are all prisoners prohibited from voting, or just those serving a sentence for a felony? If “in prison, serving a sentence for a felony” is only one category of prohibited voters, then those in prison serving misdemeanor sentences and those physically out of prison serving felony sentences (even if freed by an escape from Koror Jail) are constitutionally guaranteed the right to vote. But if the article's language comprises two separate categories—all citizens “in prison” as well as all citizens serving felony sentences—then the latter prohibition must include citizens serving felony sentences who are not in prison. For instance, a person on parole or on probation is “serving a sentence for a felony” but not “in prison.” This latter reading is preferred—all prisoners, all persons serving felony sentences, and all judicially-determined mental incompetents are

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<sup>83</sup> *Olikong v. Salii*, 1 ROP Intrm. 406, 412 (1987).

<sup>84</sup> See *Yano v. Kadoi*, 3 ROP Intrm. 174, 184 (1992) (“Article VII of the Palau Constitution provides that only citizens of Palau can vote in Palauan state and national elections.”).

<sup>85</sup> *Teriong v. Gov't of State of Airai*, 1 ROP Intrm. 664, 675 (1989).

<sup>86</sup> This delegation has been read to impose a non-optional requirement on the states—each state “shall” prescribe a minimum period of residence and provide for voter registration for state elections. See *Mechol v. Soalablai*, 1 ROP Intrm. 62, 62-63 (Trial Div. 1982) (Hefner, J.).

<sup>87</sup> ROP CONST. Art. VII.

prohibited from voting.<sup>88</sup> Both the sentence structure and logic favors this approach, as does the statutory voter eligibility requirements.<sup>89</sup>

In dicta, in *Teriong v. Government of State of Airai*, the Appellate Division stated that the only voter restrictions are that “a person in prison serving a sentence for a felony, or one who has been declared mentally incompetent by a court is not eligible to vote.”<sup>90</sup> This interpretation breaks with the reading advocated above. But the Court’s recital of Article VII in *Teriong* omits the crucial comma after “felony,”<sup>91</sup> an omission that may have poisoned the Court’s entire interpretation of the clause.

Article VII mandates the use of secret ballots in Palauan elections. The Eighteenth Amendment, enacted in 2008, added a provision to Article VII requiring the availability of voting by absentee ballot for voters who are outside of Palau during an election.

#### D. *Right of Migration*

Palauan citizens are guaranteed the right to “enter and leave Palau” and “migrate within Palau” by Article IV, Section 9.<sup>92</sup> Non-citizens are relegated to the whims of the legislature by Article III, Section 5: “The Olbiil Era Kelulau shall adopt uniform laws for admission and exclusion of noncitizens of Palau.”<sup>93</sup>

The right to migrate has been judicially-interpreted only once, in *King v. Republic of Palau*, where a motorist was arrested for violating Koror State’s curfew law.<sup>94</sup> The curfew law made it “unlawful for any person to be in any public area within the State of Koror” between 12:30 a.m. and 6:00 a.m. unless their reason for being in the public place fit one of several enumerated exceptions (e.g., emergency, the seeking of medical attention, transport to or from work, a funeral, or fishing).<sup>95</sup> The arresting

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<sup>88</sup> A third reading, that only those voters who are both in prison and *either* serving a felony sentence *or* have been determined mentally incompetent are prohibited from voting, is not favored. This reading would permit mentally incompetent citizens to vote as long as they are not in prison. And offenders who have been judicially-determined to be mentally incompetent would—hopefully—not be in prison, but rather be receiving treatment.

<sup>89</sup> 23 PNC § 1403 requires an applicant for voter registration to swear that she is “not currently under parole, probation, or sentence for any felony for which [she has] been convicted by any court of the Republic or any court within the jurisdiction of the United States” nor is she “currently under a judgment of mental incompetency or insanity.”

<sup>90</sup> *Teriong v. Government of State of Airai*, 1 ROP Intrm. 664, 675 (1989).

<sup>91</sup> *See id.* at 674.

<sup>92</sup> ROP CONST. Art. IV, § 9.

<sup>93</sup> ROP CONST. Art. III, § 5.

<sup>94</sup> *King v. Republic of Palau*, 6 ROP Intrm. 131, 132 (1997).

<sup>95</sup> *See id.* at 132 n.2 (quoting Koror Public Law No. K1-25-88).

officer found ammunition in the defendant's pocket and a subsequent search of the automobile revealed a firearm under the driver's seat.<sup>96</sup> The officer also found a matchbox on the defendant's person containing methamphetamine.<sup>97</sup> The trial court suppressed the methamphetamine, but the defendant was found guilty of possession of a firearm and of possession of bullets.<sup>98</sup> The curfew violation was apparently not prosecuted.

The defendant challenged the constitutionality of the curfew law—the original basis for the stop and arrest—as an impermissible restriction of his right to travel under Article IV, Section 9.<sup>99</sup> The Court interpreted the right of citizens to migrate within Palau as protection from the government ordering a citizen to live in a certain place.<sup>100</sup> The Court stated that the guarantee was not one of “mobility and movement.”<sup>101</sup> Because the Committee on Civil Liberties and Fundamental Rights of the Palau Constitutional Convention expressly stated that the police power of the state include the power to impose and enforce a curfew, the Court found the curfew law constitutional.<sup>102</sup>

The interpretation of *King* is truly restrictive: limiting the right to migrate to mean only that citizens cannot be order to *live* in a certain place. Of course, on the other extreme, the right to migrate within Palau cannot be reasonably interpreted to mean that citizens are free to roam anywhere in the country at any time. Such an interpretation would impede land ownership rights and security. Given the confined scope of the issue, the *King* Court's constitutional interpretations of Article IV, Section 9 may have little application outside of the realm of curfew law.

#### E. *Non-Impairment of Contracts by Legislation*

The “contracts clause” of Article IV, Section 6 guarantees that legislation shall not impair “[c]ontracts to which a citizen is a party.”<sup>103</sup> This safeguard has not been better defined in any reported opinion and its meaning is unclear. Read broadly, any legislation (enacted by either a state or a national legislature) that harmed an already executed contract of

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<sup>96</sup> *See id.* at 132.

<sup>97</sup> *See id.*

<sup>98</sup> *See id.*

<sup>99</sup> *See id.* at 133.

<sup>100</sup> *See id.* The Court read the rest of the constitutional provision—the right of citizens to “enter and leave Palau”—to mean that the government could not “arbitrarily deny a citizen the right to leave or enter the country.” *See id.*

<sup>101</sup> *Id.*

<sup>102</sup> *See id.*

<sup>103</sup> ROP CONST. Art. IV, § 6.

a citizen would be unconstitutional. Carried to an extreme, this clause could conceivably block many legislative enactments. Until it is better-defined through judicial interpretation its bounds are largely unknown. However, it is likely to be construed narrowly to avoid impinging on legislative enactments (which presumably benefit the public at large) in favor of private contracts (which presumably do not).

#### F. *Examination of Government Documents*

Another clause that, if read broadly (or even literally), could severely impact the functioning of the government is Article IV, Section 12. This section grants citizens the right “to examine any government document and to observe the official deliberations of any agency of government.”<sup>104</sup> Pursuant to the literal language of this section, the Republic cannot keep any document secret from its citizens. However, this section must have yet-to-be-defined narrower bounds, lest all personal information collected by the government, ongoing police investigations, judicial deliberations, and matters of national security be exposed at great detriment to the public at large.<sup>105</sup>

#### G. *Health Care and Education*

Article VI, “Responsibilities of the National Government,” requires the national government to provide free or subsidized health care and free public education (from grades one through twelve) to citizens.<sup>106</sup> Article IV, Section 16, as added by the Twenty-Fourth Amendment, mandates the free provision of preventive health care (as prescribed by law) by the national government.<sup>107</sup>

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<sup>104</sup> ROP CONST. Art. IV, § 12.

<sup>105</sup> The Trial Division declined to entertain an Article IV, Section 12 argument because it was not presented “squarely” to the Court. *See Shell Co. v. Palau Pub. Utils. Corp.*, 15 ROP 158, 161 (Trial Div. 2008) (Ngiraklsong, C.J.). But the lack of square presentation in *Shell* arose because the defendant failed to respond to the plaintiff’s constitutional contentions in the plaintiff’s application for a preliminary injunction. *See id.* The defendant was thus able to duck the issue by ignoring the argument in the plaintiff’s filing.

<sup>106</sup> ROP CONST. Art. VI.

<sup>107</sup> For more on Article VI and the constitutional responsibilities of the national government, see section XVII, *infra*.

## IV. FREEDOMS OF RELIGION, EXPRESSION AND ASSEMBLY

A. *Freedom of Religion*

The first three sections of Article IV secure important—although infrequently litigated—rights to the people of Palau. Section 1 declares “freedom of religion” and prohibits the government from either compelling or hindering religious exercise.<sup>108</sup> In a forward-thinking clause, Section 1 permits the government to provide assistance “to private and parochial schools on a fair and equitable basis for nonreligious purposes.” Although the meanings of “fair and equitable basis” and “nonreligious purposes” are open to debate, no reported opinion has yet to address these issues.

B. *Freedoms of Expression and Press*

Section 2 guarantees the “freedom of expression” through absolute language as well as recognizing a reporter’s privilege for “bona fide” reporters.<sup>109</sup> Although the language of the guarantee of freedom of expression is seemingly absolute, it has been narrowed (as it must) through interpretation.

The Appellate Division contemplated the freedom of expression rights of governmental employees in *April v. Palau Pub. Utils. Corp.*:

Although citizens do not generally have a right to public employment, it is impermissible for a public employer to force employees to surrender fundamental rights as a condition of their employment. Otherwise public employers would be free to require their employees to vote for a certain candidate or join a certain religion. At the same time, however, public employers must be afforded sufficient autonomy to oversee and reprimand their employees lest every grievance be elevated to a matter of constitutional proportions.<sup>110</sup>

In *April*, the Appellate Division analyzed under what circumstances a governmental employer could reprimand its employees for employee expression. The Court first found that the “government must be free to oversee its employees without judicial interference when public employees speak as government agents.”<sup>111</sup> But, because the “government no longer has the same level of self-interest in the employee’s expression”

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<sup>108</sup> ROP CONST. Art. IV, § 1.

<sup>109</sup> ROP CONST. Art. IV, § 2.

<sup>110</sup> *April v. Palau Pub. Utils. Corp.*, Civ. App. No. 08-038, slip op. at 7 (Nov. 3, 2009).

<sup>111</sup> *Id.* at 8.

when the employee speaks as a private citizen, some—but not all—private speech of public employees lies outside the bounds of employer oversight.<sup>112</sup> The Court held that “[a]bsent a powerful justification, punishing public employees for expressing themselves on issues of public concern—whether those issues relate to the public employer or not—would run afoul of our constitutional guarantee to freedom of expression.”<sup>113</sup> Expression regarding matters of public concern “is at the heart of our guarantee of freedom of expression” and “a bedrock of any democratic society.”<sup>114</sup> The Court opted to leave “issues of public concern” undefined, but advised future jurists to “inspect the gravity of the substance of the expression to delineate between matters that may concern only a few individuals and those that truly rise to the level of public concern.”<sup>115</sup>

The Court applied its newly-expressed jurisprudence to find that the terminated employee in *April* did not suffer a violation of her freedom of expression right. The employee’s speech regarded her demotion at work, which was not a matter of public concern.<sup>116</sup> Therefore, her governmental employer was unconstrained by the freedom of expression clause in reacting to the employee’s speech.<sup>117</sup>

Opponents to the Compact of Free Association between Palau and the United States claimed that denial of airtime on Palau’s radio station infringed their constitutional right to free expression.<sup>118</sup> The undisputed facts showed that, leading up to the 1993 Compact plebiscite, two Compact opponents and one Compact supporter requested airtime, and all three requests were denied.<sup>119</sup> Justice Miller found that Palau’s radio station was a government entity, and then proceeded to the inquiry of whether the radio station was required to grant the requested airtime.<sup>120</sup> The Court waxed about the “idea” behind Article IV, Section 2—that “more speech, not enforced silence” would benefit the Republic (quoting a Justice Brandeis concurrence to a 1927 United States Supreme Court case), but then contrasted it with the notion that freedom of expression does not guarantee access to government property (quoting another United

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 9.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *See id.* at 9.

<sup>117</sup> *See id.*

<sup>118</sup> *See Wong v. Nakamura*, 4 ROP Intrm. 364, 371 (Trial Div. 1994) (Miller, J.).

<sup>119</sup> *See id.*

<sup>120</sup> *See id.*

States Supreme Court case).<sup>121</sup> Ultimately, Justice Miller found that the issue need not be resolved because the remedy sought—the invalidation of the entire plebiscite—did not follow from the harm allegedly inflicted.<sup>122</sup> Given the result, the Court should have refrained from breaking this new ground in declaring the “idea” behind the freedom of expression in Palau, especially without citation to Palauan authority.

### C. *Freedoms of Assembly and Petition*

Section 3 compiles two related, yet distinct, fundamental rights: the right “to peacefully assemble and petition the government for redress of grievances” and the right to “associate with others for any lawful purpose.”<sup>123</sup> The first clause appears to be written as a required conjunctive—the first clause of Section 3 only guarantees the right to peacefully assemble *and* petition the government for redress of grievances, but not to peacefully assemble for other purposes or to petition the government for redress of grievances other than in a peaceful assembly (e.g., individually or in a violent assembly). However, the second clause of Section 3 would protect peaceful assemblies for purposes other than petitioning the government (as long as those purposes were lawful) and Section 2’s freedom of expression guarantee would protect an individual petitioning the government for redress of grievances. In an apparent effort to avoid clarifying litigation, Section 3’s second clause explicitly states that the right to associate with others for lawful purposes includes “the right to organize and to bargain collectively.” The “right to organize,” when conjoined with the right “to bargain collectively,” most naturally means the right to form unions.

## V. TAKINGS CLAUSES

Two sections of the Constitution relate to the “taking” of private property by the government. Article IV, Section 6 is written as a negative limitation protecting the right of individuals: “nor shall private property be taken except for a recognized public use and for just compensation in money or in kind.”<sup>124</sup> Article XIII, Section 7 is written as a positive grant of power to the government: “The national government shall have the power to take property for public use upon payment of just compensation.”<sup>125</sup> The latter provision enumerates further requirements before a governmental taking may be made, including exhaustion of “good

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<sup>121</sup> *See id.* at 372.

<sup>122</sup> *See id.*

<sup>123</sup> ROP CONST. Art. IV, § 3.

<sup>124</sup> ROP CONST. Art. IV, § 6.

<sup>125</sup> ROP CONST. Art. XIII, § 7.

faith negotiation” and consultation with the state government where the property is located. It also grants state governments an identical power to “take” as the national government. Furthermore, a taking “for the benefit of a foreign entity” is prohibited, and this clause has been read to prohibit a taking even if it only secondarily benefits a foreign entity.<sup>126</sup>

The remedy for an unconstitutional taking is “not . . . return of full rights to the land to the original owner,” but rather “payment of [just] compensation.”<sup>127</sup> An unconstitutional taking conveys title (or a use right) to land despite its unconstitutionality.<sup>128</sup> Therefore, the consent of the landowner to the “taking” is wholly irrelevant to the question of whether the land became government land—it only portends to whether just compensation is due.<sup>129</sup> These statements were made in the context of a case where a landowner claimed that the installation of power poles on his property constituted an unconstitutional (and therefore, void) “taking.”<sup>130</sup> The Court noted in dicta that, “[g]enerally, a taking may be unconstitutional in one of two ways: (1) for lack of just compensation or (2) for non-public use.”<sup>131</sup> In deciding whether a “taking” through regulation has occurred, “a court will focus on both the character of the governmental action and the nature and extent of interference with rights.”<sup>132</sup> Takings clause constitutional claims are subject to procedural rules (almost) just like any other lawsuit.<sup>133</sup>

When a governmental “taking” occurs, interest accrues to the former landowner from the time of the taking until the time just

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<sup>126</sup> *Id.*

<sup>127</sup> *Ulechong v. Palau Pub. Utils. Corp.*, 13 ROP 116, 120-21 (2006).

<sup>128</sup> *See id.* at 120.

<sup>129</sup> *See id.* at 121.

<sup>130</sup> *See id.* at 120-21.

<sup>131</sup> *Id.* at 120 n.2. Non-public use arises when the taken land is put to a private use.

<sup>132</sup> *Toribiong v. Gibbons*, 3 ROP Intrm. 419, 422-23 (Trial Div. 1993) (Beattie, J.) (addressing whether the national Lagoon Monument Act was so restrictive that it “took” Koror State’s use and exploitation of World War II relics sunk in its waters), (citing *Penn Central Transp. Co. v. City of New York*, 98 S. Ct. 2646, 2662 (1978)).

<sup>133</sup> *See Olkeriil v. Republic of Palau*, Civ. App. No. 09-027, slip op. at 11 (June 23, 2010) (“The takings clause does not guarantee Olkeriil the right to bring a claim in any manner, at any time, no matter how far removed from the alleged taking; it only creates a cause of action to be brought within the bounds of reasonable procedural rules.”). The *Olkeriil* appellant was barred from bringing her constitutional takings clause claim for failure to bring it as a compulsory counterclaim in an earlier lawsuit. The Court did add, by way of a footnote, that “overly-strict procedural rules that limit the filing of constitutional claims so severely as to strip the constitutional guarantees of their meaning would not survive review.” *Id.* at 11 n.3.

compensation is paid.<sup>134</sup> Interest “is part of the constitutionally required just compensation.”<sup>135</sup> Therefore, the constitutionally-required “reasonable” rate of interest must be judicially determined and the issue cannot be left to legislation alone.<sup>136</sup>

In *Gibbons v. Salii*, the Appellate Division tackled the question of whether the military defense site provisions in the Compact of Free Association between Palau and the United States were per se unconstitutional under Article XIII, Section 7.<sup>137</sup> The Compact grants rights to the United States to designate land and water areas to use as defense sites in Palau. The Military Use and Operating Rights Agreement, a separate agreement referenced by the Compact, describes the specific designated areas within Palau. Under the Compact, when the United States wishes to establish a defense site in one of the designated areas, it is to notify Palau and Palau shall make the designated site available. Palau may suggest alternative sites, but the United States has the right to reject such suggestions and demand access to the originally-designated site within sixty days of the designation.<sup>138</sup>

The *Gibbons* plaintiffs argued that this provision violated the provision in Article XIII, Section 7 of the Constitution preventing the Palauan government from exercising its eminent domain powers “for the benefit of a foreign entity.”<sup>139</sup> The plaintiffs further contended that the sixty-day time frame would necessarily prohibit the government from fulfilling its constitutional duty to exhaust good faith negotiations and use its eminent domain powers “sparingly” as a “final resort.”<sup>140</sup>

The Court found that the Compact provisions were not per se unconstitutional because such a designation and transfer to the United States could be effected without Palau even exercising its eminent domain powers—Palau could (hypothetically) purchase the designated land from the private landowners.<sup>141</sup> Notwithstanding this possibility, the Court stated that the sixty-day time limit provided in the Compact is “extraordinarily tight” to transfer title to land by mutual agreement and that “constitutional risk [is] inherent in these provisions” of the Compact

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<sup>134</sup> See *Wally v. Republic of Palau*, 16 ROP 19, 22 (2008).

<sup>135</sup> *Id.*

<sup>136</sup> See *id.* at 22-23.

<sup>137</sup> *Gibbons v. Salii*, 1 ROP Intrm. 333 (1986).

<sup>138</sup> See *id.* at 351-52.

<sup>139</sup> See *id.* at 352.

<sup>140</sup> See *id.*

<sup>141</sup> See *id.* at 352-53.

and Military Use Agreement.<sup>142</sup> The Court foresaw the following impasse:

It is plain to us that the defense site provisions may eventually place the government of Palau at a fork where one road points toward violation of the Constitution and the other leads to breach of the Compact. That fork, however, has not yet been reached and we see a possibility that the fateful choice may never present itself. The Compact does not by its terms require exercise of the power of eminent domain. It would be premature and improper for us simply to assume that such an event will come to pass.<sup>143</sup>

Despite the under-ripeness of the issue before it, the Court went on to provide an advisory opinion on the “for the benefit of a foreign entity” provision of Article XIII, Section 7.<sup>144</sup> The Court rejected the government’s syllogism that whatever use the Executive Branch chose to exercise its eminent domain powers for must inherently be “for the benefit of Palau” because otherwise it would not have chosen to exercise its eminent domain powers—even if the land is given to a foreign entity.<sup>145</sup> The Court, narrowly construing the Constitution, stated that “if the [taken] land in question is to be used by a foreign nation[,] the government of the Republic of Palau has an extremely heavy burden of showing extraordinary circumstances which establish that the particular use is for the sole benefit of Palauan persons or entities.”<sup>146</sup> Thus, the prohibition against the use of the eminent domain power “for the benefit of a foreign entity” is read to mean that the use of the eminent domain power must be “for the *sole* benefit of Palau.”<sup>147</sup>

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<sup>142</sup> *See id.* at 353.

<sup>143</sup> *Id.* at 354.

<sup>144</sup> *See id.* at 354-55.

<sup>145</sup> *See id.* The government argued that the United States’ use of Palau’s land to establish defense sites was “for the benefit of Palau” rather than for the benefit of the United States because the overall Compact—including the obligation of the United States to defend Palau—is beneficial to Palau (otherwise Palau would not have ratified the Compact). *See id.* at 354.

<sup>146</sup> *Id.* at 355. The Court went on to reject the contention that, because of the close relationship between Palau and the United States under the Compact, the United States is not a “foreign entity.” *See id.*

<sup>147</sup> The “for the benefit of a foreign entity” clause was later discussed in *Airai State Gov’t v. Ngkekiil Clan*, 11 ROP 261 (Trial Div. 2004) (Ngiraklsong, C.J.). Chief Justice Ngiraklsong found an Airai state law invalid to the extent that it granted a broader eminent domain power than that found in the national Constitution. *See id.* at 262 n.1. With regard to foreign entities, the Airai law prohibited takings only when made for the *sole* benefit of a foreign entity, a less restrictive clause than the national Constitution’s prohibition of the use of the eminent domain power “for the benefit of a foreign entity.”

After ratification of the Compact, the appellants in *Wong v. Nakamura* sought a judicial order barring implementation of the Compact.<sup>148</sup> Among other arguments, the appellants pressed again (apparently without citation to authority) that the Compact was facially invalid under the eminent domain clauses of the Palau Constitution.<sup>149</sup> The Court summarily rejected this contention with a citation to *Gibbons*.<sup>150</sup>

Land lost to the government through erosion has not been “taken.” Pursuant to statute, the government owns all marine areas below the ordinary high water mark.<sup>151</sup> Chief Justice Ngiraklsong found that erosion that expands the government-owned area below the high water mark was not a “taking” for purposes of Article IV, Section 6.<sup>152</sup> Although no erosion was proved in the case, the Chief Justice stated that “the Court hereby adopts the legal authority stating that even a registered or titled land lost by erosion returns to the government and no compensation to the original owner is required for the lost portion of the land.”<sup>153</sup>

In *Micronesia Yachts Co. v. Palau Foreign Inv. Bd.*, the Appellate Division affirmed a Trial Division ruling that placing additional conditions on a renewal on a foreign investment certificate is not an unlawful taking of property in violation of Article IV, Section 6 of the Constitution.<sup>154</sup> At

The taking at issue was Airai’s proposed use of its eminent domain power to condemn land in order to lease it to a Japanese corporation for the development of a golf course. *See id.* at 262. And, although Airai’s proposed taking was ultimately found to be unconstitutional under the Airai State Constitution, the decision sheds some light on the national Constitution because the eminent domain clauses in each are similar. *See id.* at 263 (“The [Airai State] Constitution does not require the foreign entity to be the ‘sole’ beneficiary, and it does not include an exception for situations in which the citizens of Airai might also benefit. Very simply, it prohibits the use of the power ‘for the benefit of a foreign entity,’ which is exactly what the proposed condemnation would be.”). *See also id.* at 263 (discussing the *Gibbons* interpretation of the national Constitution in determining what constitutes a “benefit” and a “foreign entity” for purposes of the Airai State Constitution.”).

<sup>148</sup> *Wong v. Nakamura*, 4 ROP Intrm. 243 (1994).

<sup>149</sup> *See id.* at 248.

<sup>150</sup> *See id.* (“Appellants have offered us no good reason to doubt the propriety of that holding.”). The Trial Division reached the same conclusion based on stare decisis: “The Court is bound by the *Gibbons* court’s determination of facial validity and, given that the Compact has not yet been implemented and no actual taking of land proposed, by its ripeness determination.” *Wong v. Nakamura*, 4 ROP Intrm. 331, 345 (Trial Div. 1994) (Miller, J.).

<sup>151</sup> 35 PNC § 102.

<sup>152</sup> *See In re Cadastral Lots 050 B 02*, 14 ROP 191, 193 (Trial Div. 2007) (Ngiraklsong, C.J.).

<sup>153</sup> *Id.*

<sup>154</sup> *Micronesia Yachts Co. v. Palau Foreign Inv. Bd.*, 7 ROP Intrm. 128 (1998).

the renewal of the certificate, the Palau Foreign Investment Board added a provision that the foreign investment certificate was subject to revocation if any of the company's shares were transferred to a non-citizen without Board approval.<sup>155</sup> However, this "renewal addendum" was not an actual addendum because the original certificate was flatly non-transferable; therefore, the Court found nothing "taken" by the addendum.<sup>156</sup>

Justice Miller found no constitutional "taking" where a plaintiff alleged that the building of a road would injure his business in *Ngiraiuelenguul v. Ngchesar State Government*.<sup>157</sup> The plaintiff alleged that the new road interfered with his ability to float logs up a stream to his sawmill.<sup>158</sup> The Court found that the new road did not "take" any of the plaintiff's existing property or interfere with his riparian right of access to water; it merely interfered with the plaintiff's ability to float logs from the greater ocean to the saltwater pond adjacent to his property.<sup>159</sup> Justice Miller stated the Constitution required that "[w]hen the government actually takes away or invades in some destructive fashion a person's land, compensation must be paid."<sup>160</sup> But the decision went on to state that "when the government acts only upon its own property, and in what it believes to be the public interest, it should be able to do so without fear that it may be called upon to pay damages for consequential injuries to the value of nearby land, or to businesses located there."<sup>161</sup> To safeguard abuse, Justice Miller stated (aspirationally) that abuses of this confidence would harm the decisionmakers, because the aggrieved populous would vent their frustrations through the democratic process.<sup>162</sup> This procedure would provide little safeguarding, however, where the harmed individuals are not citizens (and therefore cannot vote) or, as is usually the case, are a marginalized population.

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<sup>155</sup> *See id.* at 128.

<sup>156</sup> *See id.* at 129.

<sup>157</sup> *Ngiraiuelenguul v. Ngchesar State Gov't*, 8 ROP Intrm. 342 (Trial Div. 1999) (Miller, J.).

<sup>158</sup> *See id.* at 342.

<sup>159</sup> *See id.* at 343.

<sup>160</sup> *Id.* at 346.

<sup>161</sup> *Id.* (footnote omitted).

<sup>162</sup> *See id.*

## VI. EQUAL PROTECTION CLAUSE

Section 5 of Article IV guarantees, *inter alia*, equal protection: “Every person shall be equal under the law and shall be entitled to equal protection.”<sup>163</sup> This unqualified statement is immediately checked and categorized, creating tension even within Section 5. Some bases of governmental discrimination are explicitly prohibited: sex, race, place of origin, language, religion or belief, and social status or clan affiliation. However, the Constitution specifically permits preferential treatment of Palauan citizens, minors, the elderly, the indigent, handicapped, and “other similar groups.” Discrimination is also permitted “in matters concerning intestate succession and domestic relations.”<sup>164</sup>

A. *Foundations of Equal Protection Review: The Rising Tide of Suspect Classifications*

In an early equal protection case, the Appellate Division adopted an expansive reading of the clause and found a constitutional violation in *Alik v. Amalei*.<sup>165</sup> In *Alik*, the Court reviewed the appeal process of Land Commission determinations. Appeals from Land Commission determinations were to be made within 120 days of the determination by statute. The *Alik* appellant filed his appeal 149 days after the determination, but only eighty-nine days after receiving service of the determination.<sup>166</sup> The Court found that it would be unconstitutional under Article IV, Section 5 for some claimants to receive more time and others less time to appeal depending on when they received service of the Land Commission determination.<sup>167</sup> To avoid this unconstitutional construction, the Court interpreted the statutory language to mean that the 120-day time to appeal runs from receipt of service of the determination and not from the date of the determination itself.<sup>168</sup>

In *Alik* the Court effectively applied Article IV, Section 5 in an unqualified way—permitting no unequal treatment of anyone without looking at the basis of discrimination. The *Alik* plaintiff did not allege discrimination based on any “protected class” such as sex or race; he merely claimed that he had a diminished opportunity to appeal because he received service of his determination sixty days after the determination was made whereas other claimants might receive service two (or 102) days after determination. Although this application of the equal protection

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<sup>163</sup> ROP CONST. Art. IV, § 5.

<sup>164</sup> *Id.*

<sup>165</sup> *Alik v. Amalei*, 1 ROP Intrm. 513A (1988).

<sup>166</sup> *See id.* at 513B.

<sup>167</sup> *See id.* at 513C.

<sup>168</sup> *See id.* at 513D.

clause tracks the constitutional language (“[e]very person shall be equal under the law”), it could hinder the operation of the government if applied to literally and too broadly. The *Alik* interpretation has not been repeated in later opinions.<sup>169</sup>

As stated in *Ikeya v. Melaitau*, Justice Miller’s view of the equal protection clause, placing great stock in the “suspect classifications,” bore very little resemblance to the *Alik* panel’s interpretation:

The declaration that “Every person shall be equal under the law and shall be entitled to equal protection[”,] Palau Constitution Art. IV, Section 5, plainly does not forbid the legislature from making policy choices and passing laws that may benefit one person over another if it acts reasonably and does not discriminate on the basis of any of the suspect classifications contained in the next sentence of that section.<sup>170</sup>

When none of the “suspect classifications” contained in Article IV, Section 5 are at play, Justice Miller advised that the “only criterion for constitutionality [] is reasonableness.”<sup>171</sup> In *Ikeya*, Justice Miller found the legislature’s distinction between bona fide and non-bona fide purchasers of land to be reasonable and therefore not violative of the equal protection clause.<sup>172</sup> Justice Miller’s creation of “rational basis” (“reasonableness”) review for “non-suspect classifications” (although more in line with United States case law) is at odds with the Appellate Division’s earlier decision in *Alik*, wherein the Court did not question the basis for the appellant’s claim of unequal treatment.

Chief Justice Ngiraklsong separated equal protection analysis into “at least two levels of judicial review”: the rational basis test (“governmental action will be upheld if there is a rational relationship between the action taken and the objective”) and the strict scrutiny test (“governmental conduct will only be upheld if it is necessary to achieve a ‘compelling’ governmental purpose”).<sup>173</sup> The Chief Justice stated that the

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<sup>169</sup> Justice Materne, sitting in the Trial Division, later found that *Alik*’s holding that the 120-day time frame runs from the date of service rather than from the date of determination does not apply retrospectively to appeals filed pre-*Alik*. See *Temol v. Tellei*, 15 ROP 156, 157-58 (Trial Div. 2007) (Materne, J.) (finding appeal filed 181 days after the determination was issued, but only seventy-nine days after the notice of determination was served to be untimely). The notice of appeal in *Temol* was filed in 1985, three years before the *Alik* decision was rendered. See *id.* at 157.

<sup>170</sup> *Ikeya v. Melaitau*, 3 ROP Intrm. 386, 392 n.2 (Trial Div. 1993) (Miller, J.).

<sup>171</sup> *Id.*

<sup>172</sup> See *id.* at 392-93.

<sup>173</sup> *Perrin v. Remengesau*, 11 ROP 266, 269 (Trial Div. 2004) (Ngiraklsong, C.J.).

strict scrutiny test should be applied where governmental action creates “suspect” classifications (such as those based on race or national origin).<sup>174</sup>

Shortly thereafter, the Appellate Division (in a panel including both Chief Justice Ngiraklsong and Justice Miller) applied the rational-basis test in denying an equal protection challenge based on an allegation that individuals were classified based on the source of their land.<sup>175</sup> The challenge was to a resolution stating that land acquired in fee simple from the Trust Territory government was to pass to the oldest living male child in the event that the deceased left no will. The Court, in its brief analysis, found that the distinction between land acquired from the Trust Territory government and land acquired from all other sources was not irrational.<sup>176</sup>

The Appellate Division again applied rational basis review to an equal protection challenge in *Tulop v. Palau Election Commission*.<sup>177</sup> The alleged unequal treatment required absentee voters to submit their votes by the day *before* the special election rather than on the day of the election. The Court stated that under rational basis review—“a relatively low level of judicial review”—“almost any rational reason provided by the government would serve to defeat a challenger’s case.”<sup>178</sup> The Court upheld the voting requirement, finding that requiring absentee votes to arrive by the day before the election was a “rational means to avoid delay in certifying the results of the special election.”<sup>179</sup> This rationale does not seem “rational,” especially given the Court’s concession that the purpose would have been equally served by requiring the absentee votes to arrive by the day of the election.<sup>180</sup> In *Tulop*, the Court lowered the bar in rational-basis review so low that it became no test at all.

### B. Representation in Government

Challenges relating to representation in government, specifically the redistricting of electoral precincts, loom large in equal protection jurisprudence. *Eriich v. Reapportionment Commission* resolved disputes concerning the Senate redistricting plan, including an equal protection challenge under Article IV, Section 5.<sup>181</sup> In prefacing its equal protection

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<sup>174</sup> See *id.*

<sup>175</sup> See *Children of Merep v. Youlbeluu Lineage*, 12 ROP 25, 28 (2004).

<sup>176</sup> See *id.*

<sup>177</sup> *Tulop v. Palau Election Comm’n*, 14 ROP 5, 8-9 (2006).

<sup>178</sup> *Id.* at 9.

<sup>179</sup> *Id.*

<sup>180</sup> See *id.*

<sup>181</sup> *Eriich v. Reapportionment Comm’n*, 1 ROP 134 (Trial Div. 1984) (Nakamura, C.J.).

analysis, the Court stated that “[e]qual protection in the context of representation in government means that all persons must be represented equally” and that “equal protection does not apply only to voters, but to all persons within the government’s jurisdiction.”<sup>182</sup> Chief Justice Nakamura analyzed United States equal protection law and chose the more lenient standards that apply to state redistricting rather than the more stringent rules regarding federal redistricting.<sup>183</sup> The more lenient “state standard” allows for recognition of historical subdivisions, a distinction that the Court felt was important given the cultural significance of traditional villages in Palau.<sup>184</sup> In sum, a reviewing Court should attempt to minimize statistical deviations but must balance that effort against other legitimate state interests.<sup>185</sup> Chief Justice Nakamura then went about redistricting, splitting the country into five districts represented by fourteen Senators.<sup>186</sup>

Chief Justice Nakamura’s redistricting of the Fifth Senatorial District was challenged on appeal.<sup>187</sup> As designed by the Chief Justice, the Fifth Senatorial District comprised eight states and had the power to elect two Senators. Six of the states within the district objected, claiming that the two most populous states could collude to elect both of the Senators.<sup>188</sup> The appealing states also complained that the Fifth Senatorial District was not geographically compact, as it included four states located on the large northern island of Babeldaob and four states composed of outlying southern and southwest islands.<sup>189</sup> In response to these complaints, the Appellate Division chose to further subdivide the district into two districts of four states each (splitting the northern Babeldaob and the southern island states into separate districts) even though such grouping resulted in a somewhat higher statistical deviation.<sup>190</sup>

Senatorial redistricting was again before the Court in *Yano v. Kadoi*.<sup>191</sup> The Court followed the redistricting equal protection test of *Eriich*:

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<sup>182</sup> *Id.* at 140-41.

<sup>183</sup> *See id.* at 143.

<sup>184</sup> *See id.*

<sup>185</sup> *See id.* at 143-45.

<sup>186</sup> *See id.* at 148.

<sup>187</sup> *See Eriich v. Reapportionment Comm’n*, 1 ROP Intrm. 150 (1984).

<sup>188</sup> *See id.* at 151.

<sup>189</sup> *See id.* (with Ngardmau, Ngeremlengui, Ngatpang and Aimeliik to the north and Peleliu, Angaur, Sonsorol and Hatohobei in the south).

<sup>190</sup> *See id.* at 152-53.

<sup>191</sup> *Yano v. Kadoi*, 3 ROP Intrm. 174 (1992).

When reviewing such a plan, this Court must first examine the existing deviations in the plan and determine if they can be reduced. Second, if the deviations can be reduced, we must consider other arguments made in favor of the existing plan by its drafters, to see if they represent legitimate national interests. Finally, we must strike a balance between the deviations from strict mathematical equality and the asserted national interests.<sup>192</sup>

Article IX, Section 4 requires senatorial districting to be “based on population,” which the Court read to mean “citizen population” rather than “actual population” or “voter population.”<sup>193</sup> Because only citizens are afforded the right to vote, the Court felt it proper to address only citizens’ rights to equal protection rather than the rights of all inhabitants to equal protection.<sup>194</sup> The Court stated that it would be incongruous to allow a state to benefit in redistricting from an influx in non-citizen population when those elected would have “absolutely no duty” to respond to the needs of those non-citizens.<sup>195</sup> While the Court’s “absolutely no duty” language was hopefully hyperbole, it is true that even a few hundred non-citizens could alter the voting districts significantly were the districting to be done on the basis of total population. And, because Article IV, Section 5 permits discrimination in favor of citizens, no equal protection objection could stand in favor of the non-citizens.

### C. *Additional Equal Protection Case Law*

The equal protection cases decided before “suspect classifications” and “rational-basis review” came into vogue still remain good law and may be useful in the proper instance. These cases largely fail to articulate a standard of review, but provide discrete measuring points along the equal protection continuum.

In *Governor of Kayangel v. Wilter*, the Court ruled on the constitutionality of the President’s impoundment of funds appropriated to the state governments as block grants.<sup>196</sup> The Court found that, while the President is authorized to impound funds, such impoundment must not violate other constitutional provisions, such as the equal protection clause.<sup>197</sup> Chief Justice Nakamura stated that “the impoundment authority

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<sup>192</sup> *Id.* at 182.

<sup>193</sup> *See id.* at 183-84.

<sup>194</sup> *See id.* at 184.

<sup>195</sup> *See id.* at 187.

<sup>196</sup> *Governor of Kayangel v. Wilter*, 1 ROP Intrm. 206 (Trial Div. 1985) (Nakamura, C.J.).

<sup>197</sup> *See id.* at 209.

may not be exercised in a manner so as to invidiously discriminate against a person or class of persons.”<sup>198</sup> The Court found that no equal protection violation was properly stated, as the plaintiffs did not allege that, for instance, the impoundment was done to discriminate against one state (“place of origin” discrimination).<sup>199</sup>

Although the case was resolved on non-constitutional grounds, the Appellate Division noted that authority for judicial review of non-uniform voter standards is implicitly found in Article IV, Section 5 (along with Article X, Section 5) in *Skebong v. Election Commissioner*.<sup>200</sup> This statement seems questionable, as Article IV, Section 5 is not a grant of jurisdiction but a guarantee of rights (however, every grant of a constitutional right does implicitly carry with it the right of judicial review of deprivation of that right). But judicial jurisdiction to review such deprivation is more properly found in the constitutional grant of jurisdiction, Article X of the Constitution.

An Airai legislator challenged a recall election for violating her equal protection rights in *Simeon v. Election Commission*.<sup>201</sup> The petition for recall stated as the reason for recall that the legislator “no longer represent[ed the petitioners’] interests.”<sup>202</sup> The legislator objected, arguing that the stated reason was so ambiguous that it violated her right to equal protection.<sup>203</sup> The Court disagreed and permitted the recall election, finding no constitutional violation.<sup>204</sup>

The appellant, a United States citizen, asserted that he was denied equal protection by Palau’s Memorandum of Agreement with the Federated States of Micronesia in *Kruger v. Social Security Board*.<sup>205</sup> The Memorandum of Agreement provided unlimited social security benefits to non-resident non-citizens who were citizens of the Federated States of Micronesia while other non-resident non-citizens (such as United States citizens) were limited to only six months of Palauan social security benefits.<sup>206</sup> Although the equal protection violation appears plain, the Court declined to expressly rule on the “hypothetical” issue because the appellant was not in a position to receive social security benefits

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<sup>198</sup> *Id.*

<sup>199</sup> *See id.* at 211.

<sup>200</sup> *Skebong v. Election Comm’r*, 1 ROP Intrm. 366 (1986).

<sup>201</sup> *Simeon v. Election Comm’n*, 3 ROP Intrm. 372 (Trial Div. 1991) (Ngiraklsong, J.).

<sup>202</sup> *See id.* at 373.

<sup>203</sup> *See id.*

<sup>204</sup> *See id.* at 374.

<sup>205</sup> *Kruger v. Soc. Sec. Bd.*, 5 ROP Intrm. 91 (1995).

<sup>206</sup> *See id.* at 92-93.

regardless of his country of citizenship.<sup>207</sup> However, the Appellate Division did agree with the Trial Division's finding that any potential equal protection problem could be cured by simply denying the extra benefit to citizens of the Federated States of Micronesia (or by granting the extra benefit to citizens of all non-Palauan countries).

The plaintiff in *Sechelong v. Republic of Palau* attempted to stretch the coverage of equal protection too far by arguing that the statute prohibiting certain types of automobile window tinting violated Article IV, Section 5 because it allowed some types of window tinting (e.g., factory-installed tinting) and prohibited others (e.g., reflective tinting).<sup>208</sup> Justice Beattie properly rejected the equal protection argument, but gave short shrift to his rationale, stating only that "it is not the province of the Court to supplant the judgment of the [Olbiil Era Kelulau]."<sup>209</sup>

In *Palau Marine Indus. Corp. v. Seid*, a plaintiff-cum-appellant challenged the Trial Division's decision to allow the defendant/appellee to amend his answer as an abuse of discretion because the plaintiff/appellee was denied leave to amend its answer in a different lawsuit.<sup>210</sup> The Court found the equal protection argument to be frivolous and sanctionable, because Article IV, Section 5 "does not assure uniformity of judicial decisions."<sup>211</sup>

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<sup>207</sup> *See id.* at 93.

<sup>208</sup> *Sechelong v. Republic of Palau*, 6 ROP Intrm. 368, 370 (Trial Div. 1997) (Beattie, J.).

<sup>209</sup> *Id.* Justice Beattie would have assumedly felt differently had the Olbiil Era Kelulau enacted a law unconstitutionally discriminating on the basis of a suspect classification. Such deference to the legislature is inappropriate in constitutional analysis.

<sup>210</sup> *Palau Marine Indus. Corp. v. Seid*, 9 ROP 173, 175 (2002).

<sup>211</sup> *Id.* at 176 (citing numerous United States cases for support). The Appellate Division echoed its *Seid* axiom most recently in *Taima v. Sun Xiu Chun*, Civ. App. No. 09-005 (Dec. 10, 2009). The *Taima* appellant argued that his right to equal protection was violated when the lower court permitted his adversary to miss a hearing but "unequally" entered a default judgment against him when he missed a hearing. *See Taima*, Civ. App. No. 09-005, slip op. at 10. Because the Appellate Division found that the appellant's opponent never missed a hearing—and therefore no unequal treatment had occurred—it rejected the equal protection claim while stressing that the equal protection guarantee "does not assure uniformity of judicial decisions or immunity from judicial error." *See id.* at 10 n.7 (quoting *Palau Marine Indus. Corp. v. Seid*, 9 ROP 173, 176 (2002) (quoting *Beck v. Washington*, 82 S. Ct. 955, 962-63 (1962))).

## VII. DUE PROCESS CLAUSE

### A. *Due Process Overview*

“Due process” is guaranteed before the government may take action “to deprive any person of life, liberty, or property” by Article IV, Section 6 of the Palau Constitution. Because the government may use a wide-range of vehicles to deprive persons of their life, liberty, or (especially) property, courts have been called upon to define what quantum of process is “due” in a variety of situations. Consistency can be hard to achieve in this area, but certain guiding standards have emerged.

The first inquiries in any due process analysis should be whether (1) the actor alleged to have caused the deprivation is a “government” actor and (2) the “thing” allegedly taken qualifies as life, liberty, or property. If either inquiry results in a negative response, “due process” is not due and no constitutional violation may be rightfully claimed. The next step in a due process analysis is to determine what level of process was “due,” and then determine whether that process was afforded. If the proper level (or a greater level) of process was afforded to the complainant, no due process violation has occurred.

Courts in the United States have read the United States due process clause to encompass two different guarantees: the right of procedural due process and the right of substantive due process. Procedural due process ensures that a person is afforded the proper level of process before deprivation of life, liberty, or property occurs. Substantive due process requires that governmental action “shall not be unreasonable, arbitrary, or capricious, and... the means selected shall have a real, and substantial relation to the object sought to be attained.”<sup>212</sup> Only one reported Palauan decision—the Chief Justice Nakamura penned *Governor of Kayangel v. Wilter* Trial Division opinion—engages in a substantive due process analysis (and no violation was found).<sup>213</sup> The Appellate Division has not recognized substantive due process as an aspect of the Palauan due process clause.<sup>214</sup>

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<sup>212</sup> *Nebbia v. New York*, 54 S. Ct. 505, 511 (1934) (quoted in *Governor of Kayangel v. Wilter*, 1 ROP Intrm. 206, 211 (Trial Div. 1985) (Nakamura, C.J.)).

<sup>213</sup> *Governor of Kayangel v. Wilter*, 1 ROP Intrm. 206, 211 (Trial Div. 1985) (Nakamura, C.J.). In response to an allegation of denial of equal protection, substantive due process, and procedural due process, the Trial Division recounted the *Governor of Kayangel* substantive due process standard, but engaged in a hybrid equal protection-procedural due process analysis in *Perrin v. Remengesau*, 11 ROP 266, 268-70 (Trial Div. 2004) (Ngiraklsong, C.J.). Chief Justice Ngiraklsong found no constitutional violation in *Perrin*.

<sup>214</sup> The Appellate Division has uttered the words “substantive due process” only twice: “The [Land Claim Hearing Office’s] delay in issuing this determination is condemnable, but it did not deny procedural or substantive due process to the appellant.” *Elbelau v. Semdiu*, 5 ROP Intrm. 19, 22 (1994). The question of whether the 6.5 year

Procedural due process “requires notice and an opportunity to be heard.”<sup>215</sup> The person attacking a governmental act by alleging lack of due process bears the burden of demonstrating the constitutional violation.<sup>216</sup>

### B. *The Process Due for Deprivation of Life*

No Palauan case has addressed the process due before the Republic may deprive someone of their life. No criminal statute provides for the death penalty and the issue has not otherwise arisen.

### C. *Decisionmakers in Criminal Proceedings*

The Constitution, as originally drafted, did not guarantee the right to a trial by jury in any prosecution. The Ninth Amendment provided for jury trials for certain criminal cases starting on January 1, 2010.<sup>217</sup> Before this constitutional amendment, defendants had attempted to find a jury trial “right” in the due process clause but Palauan courts steadfastly rejected those attempts.

Stated quite bluntly in *Republic of Palau v. Chisato*, “There have never been jury trials in Palau.”<sup>218</sup> Palau chose to not exercise its option to hold jury trials during its Trust Territory days and again rejected jury trials during the Constitutional Convention.<sup>219</sup> On the basis of such (lack

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delay that intervened between the Land Commission’s rendering its Summary and Adjudication awarding the land at issue to the *Elbelau* appellees and the formal Land Claims Hearing Office Determination of Ownership violated due process called into question the procedure employed, not the substance of its decision. The Court did not engage in a substantive due process analysis and therefore its comment that the procedure did not violate “substantive due process” is merely dictum.

The Appellate Division summarily rejected the appellant’s deprivation of due process claim in *Ngerungel Clan v. Eriich* with the words, “Neither a substantive nor a procedural due process claim can lie here.” 15 ROP 96, 100 (2008). The Appellate Division rejected the deprivation claim because the appellant was provided notice of the hearing and an opportunity to present witnesses at the land claim hearing at issue—issues of procedure, not of substance. *See id.*

<sup>215</sup> *Pedro v. Carlos*, 9 ROP 101, 102 (2002) (citing *Ngerketiit Lineage v. Seid*, 8 ROP Intrm. 44, 47 (1999)); *see also Governor of Kayangel v. Wilter*, 1 ROP Intrm. 206, 209 (Trial Div. 1985) (Nakamura, C.J.).

<sup>216</sup> *See Pedro*, 9 ROP at 102 (citing *Uchellas v. Etpison*, 5 ROP Intrm. 86, 89 (1995)). The *Pedro* Court did not meaningful review the appellant’s due process argument, however, because the record on appeal did not include the pertinent records. *See id.* at 102. Therefore, because the appellant bore both the burden of creating a sufficient appellate record and the burden to demonstrate a due process violation, the Appellate Division denied the appeal and affirmed the opinion below. *See id.* at 102-03.

<sup>217</sup> *See* section XIII.I, *infra*.

<sup>218</sup> *Republic of Palau v. Chisato*, 2 ROP Intrm. 227, 229 (1991).

<sup>219</sup> *See id.* at 230.

of) history of jury trials in Palau, the Court held “that the due process clause of the Palau Constitution does not, by implication or otherwise, grant the right to trial by jury in the Republic of Palau.”<sup>220</sup> Given that *Chisato* was a murder trial and the appellant was facing a sentence of life imprisonment plus ten years, this statement eviscerates any due process right to a jury trial in any criminal proceeding.

Even during the Trust Territory days, the right to a jury trial for United States citizens as guaranteed by the United States Constitution did not apply to criminal prosecutions in Palauan courts.<sup>221</sup> Justice Beattie reasoned that Palau was a Trust Territory of the United Nations, not the United States, and therefore the American rule that the Bill of Rights guarantees (including the right to trial by jury) apply when the United States prosecutes its citizens abroad did not apply.<sup>222</sup>

Murder trials are conducted by special “murder panels” at the trial level—one “presiding” judge accompanied by two “special” judges. This procedure does not violate the due process rights of the accused.<sup>223</sup> Indeed, it would be anomalous for a three-judge panel to violate due process where a lone decisionmaker would not.

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<sup>220</sup> *Id.* at 231.

<sup>221</sup> See *Republic of Palau v. Wolff*, 3 ROP Intrm. 278, 278-81 (Trial Div. 1993) (Beattie, J.).

<sup>222</sup> See *id.* at 280 (“The Palau Supreme Court was created by the Government of Palau, not the United States... The Palau Supreme Court is not an agency of the United States... [I]t is the Palau Constitution which applies to criminal proceedings in Palau for violation of its statutes.”).

<sup>223</sup> See *Chisato*, 2 ROP Intrm. at 232 (confirming the holding of *Republic of Palau v. Santos*, 1 ROP Intrm. 274 (1985)).

#### D. Translation of Criminal Proceedings

A criminal defendant's due process rights include the right to an interpreter if needed to understand the proceedings.<sup>224</sup> This right of interpretation is "rooted in fundamental fairness and integrity of court" and cannot "be abandoned absent an express waiver" by the defendant.<sup>225</sup>

Although the determination of who is to provide and pay for the interpretation is left to the trial court, the Appellate Division's *Pamintuan v. Republic of Palau* opinion demands that trial courts "halt proceedings until an interpreter [is] present."<sup>226</sup> The duty to inform the court of the need for interpretation falls on the defendant, as does the duty to provide and pay for translation unless the defendant provides proof of indigence.<sup>227</sup>

#### E. Statutory Issues

An overly-vague statute describing a crime can violate the due process clause because it does not provide sufficient notice of the acts constituting a crime. The Appellate Division set out the boundaries of constitutionally-acceptable concreteness in *Ngirengkoi v. Republic of Palau*:

It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.<sup>228</sup>

The *Ngirengkoi* Court upheld the constitutionality of the indecent assault statute against a void-for-vagueness challenge. Palau's indecent assault statute criminalizes "tak[ing] indecent and improper liberties with

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<sup>224</sup> See *Pamintuan v. Republic of Palau*, 16 ROP 32, 40 (2008) ("[W]e find that the Palauan Constitution guarantees criminal defendants the right to an interpreter if they are unable to meaningfully understand the English language...").

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> See *id.* at 39 n.2. This structure—requiring a defendant to provide a translator and not commencing proceedings until a translator is present—may tempt abuse, especially because the right of interpretation can only be waived expressly. A non-English speaking, non-indigent defendant could attempt to postpone her criminal trial—perhaps indefinitely—by simultaneously refusing to waive her right to translation and refusing to provide a translator. But a trial court could presumably coerce a criminal defendant into providing an interpreter through its contempt powers or appoint a translator and require the non-indigent defendant to pay for the translator's services.

<sup>228</sup> *Ngirengkoi v. Republic of Palau*, 8 ROP Intrm. 41, 42 (1999) (quoting *Giaccio v. Pennsylvania*, 86 S. Ct. 518, 520-21 (1966)).

the person of a child under the age of 14 years without committing or intending to commit the crime of rape or carnal knowledge.”<sup>229</sup> In *Ngirengkoi*, the defendant contended that ambiguousness of the phrase “indecent and improper liberties” unconstitutionally deprived him of his right to due process in violation of Article IV, Section 6 and to be informed of the nature of the accusation against him as guaranteed by Article IV, Section 7.<sup>230</sup>

The Court applied the canon of construction “that a law should be construed to sustain its constitutionality whenever possible” and noted that at least six United States jurisdictions have found that statutes criminalizing the taking of “indecent liberties” are not unconstitutionally vague.<sup>231</sup> Furthermore, vagueness challenges not involving free speech must be examined in light of the facts of the case at hand and the conduct at issue in *Ngirengkoi* was of the sort that “a person of ordinary intelligence” would know were acts of indecent liberties.<sup>232</sup> The Court upheld the constitutionality of the indecent assault statute without engaging in a separate Article IV, Section 7 analysis regarding an accused’s right to be informed of the nature of the charges.

The constitutional right to due process may be violated by a conviction of a crime that lacks a mens rea requirement.<sup>233</sup> The Court—because it found a mens rea requirement in the statutory crime at hand—did not fully define the rationale or boundaries of this due process right, other than to say that “where a statute incorporates an offense from the common law, a culpable state of mind must accompany the conduct proscribed by the statute.”<sup>234</sup>

#### F. *Charging Issues*<sup>235</sup>

It is violative of due process to find a defendant guilty of a crime without charging the defendant of that crime. In *Franz v. Republic of Palau*,<sup>236</sup> the defendant was charged with assault and battery and

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<sup>229</sup> 17 PNC § 2806.

<sup>230</sup> See *Ngirengkoi*, 8 ROP Intrm. at 42.

<sup>231</sup> See *id.* at 42-43.

<sup>232</sup> *Id.* at 43.

<sup>233</sup> See *Takada v. Sup. Ct. of the Republic of Palau, Trial Div.*, 3 ROP Intrm. 262, 263 (1993).

<sup>234</sup> *Id.*

<sup>235</sup> See also section XIII.E *infra*, (discussing an accused’s right to be informed of the nature of the accusation).

<sup>236</sup> *Franz v. Republic of Palau*, 8 ROP Intrm. 52 (1999).

attempted assault and battery with a dangerous weapon but convicted of assault and battery and assault and battery with a dangerous weapon. Because the prosecution had charged only an *attempted* assault and battery with a dangerous weapon, but not a *completed* assault and battery with a dangerous weapon, the Appellate Division reversed the conviction for that offense.<sup>237</sup> “Attempted” and “completed” crimes are separate offenses because, under the applicable statute,<sup>238</sup> an “attempt” offense requires that the perpetrator “fall short of actual commission of the crime.”<sup>239</sup> In *Franz*, the Court found “fundamental due process prevents a court from convicting an accused of an offense not charged in the information and not necessarily included in an offense charged.”<sup>240</sup> The *Franz* decision has often been cited as setting forth the due process standard as it relates to charging documents: “The constitutional right of a defendant to know the nature and cause of the accusation means that the offense charged must be set forth with sufficient certainty so that the defendant will be able to intelligently prepare a defense.”<sup>241</sup>

In dicta, the *Franz* Court appeared to uphold the constitutionality of ROP R. CRIM. P. 31(c), which permits conviction of a defendant “of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.”<sup>242</sup> It is not immediately clear why a

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<sup>237</sup> See *id.* at 52.

<sup>238</sup> 17 PNC § 104.

<sup>239</sup> *Franz*, 8 ROP Intrm. at 54.

<sup>240</sup> *Id.* at 55.

<sup>241</sup> *Pamintuan v. Republic of Palau*, 16 ROP 32, 44 (2008) (citing *Franz v. Republic of Palau*, 8 ROP Intrm. 52, 54-55 (1999)). See also *Republic of Palau v. Kasiano*, 13 ROP 289, 290 (Trial Div. 2006) (Salii, J.) (A criminal information is sufficient—under both ROP R. CRIM P. 7 and the due process clause—“if it contains all the essential elements of the offense charged and fairly informs the accused of the charges against him which he must defend.”) (citing *Franz v. Republic of Palau*, 8 ROP Intrm. 52, 55 (1999)).

In a pre-*Franz* opinion, the Appellate Division formulated the standard as follows: “A criminal information is sufficient if it ‘contains the elements of the offense charged and fairly informs a defendant of the charge against he must defend.’” *Sungino v. Republic of Palau*, 6 ROP Intrm. 70, 70-71 (1997) (quoting *Hamling v. United States*, 94 S. Ct. 2887, 2907 (1974)). Without explanation, the Appellate Division chose not to finish the *Hamling* quotation, which reads in whole:

[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.

*Hamling*, 94 S. Ct. at 2907.

<sup>242</sup> *Franz*, 8 ROP Intrm. at 55, n.4.

defendant may be charged with a completed crime, but instead found guilty of an attempted crime when it is not constitutionally permissible for the opposite to be true. Permitting conviction of an attempted crime when only a completed crime has been charged may be sensible in the United States where, as the Supreme Court of Palau noted, attempted and completed crimes are not “separate offenses.”<sup>243</sup> But, given that attempted and completed crimes are “separate offenses” in Palau because of the statutory requirement that an attempted crime “fall short” of completion, due process should disallow a conviction of an attempt crime where only the completed offense was charged.

In *Gotina v. Republic of Palau*, the Appellate Division held that charging the accused with unlawful fishing “on or before” a certain day is not unconstitutionally ambiguous in violation of Article IV, Section 6 or 7.<sup>244</sup> The Court read “on or before” as “reasonably synonymous” with the “widely used ‘on or about’ language, and as providing an equally sufficient measure of reasonable particularity as to the time of the alleged offense.”<sup>245</sup> While (as the Court stated) this reading of the charges recognizes “practical” rather than “technical” considerations, it skews the literal meaning of the words. “On or before” a certain date does not carry the same meaning as “on or about” a certain date. Indeed, “on or before” could literally mean *any time* before the stated cut-off date, and therefore provides almost no information about the alleged time frame of the offense (nor of whether the alleged offense occurred within the applicable statute of limitations).

In *Republic of Palau v. Kumangai*, Chief Justice Ngiraklsong dismissed a count charging the defendant with committing child abuse from September 23, 1997 to September 22, 2000 for “being too indefinite with respect to the time of the alleged offense” and thus violating the defendant’s constitutional due process rights.<sup>246</sup> Noting the similarity to the United States due process clause, the Chief Justice stated that the clause “requires that a defendant in a criminal case be given notice of the elements of the offense charged against him and a fair opportunity to defend himself against those charges.”<sup>247</sup> It is a due process violation for a charge to fail to give the defendant the approximate time the charged

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<sup>243</sup> *Id.* at 54 n.3 (citing *United States v. York*, 578 F.2d 1036, 1038 & n.4 (5th Cir. 1978)).

<sup>244</sup> *Gotina v. Republic of Palau*, 8 ROP Intrm. 56 (1999).

<sup>245</sup> *Id.* at 58.

<sup>246</sup> *Republic of Palau v. Kumangai*, 10 ROP 176, 177 (Trial Div. 2001) (Ngiraklsong, C.J.).

<sup>247</sup> *Id.*

conduct occurred because the defendant is deprived of a fair opportunity to defend against the charge.<sup>248</sup>

In *Kumangai*, the government could only point to one specific act of child abuse, but could not pinpoint the date more specifically than the three-year time period noted above.<sup>249</sup> Although the information charged an ongoing abuse for those three years, it became clear at trial that the government only had evidence of a single act; because it was too late for the defendant to request a bill of particulars, the Court found that the charged count was too indefinite as to time for the defendant to adequately defend himself against the charge.<sup>250</sup>

### G. Warrant Issues

As long as an arrest warrant for breach of parole is supported by probable cause, no immediate preliminary post-arrest hearing must occur to comport with due process.<sup>251</sup> All that due process requires is “notice and an opportunity to be heard within a reasonable time frame.”<sup>252</sup> Justice Michelsen outlined the procedure required to satisfy due process: (1) service of summons on a parolee and a hearing within thirty days; or (2) issuance of an arrest warrant by the court based on probable cause supported by an affidavit.<sup>253</sup>

### H. Non-Disclosure of Evidence

In *Malsol v. Republic of Palau*, the Appellate Division contemplated the due process implications of the prosecution’s late disclosure of a written witness statement.<sup>254</sup> The prosecution waited until the week before trial to produce the witness statement of a murder victim’s neighbor, and by that time the defendant was unable to locate the witness.<sup>255</sup> Although the witness statement was somewhat ambiguous, the defendant argued that the witness statement showed that the murder victim was still alive up until the time that the defendant had a solid alibi, thereby

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<sup>248</sup> *See id.*

<sup>249</sup> *See id.*

<sup>250</sup> *See id.*

<sup>251</sup> *See Masami v. Kesolei*, 10 ROP 213, 214 (Trial Div. 2003) (Michelsen, J.).

<sup>252</sup> *Id.*

<sup>253</sup> *See id.* at 216. But, because the relevant statute improperly authorized members of the Parole Board, rather than a judge, to issue an arrest warrants upon an allegation of a parole violation, the Court ordered the parolee’s release. *See* section VIII.C, *infra*.

<sup>254</sup> *Malsol v. Republic of Palau*, 8 ROP Intrm. 161 (2000).

<sup>255</sup> *See id.* at 162

proving that the defendant was not present when the victim was slain.<sup>256</sup> Although the witness statement was admitted at trial, the defendant claimed the prosecution's withholding of the evidence violated her due process rights because she was denied an opportunity to question the witness in person.<sup>257</sup> Because the defendant did not argue a constitutional violation to the Trial Division, the Appellate Division reviewed only the conduct of the Trial Division—admitting the witness statement on the defendant's motion—rather than the prosecution's late disclosure of the witness statements.<sup>258</sup> The Court found no constitutional violation, but did urge the Attorney General's office to adopt an "open file" policy and freely share all non-privileged information with defense counsel.<sup>259</sup>

Like *Malsol*, in *Kumangai v. Republic of Palau*, the defendant claimed a due process violation in the government's failure to disclose evidence to him in advance of trial.<sup>260</sup> The withheld evidence was the confidential informant's audiotape, which the government allegedly misplaced until after trial. The Court stated its test:

In determining whether a criminal defendant's due process rights have been violated by the government's failure to disclose impeachment evidence, the Appellate Division must ask whether, but for the failure to disclose, the outcome of the proceeding below would have been different.<sup>261</sup>

Recounting the *Ngiraked v. Republic of Palau* decision, the *Kumangai* Court stated the a due process violation only occurs when the withheld evidence is "material" to the issue of a defendant's guilt or punishment and that, to be "material," disclosure of the evidence creates a reasonable probability that the result of the proceeding would have been different.<sup>262</sup> A "reasonable probability" is described as "a probability sufficient to undermine confidence in the outcome."<sup>263</sup> The Court summarily ruled that

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<sup>256</sup> *See id.*

<sup>257</sup> *See id.* at 163.

<sup>258</sup> *See id.*

<sup>259</sup> *See id.* at 163 & n.2. To be sure, it does not offend the Constitution for the government to fail to turn over a witness statement that does not exist. *See Republic of Palau v. Worswick*, 3 ROP Intrm. 269, 276-78 (1993) (finding that trial court's determination that no witness statements were taken was not clearly erroneous and therefore no constitutional violation for withholding the witness statements could have occurred).

<sup>260</sup> *Kumangai v. Republic of Palau*, 9 ROP 79 (2001).

<sup>261</sup> *Id.* at 82-83 (citing *Ngiraked v. Republic of Palau*, 5 ROP Intrm. 159, 172 & n.9 (1996)).

<sup>262</sup> *See id.* at 85.

<sup>263</sup> *Id.*

no showing had been made that disclosure of the misplaced tape would create such a reasonable probability and therefore the defendant's due process rights were not violated by the government's failure to produce the tape.<sup>264</sup> This "reasonable probability of a different outcome" standard, as applied, is a high bar to meet, especially where the defendant does not know what is contained in the withheld evidence.

The Court rejected a second "failure to disclose" due process argument in *Kumangai*, where the defendant alleged that the government's untimely disclosure of the confidential informant's counterfeiting activities prejudiced his ability to impeach the witness.<sup>265</sup> But, as in *Ngiraked*, the Court felt that the defendant had "significant impeachment material" about the same witness, including a drug trafficking arrest and the information that the witness was testifying in order to gain leniency for himself.<sup>266</sup> Again, the "reasonable probability" standard proved a high bar to hurdle, even where the government withheld evidence of an important witness's criminal dishonesty.

The *Ngiraked* decision cited in *Kumangai* is a grave case stemming from the assassination of Palau's first President. The prosecution initially interviewed a witness, but then the interview tapes were inadvertently destroyed. The witness was subsequently called at trial and testified. The defendants alleged that the destruction of the interview tapes violated their due process rights, as well as their right to examine all witnesses.<sup>267</sup> With regard to due process, the *Ngiraked* Court adopted the United States' "Brady rule" in Palau.<sup>268</sup> The *Brady* rule states that suppression of exculpatory evidence by the prosecution in the face of a defendant's request for evidence violates the due process clause where the evidence is "material" to guilt or punishment.<sup>269</sup> Evidence is "material" only if the disclosure of the evidence to the defense would create a reasonable probability that the result of the proceeding would have been different.<sup>270</sup> The "suppressed" evidence in question in *Ngiraked*, however, was not exculpatory, but instead was only potentially impeaching evidence.<sup>271</sup> The Court found the suppressed evidence was not material in light of the other

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<sup>264</sup> *See id.*

<sup>265</sup> *See id.*

<sup>266</sup> *See id.*

<sup>267</sup> *See Ngiraked*, 5 ROP Intrm. at 170. *Ngiraked's* examination clause analysis is discussed in section X, *infra*.

<sup>268</sup> *See id.* at 172 (citing *Brady v. Maryland*, 83 S. Ct. 1194 (1963)).

<sup>269</sup> *See id.*

<sup>270</sup> *See id.*

<sup>271</sup> *See id.*

impeachment evidence available to the defense and therefore found no due process violation.<sup>272</sup>

I. *Non-Disclosure of the Identity of a Confidential Informant*

The government's non-disclosure of the identity of a confidential informant potentially implicates due process clause considerations. The Appellate Division visited this non-disclosure issue in *Ueki v. Republic of Palau*.<sup>273</sup> In *Ueki*, police officers used a confidential informant to execute three controlled buys of methamphetamine from the defendant.<sup>274</sup> The government revealed the identity of the confidential informant to defense counsel only for the purpose of the attorney running a conflict check and prohibited the conveyance of the identity of the informant to the defendant.<sup>275</sup> After recounting United States case law, the Court stated the constitutional rule:

[T]he question whether a defendant is entitled to disclosure of and/or testimony from a confidential informant is entirely distinct from the question whether the government may prove its case without such testimony. "When disclosure is warranted, it is for the purpose of allowing the *defendant* to determine whether he wishes to call the informant as a witness in an effort to rebut the government's case."<sup>276</sup>

And, because the confidential informant was the only "direct participant" in the controlled buys, the informant's testimony in *Ueki* would not have been cumulative.<sup>277</sup> Based on the impermissible non-disclosure, the Appellate Division vacated the *Ueki* defendant's convictions and remanded the case for retrial.<sup>278</sup> In the interest of safeguarding informants, the Court noted that trial courts may, on a case-by-case basis when appropriate and as demonstrated by the government, take steps to protect witnesses in criminal prosecutions.<sup>279</sup> But the Court stated that the Republic's interest in prosecution of narcotics cases must, on some

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<sup>272</sup> *See id.*

<sup>273</sup> *Ueki v. Republic of Palau*, 10 ROP 153, 159-61 (2003).

<sup>274</sup> *See id.* at 155-56.

<sup>275</sup> *See id.* at 159.

<sup>276</sup> *Id.* at 160-61 (quoting *Oiterong v. Republic of Palau*, 9 ROP 195, 198 (2002)).

<sup>277</sup> *See id.* at 161.

<sup>278</sup> *See id.*

<sup>279</sup> *See id.*

occasions, “be trumped by the defendant’s constitutional due process right to a fair trial, which includes the right to adequately prepare and present his defense.”<sup>280</sup> *Ueki* was such a case.

Following *Ueki*, the Appellate Division held, in *Ngirailild v. Republic of Palau*, that the disclosure of the identity of a confidential informant to defense counsel only (and not to the defendant) did not run afoul of the defendant’s right to due process under Article IV, Section 6 or his rights to effective counsel or to examine all witnesses in Article IV, Section 7.<sup>281</sup> The *Ngirailild* Court quoted extensively from the *Ueki* opinion for the standard applicable to disclosure of a confidential informant, but ultimately found that no disclosure was required.<sup>282</sup> The defense was told that it could call the informant as a witness and defense counsel was permitted to interview the informant about the drug sale that led to the arrest.<sup>283</sup> In finding that none of the defendant’s Article IV rights were violated (without separately addressing the rights to due process and to examine all witnesses), the Appellate Division put great weight in the trial court’s explicit direction to the defense that it was permitted to call the confidential informant as a witness.<sup>284</sup>

#### J. *Civil Court Procedure for Deprivation of Property Rights*

The due process clause guarantees that courts (and administrative bodies) follow certain minimum procedures in adjudicating property rights. Failure to adhere to these minimum procedures may violate a litigant’s due process right and invalidate the court’s decision. The “specifics of each case” determine whether and what sort of hearing a trial court must hold on a motion, for “procedural due process does not entitle a litigant to a hearing on every motion.”<sup>285</sup> An oral hearing on a motion is

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<sup>280</sup> *Id.*

<sup>281</sup> *Ngirailild v. Republic of Palau*, 11 ROP 173 (2004). The ineffective assistance counsel claim, which was based on the assertion that defense counsel could not effectively represent the defendant without revealing the identity of the confidential informant, was summarily rejected: “an ineffective assistance claim turns on decisions made and actions taken by counsel, not by the court.” *Id.* at 174. While most of the time an ineffective assistance claim will turn on the actions of counsel, it is not inconceivable that a trial court could rule in such a way to limit defense counsel from achieving effective representation. Such a blanket statement and summary disposition of the issue was therefore not appropriate.

<sup>282</sup> *See id.* at 175.

<sup>283</sup> *See id.*

<sup>284</sup> *See id.* See section X, *infra*, regarding the right to examine witnesses.

<sup>285</sup> *Ngerketiit Lineage v. Seid*, 8 ROP Intrm. 44, 47 (1999).

“necessary only if determination of the motion requires resolution of a material and genuine factual dispute.”<sup>286</sup>

The Appellate Division held that it is not violative of due process for a lower court to hold a civil trial without a defendant’s attendance in the absence of proof that the absent defendant was not served with notice of the trial date in *Malsol v. Ngiratechekii*.<sup>287</sup> The *Malsol* defendant filed an answer in the civil personal injury case, but failed to provide an address for service (in violation of ROP R. Civ. P. 11).<sup>288</sup> The case then dragged on for nine years before trial (during which time the defendant appeared at two status conferences).<sup>289</sup> The absent defendant was found liable and subsequently appealed.<sup>290</sup> On remand for fact-finding, the Trial Division found that the absent defendant had received notice of the trial date.<sup>291</sup> The Appellate Division held that the due process clause guarantees a civil defendant the right to notice of the trial date, but does not require a trial court to make a determination as to whether an absent defendant received such notice before going forward with trial.<sup>292</sup> The Court noted that a defendant is not guaranteed personal service of a trial notice when the defendant does not comply with the rules requiring the furnishing of a current address to the court: “The service rules, however, do not require the court or the litigants to track down a party whose address is unknown.”<sup>293</sup> Following *Malsol*, the Appellate Division has found no due process violation where service of notice of a land court hearing was actually made, although not at the appellant’s abode, place of business, or to his specified agent.<sup>294</sup>

As held in *Silmai v. Land Claims Hearing Office*, it violates an appellant’s due process rights for a trial court to sua sponte dismiss the pleadings without providing the parties with an opportunity to be heard.<sup>295</sup> The lower court in *Silmai* had treated the defendant’s answer and affirmative defenses as a motion for judgment on the pleadings and issued

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<sup>286</sup> *Id.* at 48.

<sup>287</sup> *Malsol v. Ngiratechekii*, 7 ROP Intrm. 70 (1998).

<sup>288</sup> *See id.* at 71.

<sup>289</sup> *See id.*

<sup>290</sup> *See id.*

<sup>291</sup> *See id.*

<sup>292</sup> *See id.*

<sup>293</sup> *Id.* at 72.

<sup>294</sup> *See Etpison v. Skilang*, 16 ROP 191, 193 (2009) (“Litigants bear the responsibility of notifying the court where they want to be served and making any objections in a timely way.”).

<sup>295</sup> *Silmai v. Land Claims Hearing Office*, 3 ROP Intrm. 225 (1992).

a sua sponte order dismissing the complaint.<sup>296</sup> The Appellate Division, in finding that the lower court had abused its discretion, did not state what sort of “opportunity to be heard” must be afforded before dismissal of the pleadings is constitutionally permissible.

In *Klai Clan v. Bedechel Clan*, the Court reviewed the Trial Division’s sua sponte order to vacate and amend its previous order.<sup>297</sup> The amended order called for remand of the case to the Land Claims Hearing Office (“LCHO”) for further proceedings.<sup>298</sup> Because the Trial Division did not give the parties notice and an opportunity to be heard, as required by ROP R. CIV. P. 59(d), the Appellate Court found that the sua sponte vacation and amendment of the order violated the litigant’s procedural due process rights as set forth in Article IV, Section 6.<sup>299</sup> This use of the due process clause seems strained, especially in light of Rule 59(d)’s focus on a trial court’s authority to grant a new trial, not amend an order.

The Appellate Division held that a court may rule on a motion for default judgment without a hearing without offending the procedural due process right of the party seeking the judgment in *Western Caroline Trading Co. v. Leonard*.<sup>300</sup> The *Western Caroline* appellant won a default judgment, but appealed the amount of the trial court’s judgment.<sup>301</sup> The Appellate Division found that the opportunity to file a motion in favor of default judgment and supporting documents afforded the moving party sufficient process.<sup>302</sup>

It is violative of due process for a trial court to apply res judicata to bar a claimant’s claim to land when the claimant was not involved in the earlier proceeding that serves as the basis for the res judicata ruling.<sup>303</sup> Instead of reaching this constitutional question, however, the Appellate Division could simply have overruled the lower court’s finding that res judicata applied and thereby achieved the same result.

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<sup>296</sup> See *id.* at 226.

<sup>297</sup> *Klai Clan v. Bedechel Clan*, 2 ROP Intrm. 84 (1990).

<sup>298</sup> See *id.* at 85.

<sup>299</sup> See *id.* at 85-86.

<sup>300</sup> *Western Caroline Trading Co. v. Leonard*, 16 ROP 110, 113-14 (2009).

<sup>301</sup> See *id.* at 111-12.

<sup>302</sup> See *id.* at 114 (“Plaintiff had an opportunity to be heard when it filed its action and its subsequent motion for default judgment.”). Although a default judgment hearing is not required by rule (see ROP R. CIV. P. 55(b)(2)), court rules should not be relied upon as evidence of minimum due process. The *Western Caroline* Court relied too heavily on the permissive language of the rule in finding that no hearing was required under the Constitution. See *id.* at 114 (“Due process does not require more than that, particularly with a discretionary statute.”).

<sup>303</sup> See *Butelbai Clan v. Techur*, 2 ROP Intrm. 122, 125-27 (1990).

The Appellate Court held in *Bruno v. Santos* that it does not violate due process for the LCHO, in response to a request to define a boundary, to define the boundary per the request without holding a hearing.<sup>304</sup> The parties, in a letter, asked the LCHO to review four items and then make a boundary determination; it did so, but the disappointed party claimed on appeal that the determination violated due process because no hearing was held.<sup>305</sup> The Appellate Division disagreed, pointing out that “[t]he agreement neither requested nor anticipated that the Land Court would hold a hearing regarding the disputed boundaries.”<sup>306</sup> This opinion basically permits individuals to “bargain away” their due process rights—if a governmental body is jointly asked by both parties to complete certain steps before coming to a determination and it does so, no more process is due.

As to execution of money judgments, the Appellate Court relied on United States case law to find that due process requirements are satisfied if: (1) notice is provided to the judgment debtor that property has been seized; (2) notice is provided to the judgment debtor of exemptions to which the judgment debtor may be entitled; and (3) a prompt opportunity to be heard is provided for the judgment debtor to assert exemptions or challenge the seizure.<sup>307</sup> Due process, however, does not require pre-attachment notice.<sup>308</sup> The same process is due to judgment debtors when property is seized by way of writ of attachment as when it is seized through a writ of execution.<sup>309</sup>

In *Peleliu State Government v. 9th Peleliu State Legislature*, Chief Justice Ngiraklsong laid out the minimum due process requirements in prejudgment seizure cases:

(1) the availability of ex parte prejudgment seizure must be limited to situations where plaintiff has established that the property to be seized is of a type that can be readily concealed, disposed of, or destroyed; (2) the plaintiff must allege specific facts based on actual knowledge supporting the underlying action and the right of plaintiff to seize the property; (3) the application for the order of seizure must be made to a judge rather than to a clerk; (4) the defendant has a right to a prompt, postseizure hearing to challenge the

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<sup>304</sup> *Bruno v. Santos*, 9 ROP 41 (2001).

<sup>305</sup> *See id.* at 41-43.

<sup>306</sup> *Id.* at 43.

<sup>307</sup> *See Richmond Wholesale Meat Co. v. Ngiraklsong*, 2 ROP Intrm. 292, 296-97 (1991).

<sup>308</sup> *See id.* at 298.

<sup>309</sup> *See id.*

seizure; and (5) the defendant must be able to recover damages from the plaintiff if the taking was wrongful and to regain possession of the seized items by filing a bond.<sup>310</sup>

Where the assets to be seized were fungible boat parts, the Chief Justice found that the due process requirements had been met and ordered prejudgment seizure upon posting of a sizeable bond.<sup>311</sup>

The Appellate Division recently stated, in *In re Idelui*, that a judicial decision that violates a party's right to due process is a nullity.<sup>312</sup> In *Idelui*, four claimants to a parcel of land were overlooked and therefore received no notice of the hearing determining ownership of the land.<sup>313</sup> The Land Court held the hearing and issued a determination of ownership and a certificate of title before it realized its mistake over a year later.<sup>314</sup> The Appellate Division upheld the Land Court's cancellation of the determination of ownership and certificate of title despite the lack of rule-based authority to do so. The Court found that, because the Land Court hearing was conducted in violation of the four excluded claimants' due process rights, the subsequent determination of ownership and certificate of title were void ab initio and could be cancelled pursuant to the lower court's inherent authority.<sup>315</sup>

#### K. *Due Process Implications of Property Rights in Employment*

Certain government employees and elected officials possess a property right to their continued employment. When such a right is recognized, an employee or elected official must be afforded due process before she may be removed from office. Such a property right to employment may arise through a contract for continued employment for a specified time (or for an unspecified time upon certain conditions, such as "good behavior" or "satisfactory execution of duties").

In a since-vacated opinion, Justice Ngiraklsong ruled that the due process clause entitles a member of the House of Delegates to notice and

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<sup>310</sup> *Peleliu State Gov't v. 9th Peleliu State Legislature*, 15 ROP 179, 181 (Trial Div. 2008) (Ngiraklsong, C.J.) (quoting *Paramount Pictures Corp. v. Doe*, 821 F. Supp. 82, 87-88 (E.D.N.Y. 1993)).

<sup>311</sup> *See id.* at 182.

<sup>312</sup> *In re Idelui*, Civ. App. No. 10-013, slip op. at 5 (Sept. 24, 2010) ("The deprivation of a party's constitutional due process right to notice and an opportunity to be heard renders a court's judgment on that issue void.").

<sup>313</sup> *See id.* at 2.

<sup>314</sup> *See id.*

<sup>315</sup> *See id.* at 6-7.

an opportunity to be heard before expulsion from that body.<sup>316</sup> Justice Ngiraklsong agreed that the expelled member was at least entitled to notice of the resolution calling for his expulsion so that he could appear before the House of Delegates to argue against (or acquiesce in) the resolution.<sup>317</sup> Justice Ngiraklsong found the lack of notice especially unreasonable given that “Koror is a small town” and “[t]he Legislature Building is within approximately 2 miles from [the expelled member’s] office and even less from his residence.”<sup>318</sup> The Appellate Division, however, found that the controversy was moot because the House of Delegates of the Second Olbiil Era Kelulau had already completed their service; therefore the Court remanded the case back to Justice Ngiraklsong with instructions to vacate the judgment.<sup>319</sup>

As found by Justice Miller in *Ngiraingas v. Eighth Peleliu State Legislature*, due process requires that a state governor be given notice of removal from office and an opportunity to state her case before the state legislature vote that results in removal.<sup>320</sup> In *Ngiraingas*, a super-majority of the state legislature of Peleliu had resolved that the governor would be removed from office unless the legislature voted to revoke the removal by a certain date.<sup>321</sup> The resolution of removal was the first notice the governor received of the legislature’s actions, and no further official legislative meeting occurred between the notice and the date set for removal.<sup>322</sup> Justice Miller found that the governor’s opportunity to speak to the individual legislators on an ad hoc basis before his removal took effect fell short of fulfilling the governor’s due process rights:

The opportunity to be heard guaranteed by the due process clause is not the opportunity to hear oneself talk, but to have one’s words and arguments given consideration by the person or persons who will be determining whether to deprive you of your life, liberty, or property.<sup>323</sup>

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<sup>316</sup> See *Salii v. House of Delegates*, 3 ROP 351 (Trial Div. 1988) (Ngiraklsong, J.).

<sup>317</sup> See *id.* at 355.

<sup>318</sup> *Id.* at 356.

<sup>319</sup> See *Salii v. House of Delegates*, 1 ROP Intrm. 708 (1989).

<sup>320</sup> *Ngiraingas v. Eighth Peleliu State Legislature*, 13 ROP 261 (Trial Div. 2006) (Miller, J.).

<sup>321</sup> See *id.* at 262.

<sup>322</sup> See *id.*

<sup>323</sup> *Id.* at 263.

Because the governor was not afforded an opportunity to present his case before the legislature preceding the vote to remove him, the resolution violated his due process rights.<sup>324</sup>

The Appellate Division found a violation of a terminated public employee's right to procedural due process in *April v. Palau Public Utilities Corp.*<sup>325</sup> The defendant-employer utility company, a public corporation wholly owned by the national government with board members appointed by the President of Palau, qualified as a "government actor" for due process purposes.<sup>326</sup> In determining whether the terminated employee had a due process right to continued employment, the Appellate Division looked no further than the defendant-employer's answer admitting that a right to continued employment existed.<sup>327</sup> Upon finding that property right to continued employment with a government employer, the Court stated that the employee "should have been afforded due process before [a] deprivation" of her employment occurred.<sup>328</sup>

In determining whether sufficient process was afforded to the terminated employee, the *April* Court first rejected the appellant's contention that her employer had failed to adhere to its own internal procedures in terminating her employment.<sup>329</sup> Turning to the "notice and an opportunity to be heard" aspect of procedural due process, the Appellate Division found that the employee's constitutional rights had been violated because she was terminated on the spot, without "even a minimal level of process."<sup>330</sup> Without setting forth exactly what quantum was due, the Court noted "one procedure does not fit all" in determining what or how much process is due before a particular deprivation of life, liberty, or property may occur.<sup>331</sup> Damages for a deprivation of procedural due process "should be calculated only to compensate a plaintiff for the affront of suffering a deprivation of process" and recovery of "anything resembling back pay or compensation for her termination" would only be permissible "if proper process would have resulted in [the employee's] reinstatement."<sup>332</sup> Citing United States case law, the Court stated that nominal damages are likely appropriate unless notice and an opportunity

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<sup>324</sup> See *id.* at 263-64.

<sup>325</sup> *April v. Palau Pub. Utils. Corp.*, Civ. App. No. 08-038 (Nov. 3, 2009).

<sup>326</sup> See *id.*, slip op. at 4.

<sup>327</sup> See *id.* at 4-5.

<sup>328</sup> *Id.* at 5.

<sup>329</sup> See *id.* at 5-6.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 6-7.

to be heard would have left the terminated employee in a better position employment-wise.<sup>333</sup>

After remand to the Trial Division to calculate damages, the *April* employee's plight returned to the Appellate Division a second time.<sup>334</sup> The Trial Division awarded nominal damages of one dollar and the employee appealed the amount of the award.<sup>335</sup> After affirming the Trial Division's decision not to impose punitive damages, the Appellate Division again remanded because it found that the Trial Division had failed to answer the vital question of whether a proper hearing would have substantively improved the employee's situation.<sup>336</sup>

#### L. *Other Property Rights*

The Disciplinary Tribunal stated that a respondent in an attorney disciplinary proceeding is afforded due process protection based on the quasi-criminal nature of such proceedings.<sup>337</sup> However, it is not the "quasi-criminal" nature of disciplinary proceedings that confer due process rights upon respondents—due process is afforded to parties in many entirely non-criminal settings. It is a type property—the respondent's law license—that is on the line in such proceedings, not the respondent's life or liberty.

The appellant claimed that failure to receive notice that certain land was claimed as government land before the expiration of the time period in which to file land claims against the government violated his right to due process in *Carlos v. Ngarchelong State Public Lands Authority*.<sup>338</sup> The Appellate Division disagreed, ruling that the constitutional provision (Article XIII, Section 10) and enabling legislation (35 PNC § 1304(b)) at issue did not foreclose any rights because even after the expiration of the time period set out to claim government lands claimants could still file quiet title actions against the government.<sup>339</sup>

The *Carlos* Court improperly focused on whether the limited time span of the rights afforded by Article XIII, Section 10 (and its enabling

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<sup>333</sup> *See id.* at 7.

<sup>334</sup> *April v. Palau Pub. Utils. Corp.*, Civ. App. No. 10-014 (Aug. 16, 2010).

<sup>335</sup> *See id.*, slip op. at 3.

<sup>336</sup> *See id.* at 4 ("Would a hearing have resulted in [the employee]'s reinstatement? If the answer is yes, then the trial court should consider an award of back pay or compensation for her termination. If the answer is no, then nominal damages are likely appropriate.").

<sup>337</sup> *See In re Shadel*, 16 ROP 254, 258 (Disc. Trib. 2009) ("Respondent is correct in that disciplinary proceedings are quasi-criminal in nature, and therefore afford him the right to due process of law.").

<sup>338</sup> *Carlos v. Ngarchelong State Pub. Lands Auth.*, 8 ROP Intrm. 270 (2001).

<sup>339</sup> *See id.* at 271-72.

legislation) created a due process violation. Just because a right is “new” and for a limited time (effectively an “excess right”) does not mean—as the Court seemingly held—that deprivation of that right creates no due process violation. The appellant did not argue that Article XIII, Section 10 deprived him of due process—he argued that the government’s failure to publish notice of its claim to certain land deprived him of due process because he was unaware of his need to file an Article XIII, Section 10 claim. The Court dispensed of this argument in one sentence, finding that it is the citizens’ duty to identify public land rather than the government’s duty to publish notice regarding the allegedly public status of land.<sup>340</sup> This analysis is clouded by the rest of the Court’s opinion. While the outcome was correct—no due process violation occurred—the Court’s reasoning should have focused solely on the actual claimed due process violation.

In *Western Caroline Trading Co. v. Philip*, the Appellate Division stated that a party to a contract “does not have a constitutional right to have a contract interpreted in its favor.”<sup>341</sup> The contract at issue in *Western Caroline* included a clause governing the payment of attorney’s fee should litigation arise concerning the contract.<sup>342</sup> Despite one party’s argument that the due process clause protected its property right, the Court properly stated that “there is no constitutional issue for us to decide.”<sup>343</sup>

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<sup>340</sup> *See id.*

<sup>341</sup> *Western Caroline Trading Co. v. Philip*, 13 ROP 28, 29, n.1 (2005).

<sup>342</sup> *See id.* at 28-29.

<sup>343</sup> *Id.* at 29, n.1.

## VIII. SEARCHES AND WARRANTS

Article IV, Section 4 provides the seemingly absolute guarantee that “[e]very person has the right to be secure in his person, house, papers and effects against entry, search and seizure.”<sup>344</sup> But Section 6 of the same article then provides that “[a] warrant for search and seizure may not issue except from a justice or judge on probable cause supported by an affidavit particularly describing the place, persons, or things to be searched, arrested, or seized.”<sup>345</sup>

By its own terms, Section 4 protects against all searches or seizures, warranted or unwarranted. Section 4 does not limit only government actors, but provides a freedom from searches and seizures by anyone. As a result, even a private party could infringe on another’s search and seizure rights. Section 6 contradicts Section 4 by setting forth a warrant procedure for conducting a search or seizure. The language of Section 4’s absolute freedom cannot be resolved with the incongruity of Section 6’s warrant provision without altering the plain meaning of one of the provisions. It is Section 4 that has given way, and searches and seizures pursuant to valid warrants have not been seriously challenged. On the other hand, criminal defendants have mounted numerous constitutional challenges to searches and seizures performed in the absence of a warrant.

A. *Interpretation of the Search and Seizure Guarantees*

Facing a rule that would “cripple[] law enforcement,” the government appealed from the Trial Division’s interpretation that the Constitution prohibits all warrantless searches and seizures in *Republic of Palau v. Gibbons*.<sup>346</sup> In *Gibbons*, two officers arrived at the scene and were told that the defendant had a gun in his automobile.<sup>347</sup> The officers impounded the vehicle and arrested the defendant.<sup>348</sup> The Appellate Division, citing United States authority, stated that “[o]nce the police had facts sufficient to indicate there was probable cause to believe that defendant was in possession of an illegal firearm, they could have searched defendant’s automobile even if no search warrant was obtained.”<sup>349</sup> With that statement, sanctioned warrantless searches and seizures came to Palau and

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<sup>344</sup> ROP CONST. Art. IV, § 4.

<sup>345</sup> ROP CONST. Art. IV, § 6.

<sup>346</sup> *Republic of Palau v. Gibbons*, 1 ROP Intrm. 547A, 547F (1988).

<sup>347</sup> *See id.* at 547L.

<sup>348</sup> *See id.*

<sup>349</sup> *See id.* at 547M.

the Appellate Division eviscerated the literal meaning of Article IV, Section 4.

The *Gibbons* Court explicitly overruled the Trial Division's finding that Article IV, Section 4 flatly prohibits warrantless searches and seizures, stating that "[s]uch a broad declaration is neither logical nor practical."<sup>350</sup> The Court held that Article IV, Section 4 "speaks only of the general right" to be free from searches and seizures and, "[t]aken in a vacuum and construed literally, this section would prohibit any search or seizure under any circumstances."<sup>351</sup> The Court found that a warrant procured pursuant to Article IV, Section 6 permits a search or seizure and therefore, Section 4's prohibition against all searches and seizures "is not, and cannot be, an absolute right."<sup>352</sup>

Upon establishing this crack in Section 4's absolutism, the Court went on to expand the exceptions, stating that Section 4 "does not preclude warrantless searches merely because it does not contain the word 'unreasonable.'"<sup>353</sup> The right to be free from "unreasonable" searches and seizure is guaranteed by statute (1 PNC § 403), and the Court found it proper to read this "unreasonable" limitation into the constitutional language as well.<sup>354</sup> For support, the Court noted that, in the absence of a warrantless search and seizure exception, a police officer could not arrest a person without first obtaining a warrant even if the officer observed the person shoot and kill another person.<sup>355</sup>

Citing United States case law, the Court stated that a seizure of a person (in the form of an arrest) occurs when, under the totality of the circumstances, a reasonable person would not believe that she is free to leave.<sup>356</sup> The Court found that no warrant is needed for arrests based on probable cause.<sup>357</sup> The Court went on to state that the "police are not required to obtain a search warrant to stop an automobile"<sup>358</sup> when the police possess probable cause to believe that the vehicle contains contraband or evidence of a crime because (1) automobiles are inherently mobile, thereby creating exigent circumstances that make the warrant requirement impractical, and (2) people have a reduced expectation of

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<sup>350</sup> *Id.* at 547Q.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* at 547R.

<sup>353</sup> *Id.*

<sup>354</sup> *See id.*

<sup>355</sup> *See id.* at 547S n.4.

<sup>356</sup> *See id.* at 547S.

<sup>357</sup> *See id.*

<sup>358</sup> Stopping an automobile constitutes a seizure—not a search.

privacy in automobiles.<sup>359</sup> The Court stated that its examples were non-exhaustive and that any judicial proclamation prohibiting warrantless searches across the board would only handicap law enforcement.<sup>360</sup> The Court's language not only cracked the door to warrantless searches, it blew the hinges.

### B. *Exceptions to the Warrant "Requirement"*

With the establishment of the constitutionality of warrantless searches and seizures in *Gibbons*, the Court went about the difficult—and unguided—task of delineating under what circumstances the warrant “requirement” may be circumvented.<sup>361</sup> Through case law, courts have upheld warrantless seizures of items in plain view, border searches, and searches incident to lawful arrests. In addition, courts have held that, although police officers do not need warrants to enter public places, officers may not rely on the “open fields” doctrine to enter privately-owned land surrounding a residence. These cases are discussed below.

Contraband in “plain view” may be seized as long as the intrusion that enabled the police to perceive and physically seize the item was legal.<sup>362</sup> Relying on United States law, the Appellate Division stated that an “investigatory stop short of an arrest is valid if based upon a reasonable suspicion that criminal activity is afoot” and “reasonably related in scope to the justification for its initiation.”<sup>363</sup> Reasonable suspicion “must be based upon ‘specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion.’”<sup>364</sup>

Justice Michelsen addressed the “border search” exception to the warrant requirement in *Republic of Palau v. Techur*.<sup>365</sup> In *Techur*, the defendant's cargo on an international flight alerted a trained narcotics dog; the cargo was then opened by a customs officer (without a warrant) and marijuana was discovered in the cargo.<sup>366</sup> The defendant argued that the search violated her constitutional rights. After stating (without citation)

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<sup>359</sup> See *id.* at 547T.

<sup>360</sup> See *id.*

<sup>361</sup> “Unguided” in the sense that the basis for unwarranted searches and seizures cannot be found in the Constitution.

<sup>362</sup> See *Republic of Palau v. Singeo*, 1 ROP Intrm. 551, 556-59 (1989) (finding seizure of firearm during stop of van to be constitutional).

<sup>363</sup> See *id.* at 559.

<sup>364</sup> See *id.* (quoting *Terry v. Ohio*, 88 S. Ct. 1868, 1880 (1968)).

<sup>365</sup> *Republic of Palau v. Techur*, 6 ROP Intrm. 340 (Trial. Div. 1997) (Michelsen, J.).

<sup>366</sup> See *id.* at 340-41.

that “[t]he Palau Constitution incorporated the search warrant requirement that was a familiar part of [pre-Constitution] Trust Territory law,” the Court went on to state that border searches were considered reasonable at the time of the adoption of the Constitution and that nothing in the Constitution “can be construed to be an effort to restrict border searches to something stricter than what had been previously allowed.”<sup>367</sup> Thus, the “border search” exception to the warrant requirement was formally recognized. The defendant further argued that the exception should only apply to inbound (and not outbound) passengers and cargo, but the Court was not moved by the argument.<sup>368</sup> However, the Court did state—without deciding—that “secret searches” conducted outside the presence of the owner may be held to more stringent standards, such as a reasonable suspicion requirement, opening of cargo in the presence of a witness, or the subsequent notification of the owner that a search was conducted.<sup>369</sup>

It seems dangerous to rely on “whatever was considered reasonable” at the time of the adoption of the Constitution (especially without citation to evidence as to what that was) as a method of constitutional construction. Under *Techur* it would seem that whatever was reasonable at the time of the adoption would continue to be permissible as long as it was not specifically made unconstitutional in the Constitution.

The Appellate Division recognized the constitutionality of a “search incident to a lawful arrest” in *King v. Republic of Palau*.<sup>370</sup> Because the *King* defendant was “validly” stopped and arrested for a curfew violation, the Court held that the pat-down search incident to the arrest and seizure of the ammunition from the defendant’s pants pocket was also valid.<sup>371</sup> The arresting officer found ammunition in the defendant’s pocket and a subsequent search of the automobile revealed a firearm under the driver’s seat.<sup>372</sup> The officer also found a matchbox on the defendant’s person containing methamphetamine.<sup>373</sup> The trial court suppressed the methamphetamine, but the defendant was found guilty of both possession of a firearm and possession of ammunition.<sup>374</sup>

The *King* Court then examined 18 PNC § 301(a), the statute dealing with searches incident to arrest, and concluded that the law—

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<sup>367</sup> *Id.* at 341-42.

<sup>368</sup> *See id.* at 342-43.

<sup>369</sup> *See id.* at 344.

<sup>370</sup> *King v. Republic of Palau*, 6 ROP Intrm. 131 (1997).

<sup>371</sup> *See id.* at 134.

<sup>372</sup> *See id.* at 132.

<sup>373</sup> *See id.*

<sup>374</sup> *See id.*

which was enacted under the Trust Territory government—may be written over-inclusively to permit unconstitutional searches as it was written to codify subsequently-overruled United States search and seizure case law.<sup>375</sup> The Court recounted its *Gibbons* decision wherein it

rejected the syllogism that (1) the United States Constitution allows “reasonable” searches without a warrant; (2) Article IV Section 4 of the Palau Constitution makes no mention of reasonableness; (3) therefore the Palau Constitution does not allow “reasonable” searches without a warrant.<sup>376</sup>

Recognizing the danger attendant to custodial arrests (especially those involving automobiles), the Court held that “when a police officer has made a lawful custodial arrest of an occupant of a motor vehicle, the officer may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.”<sup>377</sup> Therefore, the automobile search and resulting seizure of the firearm were found to be constitutional.<sup>378</sup>

The Trial Division ruled against the recognition of the “open fields” warrant exception in *Republic of Palau v. Rafael*.<sup>379</sup> In *Rafael*, Justice Miller granted the defendant’s motion to suppress where police officers entered the defendant’s land without a search warrant and found marijuana plants growing in the jungle. The Court looked to United States case law to determine whether the marijuana patch was located on an “open field” (in which, under prevailing United States case law, a defendant does not have a legitimate expectation of privacy) or within the defendant’s “curtilage” (in which a defendant does have a legitimate expectation of privacy).<sup>380</sup> Ultimately, however, Justice Miller found that importing the United States approach was not appropriate in this instance because “the conception of privacy an[d] geography which underlie the U.S. decisions do not translate well to Micronesia and to Palau in particular.”<sup>381</sup> Noting that Palau’s “total area is less than some of the ranches and forests in the U.S.,” Justice Miller found that a legitimate expectation of privacy exists in Palauan family farms.<sup>382</sup> The Court

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<sup>375</sup> *See id.* at 134-37.

<sup>376</sup> *Id.* at 138 (citing *Republic of Palau v. Gibbons*, 1 ROP Intrm. 547A, 547Q (1988)).

<sup>377</sup> *Id.* at 138-39.

<sup>378</sup> *See id.* at 139.

<sup>379</sup> *Republic of Palau v. Rafael*, 6 ROP Intrm. 305 (Trial Div. 1997) (Miller, J.).

<sup>380</sup> *See id.* at 307-08.

<sup>381</sup> *Id.* at 308.

<sup>382</sup> *Id.* at 309.

further noted that the “open fields” doctrine even as applied in the United States is problematic because it permits police officers to effectively trespass on citizens’ land without search warrants.<sup>383</sup> The Court stated its ultimate finding: “privately-owned land surrounding a residence, as long as it is not generally accessible or visible to the public, should be protected from unwarranted searches regardless of whether it would be considered curtilage under current U.S. law.”<sup>384</sup>

In *Republic of Palau v. Shmull*, the Court considered whether or not a warrant is required for law enforcement officers to enter a store and conduct a search.<sup>385</sup> In *Shmull*, three officers were sent to investigate a report that illegal fish were being offered for sale at a store.<sup>386</sup> When the officers arrived, the “Open” sign was turned over to “Closed” and one of the store’s three entrances were locked.<sup>387</sup> As two customers exited one of the open doors, two of the officers entered, and the third officer entered through an open back door.<sup>388</sup> Justice Miller recited that officers are free to enter stores that are open to the general public without search warrants, but that storeowners are free to refuse entry to any persons.<sup>389</sup>

Justice Miller found that the store owners did not sufficiently exercise their right to exclude the officers from their store because a third party arriving on the scene would have felt free to enter through the open doors and the officers were not verbally told that the store was closed.<sup>390</sup> The Court found no constitutional harm in the officers opening the display freezers once inside the store, as any customer would be permitted to look at the fish for sale.<sup>391</sup>

It is sensible that police officers do not need a search warrant to enter public businesses and other areas generally open to the public. But the Court’s holding that store owners may exclude police officers from their premises could be tested when put to extremes—for instance, a sign on the door of the store saying “Open to the Public, but No Police Officers Allowed” or even a sign on a particular freezer within the fish market forbidding only police officers from opening that specific freezer. Such

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<sup>383</sup> *See id.* at 311.

<sup>384</sup> *Id.* at 312.

<sup>385</sup> *Republic of Palau v. Shmull*, 9 ROP 236 (Trial Div. 2000) (Miller, J.).

<sup>386</sup> *See id.* at 236.

<sup>387</sup> *See id.*

<sup>388</sup> *See id.*

<sup>389</sup> *See id.* at 236-37.

<sup>390</sup> *See id.* at 237. But the Court noted that the outcome may have been different had all three officers entered through the back door without a showing that the back door was in general use by customers. *See id.* at 237 n.1.

<sup>391</sup> *See id.* at 237.

hypothetical signs are not readily distinguishable from a shopkeeper's oral request that an officer leave a store, and may well be within a shopkeeper's rights.<sup>392</sup>

C. *Probable Cause and the Issuance and Scope of Warrants*

The Appellate Division has imposed a constitutional requirement for probable cause hearings before the Republic may "seize" an accused person for extended periods:

Article IV, Sections 4 and 6, of the Palau Constitution require a judicial determination of probable cause as a prerequisite to any extended pretrial restraint on the liberty of an arrested person. What must be determined is whether there is probable cause to believe a crime has been committed and that the arrested person has committed it.<sup>393</sup>

Following United States case law, the Court found that probable cause hearings do not need be adversarial in order to be constitutional.<sup>394</sup> And a second probable cause hearing is not needed after arrest if a judge has already found that probable cause existed to issue an arrest warrant.<sup>395</sup> The Trial Division has since found that Article IV, Sections 4 and 6 do not impose a constitutional requirement for a probable cause hearing if the defendant is not subject to pretrial restraint.<sup>396</sup>

For a search warrant to issue, probable cause must exist to believe evidence of a crime or contraband is to be found at the specific premises; however, probable cause need not exist that the owner or occupier of the property is involved in the crime.<sup>397</sup> This rule is sensible because a contrary rule would permit wrongdoers to hide their contraband or criminal tools in the premises of innocent third parties. As the Court stated, "the culpability of the occupier of the premises is not an issue when the court issues a search warrant."<sup>398</sup> The question, in deciding whether to

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<sup>392</sup> An officer with a search warrant would have the right to ignore such signs in executing the warrant.

<sup>393</sup> *Ngerur v. Sup. Ct. of the Republic of Palau*, 4 ROP Intrm. 134, 135-36 (1994).

<sup>394</sup> *See id.* at 136.

<sup>395</sup> *See id.*

<sup>396</sup> *See Republic of Palau v. Olkeriil*, 6 ROP Intrm. 361, 361-62 (Trial Div. 1997) (Michelsen, J.).

<sup>397</sup> *Republic of Palau v. S.S. Enters., Inc.*, 9 ROP 48, 48, 51 (2002).

<sup>398</sup> *Id.* at 51.

issue a search warrant, is merely “whether there is probable cause to believe that contraband or evidence is located in a particular place.”<sup>399</sup>

As long as a judge is the decisionmaker who decides whether to issue a warrant, a criminal defendant’s constitutional rights are not violated if an affidavit in support of a warrant is sworn before a Clerk of Courts instead of in front of the judge.<sup>400</sup> This result is consistent with the Constitution, which only requires that a warrant must be issued by a “justice or judge on probable cause supported by an affidavit.” The Constitution does not require the affidavit to be physically sworn before the judge.

In *Masami v. Kesolei*, Justice Michelsen found the statutory provision authorizing members of the Parole Board to issue arrest warrants when a parolee is alleged to have violated the terms of their parole in “direct conflict” with the constitutional requirement that a warrant for search or seizure may not issue except from a “judge or justice.”<sup>401</sup> The Court also found the statute to be constitutionally infirm because it permitted the issuance of an arrest warrant on the mere allegation of a parole violation, a lower threshold than the constitutionally-required standard of “probable cause supported by an affidavit.”<sup>402</sup> Because the arrest warrant in *Masami* was not issued by a judge or justice, the Court granted the parolee’s request for a writ of habeas corpus ordering his release.<sup>403</sup>

Justice Miller considered the scope of a search warrant in *Republic of Palau v. Shao Wen Wen*.<sup>404</sup> The search warrant described the premises, a beauty salon, as a “two story concrete building,” and the defendants argued that the description was insufficient to permit the officers to search all of the apartments and rooms in the building.<sup>405</sup> The general rule is that the search of multiple units at a single address must be supported by probable cause as to each unit. However, Justice Miller found exceptions to the general rule in *Shao Wen Wen*.<sup>406</sup> Given that a prostitution arrest was made in one of the upstairs apartments, the Court found that probable cause existed for the officers to extend the search to the other upstairs

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<sup>399</sup> *Kotaro v. Republic of Palau*, 7 ROP Intrm. 57, 61 (1998).

<sup>400</sup> *See Republic of Palau v. Tomei*, 7 ROP Intrm. 25, 26 (1998).

<sup>401</sup> *Masami v. Kesolei*, 10 ROP 213, 213-14 (Trial Div. 2003) (Michelsen, J.). The due process analysis of *Masami* related to the issuance of the arrest warrant may be found in section VII.G, *supra*.

<sup>402</sup> *See id.* at 214.

<sup>403</sup> *See id.*

<sup>404</sup> *Republic of Palau v. Shao Wen Wen*, 9 ROP 279 (Trial Div. 2002) (Miller, J.).

<sup>405</sup> *See id.* at 281.

<sup>406</sup> *See id.* at 281-82.

apartments.<sup>407</sup> Furthermore, the Court found that the entire premises may be searched including separate bedrooms if multiple people share common living quarters.<sup>408</sup>

This second “exception” seems particularly suspect, and was supported by only a citation to a state appellate case from the United States. It would not seem permissible to search the bedroom of person A just because person A and person B share a living room where officers have probable cause to believe that person B harbors evidence of a crime. The separateness of the bedrooms should be recognized despite the closeness of the quarters. Person A’s expectation of privacy in her bedroom should not be upended because her housemate is suspected of prostitution.

The *Shao Wen Wen* Court also rejected the argument that the search warrant was not sufficiently particularized in describing the items to be seized.<sup>409</sup> The search warrant authorized the seizure of “evidence of prostitution including, but not limited to condoms, pornography, sexual devices and aids, and financial records, receipts, cash as well as articles of personal property tending to establish the identity of persons in control of the premises.”<sup>410</sup> Justice Miller found that the direction to seize only “evidence of prostitution” constitutionally specific enough to guide the officers in their search.<sup>411</sup>

In addressing the articles seized, the Court stated that, “the question whether evidence may be seized pursuant to a search warrant is distinct from the question whether that evidence will prove defendants’ guilt or even be deemed admissible at trial.”<sup>412</sup> According to the Court, it is enough that the officers had “cause to believe” that the seized items would aid in the apprehension or conviction of persons involved in the crime of prostitution.<sup>413</sup> This last statement may go too far and permit over-seizure of items when applied too leniently. For instance, the Court approved the seizure of earrings from the beauty salon, even though it is hard to imagine how such items would aid in the defendant’s conviction.<sup>414</sup>

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<sup>407</sup> *See id.* at 282.

<sup>408</sup> *See id.*

<sup>409</sup> *See id.* at 283.

<sup>410</sup> *Id.*

<sup>411</sup> *Id.* at 283-84.

<sup>412</sup> *Id.* at 285.

<sup>413</sup> *See id.*

<sup>414</sup> *See id.* at 285 n.9 (“accessories” to the crime, as quipped by the Court).

## IX. CONFESSIONS AND SELF-INCRIMINATION

Section 7 of Article IV protects two related liberties: the freedom from forced self-incrimination and from coerced confessions.<sup>415</sup> The first states that a person accused of a criminal offense “shall not be compelled to testify against himself.”<sup>416</sup> Although this privilege could be narrowly construed to protect only in-court testimony, such a construction would afford relatively little protection. Similarly, “[c]oerced or forced confessions” are inadmissible as evidence and a conviction may not be made “solely on the basis of a confession without corroborating evidence.”<sup>417</sup> These two clauses collectively protect accused persons from compelled confessions, whether they be true or false, made at the police station or during trial.

A. *Freedom from Compelled Self-Incrimination*

The freedom from compelled self-incrimination is almost absolute; it is trumped only where an actual grant of immunity has been bestowed upon the self-incriminator. Even a high unlikelihood of prosecution does not prevent the invocation of the constitutional privilege against compelled self-incrimination.<sup>418</sup> The constitutional freedom from compelled self-incrimination belongs to “[a] person accused of a criminal offense.” Hearings before the Disciplinary Tribunal, although serious in nature, are not criminal and therefore those responding to such charges should not be granted the privilege against compelled self-incrimination (or at least the basis for the privilege should not be grounded in the Constitution). The Disciplinary Tribunal has ruled that assertion of the privilege before the tribunal requires that the person asserting the privilege (or their counsel) actually assert it before the tribunal.<sup>419</sup>

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<sup>415</sup> ROP CONST. Art. IV, § 7.

<sup>416</sup> *Id.*

<sup>417</sup> *Id.*

<sup>418</sup> See *Secharaimul v. Palau Election Comm’n*, 7 ROP Intrm. 246, 248 n.2 (Trial Div. 1998) (Miller, J.). In *Secharaimul*, voters who wrongfully voted in a state election refused to testify in depositions designed to demonstrate that a different candidate could have won had all unqualified voters been excluded. See *id.* at 247-48. Justice Miller recognized the deponents’ privilege to refuse to testify against themselves despite the government’s own confusion in registering voters and the perceived remoteness of the possibility that the wrongfully registered voters would be prosecuted for voter fraud. See *id.* at 248 & n.2.

<sup>419</sup> See *In re Schluckebier*, 13 ROP 35, 38-39 (Disc. Trib. 2006). In *Schluckebier*, disciplinary counsel stated that she had spoken to the respondent’s attorney and that he had said that his client was asserting his privilege against compelled self-

B. *Inadmissibility of Coerced Confessions as Evidence*

“Coerced” or “forced” confessions are constitutionally excluded from evidence “regardless of whether the statement was given after an advice of rights, and without a separate inquiry whether such statements were truthful.”<sup>420</sup> The voluntariness of a confession is measured by a “totality of the circumstances” approach, inspecting both questions of the capacity of the suspect and the actions of the government.<sup>421</sup> Factors considered in determining whether the suspect had the requisite “capacity” to voluntarily confess include the suspect’s age, intelligence, health, and level of impairment due to drugs or alcohol.<sup>422</sup> Actions by the government that tend to demonstrate an involuntary confession include physical threats, abuse, deceits, or impossible promises made by the police.<sup>423</sup>

In *Republic of Palau v. Recheluul*, the defendant was taken by police officers to a hotel room rather than to jail in an attempt to secure her agreement to act as a confidential informant.<sup>424</sup> The defendant’s young son was with her and was also taken by the police to the hotel room.<sup>425</sup> After several hours of questioning, the defendant agreed to make a statement.<sup>426</sup> The government then sought to use the statement against the defendant at her trial.<sup>427</sup> The defendant objected to the admissibility of her statement, arguing that it was unconstitutionally procured because the burden of the custody of her young son added undue psychological pressure for her to cooperate with the police officers and because she was misled into believing that the police officers were going to use her as a confidential informant when in actuality they sought her confession to use against her.<sup>428</sup>

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incrimination. *See id.* at 38. However, the respondent filed no response to the disciplinary complaint and the invocation of the privilege was never formally made to the tribunal. *See id.* Therefore, the tribunal found that the privilege was not properly invoked and did not rule on whether the privilege could be invoked by a respondent in a disciplinary matter. *See id.* Should the issue be properly presented to the tribunal in the future, it should decline to find a *constitutional* privilege against self-incrimination in civil disciplinary proceedings.

<sup>420</sup> *Republic of Palau v. Recheluul*, 10 ROP 205, 207 (Trial Div. 2002) (Michelsen, J.).

<sup>421</sup> *Id.*

<sup>422</sup> *See id.*

<sup>423</sup> *See id.*

<sup>424</sup> *See id.* at 206.

<sup>425</sup> *See id.*

<sup>426</sup> *See id.*

<sup>427</sup> *See id.* at 208.

<sup>428</sup> *See id.* at 207-08.

The Court rejected the defendant's constitutional arguments, finding that the child was adequately cared for during the interrogation and that the police officers did not attempt to use the presence of the defendant's child against her.<sup>429</sup> The Court further found that the police officers were seeking to use the defendant as a confidential informant and not merely seeking to elicit her confession.<sup>430</sup> However, citing statutory authority, the Court suppressed the defendant's statement because the police officers denied the defendant's request to make a telephone call to her family during the course of the interrogation.<sup>431</sup>

The Appellate Division took up contemplation of the voluntariness of statements made to the police in *Wong v. Republic of Palau*, and, similar to the *Recheluul* decision, found the statements to be voluntary.<sup>432</sup> The *Wong* defendant was found guilty of the first degree murder of his cellmate at Koror Jail.<sup>433</sup>

In *Wong*, a guard found the defendant's cellmate badly beaten, and asked the defendant either, "What have you done to him?" or "What happened to him?"<sup>434</sup> The defendant responded that he had "hurt" or "hit" his cellmate.<sup>435</sup> While walking the defendant out of the jail to a different building, the officer told the defendant to "relax, relax."<sup>436</sup> The defendant explained that a fight had unfolded after his cellmate had taken his compact disc, refused to return it, and had threatened to beat him up.<sup>437</sup> The defendant was given an hour to calm down before the officer read him his constitutional rights.<sup>438</sup>

The Court held that these statements should not be suppressed because the defendant's statements were not the result of "interrogation" by the police.<sup>439</sup> "[C]ustodial interrogation is inherently coercive," and therefore "a defendant in police custody must be advised of his right to remain silent and right to counsel before interrogation begins."<sup>440</sup> The

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<sup>429</sup> *See id.* at 208.

<sup>430</sup> *See id.*

<sup>431</sup> *See id.* at 208-09 (citing 18 PNC §§ 218, 220). Given this statutorily-based suppression, it was unnecessary for Justice Michelsen to indulge in any constitutional discussion.

<sup>432</sup> *Wong v. Republic of Palau*, 11 ROP 178 (2004).

<sup>433</sup> *See id.* at 181.

<sup>434</sup> *See id.* at 180.

<sup>435</sup> *See id.*

<sup>436</sup> *Id.*

<sup>437</sup> *See id.* at 181.

<sup>438</sup> *See id.*

<sup>439</sup> *See id.* at 181-82.

<sup>440</sup> *Id.* at 182.

Court cited to 18 PNC § 218,<sup>441</sup> stating that it codifies the “reading of rights” rule of the United States case of *Miranda v. Arizona*<sup>442</sup> and therefore permits the consultation of United States authorities.<sup>443</sup> The Court stated the following regarding interrogation:

Interrogation includes “either express questioning or its functional equivalent,” which is defined as “any words or actions on the part of the police... that the police should know are reasonably likely to elicit an incriminating response from the subject.” *Rhode Island v. Innis*, 100 S. Ct. 1682, 1689-90 (1980). A defendant is interrogated for *Miranda* purposes when “the inquiry is conducted by officers who are aware of the potentially incriminating nature of the disclosures is sought.” *United States v. Morales*, 834 F.2d 35, 38 (2d Cir. 1987). However, the *Miranda* Court distinguished “[g]eneral on-the-scene questioning as to facts surrounding a crime” as beyond the reach of the rule laid down in that case. *See United States v. Conley*, 779 F.2d 970, 972 (4th Cir. 1985) (quoting *Miranda*, 86 S. Ct. at 1629); *United States v. Chase*, 414 F.2d 780, 781 (9th Cir. 1969) (holding that limited, on-the-scene investigative questioning need not be preceded by *Miranda* warnings).<sup>444</sup>

The Court held that the guard’s initial questioning of the defendant was “on-the-scene investigative questioning” to ascertain what had occurred and the extent of the injuries, “not a question calculated to extract incriminating statements.”<sup>445</sup> The defendant’s subsequent statements, following the guard’s statement to “relax,” were held to be “spontaneous” statements not responsive to any questioning.<sup>446</sup> As a result, both of the defendant’s statements were deemed admissible.

The *Wong* defendant went on to make additional incriminating statements after advisement of his rights.<sup>447</sup> The Court found each of

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<sup>441</sup> 18 PNC § 218(b) requires the advisement of “any person arrested” of their right to remain silent, right to request the presence of counsel, and right to the services of the public defender. Although the *Recheluul* defendant had not been “arrested” for the attack on his cellmate, the Court applied that statutory section to its “reading of rights” analysis because the defendant was “in custody.”

<sup>442</sup> *Miranda v. Arizona*, 86 S. Ct. 1602 (1966).

<sup>443</sup> *See Wong*, 11 ROP at 182 & n.2 (citing *Republic of Palau v. Imeong*, 7 ROP Intrm. 257, 259 (Trial Div. 1998) (Michelsen, J.)).

<sup>444</sup> *Id.* at 182.

<sup>445</sup> *Id.*

<sup>446</sup> *Id.*

<sup>447</sup> *See id.* at 181.

those statements to be admissible because the defendant had been advised of his rights prior to making the statements.<sup>448</sup> The statements that the defendant made before being advised of his rights did not disable the defendant from subsequently waiving his rights after advisement and confessing.<sup>449</sup> Assessing the voluntariness of a defendant's waiver of his rights "requires the court to examine the totality of the circumstances to determine whether the will of the suspect was overborne by government coercion."<sup>450</sup> The "Wong test" for the voluntariness of a confession is "whether the confession was extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence."<sup>451</sup> The defendant's subsequent statements were found to be voluntary; therefore, the Court found that the defendant's rights were not violated.<sup>452</sup>

Nevertheless, *Wong* leaves unanswered whether the reading of pre-interrogation warnings is a constitutional requirement or merely a statutory one. It is certainly the latter, but it is unclear whether the former bears upon the issue as well. Given the present statutory nature of the right, it is best to regard its constitutional nature as undefined, rather than try to perceive the boundaries of a constitutional guarantee from an analysis of what was largely a statutory issue.

### C. *Necessity of Evidence Corroborating a Confession*

Article IV, Section 7 prohibits conviction solely based on a confession without "corroborating evidence."<sup>453</sup> Justice Miller, in dictum and without citation, stated that the Court had previously interpreted this clause to mean "that a person should not be convicted where his confession is the only evidence that a crime was committed."<sup>454</sup> While a reasonable interpretation, it is not particularly illuminating. This constitutional guarantee is likely largely illusory, as some low quantum of circumstantial or other evidence will virtually always exist. But where a person walks off the street and confesses to some remote offense, the police would at least have to engage in some investigation before a prosecution could be brought. Hence, unless a defendant waived her constitutional rights, a prosecution could not be successfully based on a confession alone.

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<sup>448</sup> *See id.* at 183.

<sup>449</sup> *See id.*

<sup>450</sup> *Id.* (citing *Alston v. Redman*, 34 F.3d 1237, 1253 (3d Cir. 1994)).

<sup>451</sup> *Id.* at 183-84 (quoting *Hutto v. Ross*, 97 S. Ct. 202, 203 (1976)).

<sup>452</sup> *See id.*

<sup>453</sup> ROP CONST. Art. IV, § 7.

<sup>454</sup> *Republic of Palau v. Bells*, 13 ROP 216, 218 n.1 (Trial Div. 2005) (Miller, J.).

## X. EXAMINATION AND COMPULSION OF WITNESSES

Section 7 of Article IV guarantees a person accused of a criminal offense a “full opportunity to examine all witnesses” as well as “the right of compulsory process for obtaining witnesses and evidence on his behalf at public expense.”<sup>455</sup> This “examination clause” protects criminal defendants from anonymous accusers as well as provides a powerful tool to enlist witnesses in their defense.<sup>456</sup>

The Appellate Division addressed the right of a criminal defendant to “examine all witnesses” in *Rechucher v. Republic of Palau*.<sup>457</sup> A victim’s written statement was admitted at trial even though the victim testified at trial that she could no longer remember some of the events in question.<sup>458</sup> The defendant challenged the statement as hearsay and its admittance as violative of his constitutional examination clause right because the victim could not be effectively questioned.<sup>459</sup> Despite differences between the constitutions, the Court found United States confrontation clause case law instructive.

The Court quoted language from the United States Supreme Court that “when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.”<sup>460</sup> The *Rechucher* Court recognized that the *Crawford* decision abrogated the earlier test set forth by the United States Supreme Court in *Ohio v. Roberts*<sup>461</sup> to determine whether admitting hearsay evidence violates the “confrontation clause.”<sup>462</sup> However, the

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<sup>455</sup> ROP CONST. Art. IV, § 7.

<sup>456</sup> In an (unisolated) instance of post-facto “Americanizing” of the Palauan Constitution, the right to “examine all witnesses” has been referred to as the “Confrontation Clause” (a nod to the Sixth Amendment to the United State Constitution’s guarantee that an accused in a criminal case shall have the right “to be confronted with the witnesses against him”). The Palauan clause is more properly known as the “examination clause.”

<sup>457</sup> *Rechucher v. Republic of Palau*, 12 ROP 51 (2005).

<sup>458</sup> *See id.* at 52-53.

<sup>459</sup> *See id.* at 55.

<sup>460</sup> *Id.* at 57 (quoting *Crawford v. Washington*, 124 S. Ct. 1354, 1369 n.9 (2004)).

<sup>461</sup> *Ohio v. Roberts*, 100 S. Ct. 2531 (1980).

<sup>462</sup> *See Rechucher*, 12 ROP at 57. Under the *Roberts* test:

[H]earsay can be admitted, consistent with the Confrontation Clause in the United States Constitution and thus consistent with the right to examine witnesses granted by the Palau Constitution, if (1) the declarant is unavailable and (2) the statement bears adequate indicia of reliability.

*Id.* at 56 (citing *Roberts*, 100 S. Ct. at 2538-39). In *Crawford*:

*Rechucher* Court still engaged in a full *Roberts* analysis, stating that it need not choose between the *Roberts* or the *Crawford* approach because *Crawford* did not apply because no confrontation clause violation can occur if the declarant appears for cross-examination at trial.<sup>463</sup> This reading of *Crawford* confuses the issue. *Crawford* abrogated the *Roberts* test and therefore a finding of no constitutional impropriety under *Crawford* means that no constitutional impropriety is present, not that *Crawford* does not apply to a particular case.

Chief Justice Ngiraklsong has since cited *Crawford* for the proposition that “testimonial statements, including custodial police statements, cannot be admitted against a co-defendant because such statements violate the co-defendant’s right to confront witnesses against him.”<sup>464</sup> Therefore, a co-defendant’s statements to police are not admissible to the extent that the statements regard the actions of the declarant’s co-defendant.<sup>465</sup>

In a similar vein as *Rechucher*, the Court established that the examination clause is generally satisfied by a criminal defendant’s opportunity to cross-examine a witness. In *Ngiraked v. Republic of Palau* the prosecution initially interviewed a witness, but then the interview tapes were inadvertently destroyed.<sup>466</sup> The defendants were not able to examine the tapes; however, the witness was called at trial and testified. The defendants alleged that the destruction of the interview tapes violated their right to “full opportunity to examine all witnesses.”<sup>467</sup> The Court looked to United States case law without ruling whether the Palauan examination clause grants more rights than its counterpart in the United States confrontation clause.<sup>468</sup> The Court ruled that the lack of production of a

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[T]he [United States] Supreme Court divided hearsay statements into testimonial and nontestimonial: admission of nontestimonial hearsay is “wholly consistent” with the Constitution, but testimonial hearsay evidence may only be admitted if the declarant is unavailable and if there was a prior opportunity for cross-examination.

*Id.* (citing *Crawford*, 124 S. Ct. at 1374).

<sup>463</sup> *See id.* at 57.

<sup>464</sup> *Republic of Palau v. Avenell*, 13 ROP 266, 267 (Trial Div. 2006) (Ngiraklsong, C.J.) (citing *Crawford*, 124 S. Ct. at 1374).

<sup>465</sup> *See id.* at 267-68.

<sup>466</sup> *Ngiraked v. Republic of Palau*, 5 ROP Intrm. 159 (1996).

<sup>467</sup> *See id.* at 170. The *Ngiraked* defendants further alleged that the destruction of the tapes violated their due process rights. For more on that aspect of the decision, see section VII.H, *supra*.

<sup>468</sup> *See id.* at 170-71.

witness statement does not violate the examination clause where the defense is permitted to cross-examine a witness at trial.<sup>469</sup>

Although usually analyzed under the guise of due process,<sup>470</sup> the government's non-disclosure of the identity of a confidential informant can raise examination clause issues if the defendant is impeded from calling the informant as a witness. Nonetheless, no examination clause concerns are present if the court informs the defendant that the confidential informant may be called.<sup>471</sup> Lastly, the examination clause does not carry with it the right for a defendant to demand that the government call a certain witness.<sup>472</sup>

## XI. RIGHT TO COUNSEL

The Constitution secures an “accused” the right to counsel in Article IV, Section 7: “At all times the accused shall have the right to counsel. If the accused is unable to afford counsel, he shall be assigned counsel by the government.”<sup>473</sup> The Constitution leaves open the questions of when the right to counsel attaches, how “effective” counsel must be, when an accused is deemed “unable” to afford counsel, and even who qualifies as “counsel.” Case law has made steps to answer some of the questions, but significant issues await resolution. The right to counsel – appointed or otherwise – does not extend to civil cases, as civil litigants are not “accused.”<sup>474</sup>

### A. *The Right to Appointed Counsel*

The right to “appointed counsel” only comes into play when the accused is “unable to afford counsel.” A proper showing of inability to afford counsel must be supported by sufficient evidence; a court is not obligated to accept a defendant's conclusory, unsworn statements of

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<sup>469</sup> See *id.* at 171-72.

<sup>470</sup> See section VII.I, *supra*.

<sup>471</sup> See, e.g., *Ngirailild v. Republic of Palau*, 11 ROP 173, 175 (2004) (finding no constitutional violation where “the defense was told explicitly that it could call the informant as a witness.”).

<sup>472</sup> See *Oiterong v. Republic of Palau*, 9 ROP 195, 198 (2002) (“There is no right for the defendant to compel the government to call the informant as a witness.” (footnote omitted)).

<sup>473</sup> ROP CONST. Art. IV, § 7.

<sup>474</sup> *Emaudiong v. Arbedul*, 4 ROP Intrm. 200, 200 n.2 (1994) (stating that litigants—even indigent litigants—in civil cases have no constitutional right to a waiver of transcription fees).

poverty.<sup>475</sup> Although the right to appointed counsel does not amount to a right to “level the playing field,” indigent criminal defendants should, on a proper showing of inability to pay, be afforded other considerations—such as waiver of transcription fees—in order to ensure that they receive a fair trial.

Appointed counsel, although required to be zealous advocates, are not conscripted into slavery. They need not press frivolous appeals on behalf of their clients. Upon determination that a filed appeal is frivolous, appointed counsel is to make a “no merit” motion accompanied by a brief setting forth anything in the record that might arguably support the appeal.<sup>476</sup> The brief must be served on the client and the client must be given an opportunity to rebut anything in the motion or the brief.<sup>477</sup> The court then decides whether the appeal is frivolous and therefore worthy of dismissal or non-frivolous and worthy of continued representation.<sup>478</sup> This procedure safeguards the client’s right to an attorney while also recognizing an attorney’s duty to refrain from engaging in frivolous arguments.<sup>479</sup> It should be noted, however, that in balancing these or any other competing interests, a thumb should always be placed on the side of the scale favoring the constitutional right.

### B. *The Qualifications and Effectiveness of Counsel*

In *Republic of Palau v. Decherong*, the Appellate Division looked to a memorandum issued by Chief Justice Nakamura to determine whether a criminal defendant’s right to counsel had been violated by representation by a non-attorney “trial counselor” rather than a full attorney.<sup>480</sup> Trial counselors, also referred to as trial assistants, are non-attorneys who effectively act in the place of attorneys in both trial and pre-trial proceedings. In 1983, the Chief Justice issued a memorandum to the Attorney General and the Public Defender that outlined the Supreme

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<sup>475</sup> *Wolff v. Ngiraklsong*, 9 ROP 20, 20 (2001) (stating that a prior representation of a defendant by the Office of the Public Defender does not demonstrate inability to afford counsel, as that office “has a longstanding practice of attempting to represent all criminal defendants who ask for counsel, regardless of need.”).

<sup>476</sup> *Orrukem v. Republic of Palau*, 5 ROP Intrm. 256, 257 (1996) (stating where counsel determines before filing a criminal appeal that it would be frivolous, counsel should file the appeal and proceed with a no-merit brief).

<sup>477</sup> *Id.*

<sup>478</sup> *Id.*

<sup>479</sup> *See In re Tarkong*, 4 ROP Intrm. 121, 132 (Disc. Trib. 1994) (ordering attorney to reimburse client for the monetary sanctions imposed for filing a frivolous appeal in a civil case).

<sup>480</sup> *Republic of Palau v. Decherong*, 2 ROP Intrm. 152, 161 (1990).

Court's policy on the use of such trial counselors. The memorandum stated that trial counselors were to only handle criminal cases where the possible maximum punishment would not exceed five years.<sup>481</sup> The memorandum further stated that this limitation necessarily restricted the use of trial counselors to cases assigned to the Court of Common Pleas.<sup>482</sup>

The *Decherong* defendant was represented by a trial counselor at her plea hearing despite facing a maximum of thirty years' imprisonment in violation of the Chief Justice's policy memorandum.<sup>483</sup> The Appellate Division found that the guilty plea was void for violation of the policy set forth by the memorandum, but drew short of actually injecting the memorandum's policy with constitutional significance.<sup>484</sup>

The majority separately considered the defendant's constitutional right to "effective" assistance of counsel. The Court ruled that such challenges are to be brought by collateral attack through a petition for a writ of habeas corpus rather than via a direct appeal.<sup>485</sup> The Court cited United States case law for the rationale behind this approach: ineffective assistance claims usually require development of facts outside the record and habeas proceedings provide an appropriate format for such development.<sup>486</sup> A trial court's failure to take sua sponte notice of "obviously" inadequate representation, however, could properly be brought on direct appeal as it involves the actions of the trial judge rather than defense counsel.<sup>487</sup> Therefore, "as a matter of policy, future claims of ineffective assistance of counsel [shall] be brought via a writ, unless the claimed conduct of counsel is so egregious as to amount to 'plain error.'"<sup>488</sup>

In concurrence, Justice Ngiraklsong complained that the majority permitted the Chief Justice to "establish 'judicial policy' by memoranda

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<sup>481</sup> *See id.* at 160-61.

<sup>482</sup> *See id.* at 161.

<sup>483</sup> *See id.*

<sup>484</sup> *Id.* ("Because appellant's guilty pleas were ultimately taken in the Trial Division of the Supreme Court, defendant's representation by a trial counselor in that court violates the procedure established in the 1983 memorandum from the Chief Justice."). In doing so, the Court regarded the memorandum as a "court rule," the violation of which could result in the reversal of a conviction, but avoided the constitutional issue. Furthermore, the Court stated that it was unclear whether the trial counselor was retained or appointed. *Id.* at 154. But retention of a trial counselor could not violate the defendant's constitutional right to counsel, for such retention would be the defendant's choice and act as a waiver of any right to representation by a full-fledged attorney.

<sup>485</sup> *Id.* at 167-68.

<sup>486</sup> *Id.* at 167.

<sup>487</sup> *Id.* at 167-68.

<sup>488</sup> *Id.* at 168 (citation omitted).

regarding constitutional issues such as effectiveness of counsel.”<sup>489</sup> Justice Ngiraklsong felt that, given the purpose of the right to counsel, which is to ensure that a criminal defendant does not suffer as a result of ignorance of the law, the *Decherong* defendant was constitutionally entitled to the assistance of an attorney rather than a trial counselor.<sup>490</sup> Although he concurred in the outcome, Justice Ngiraklsong voiced his opinion that the policy of the use of trial counselors should be formed by the legislature or through judicial opinions, not by a memorandum.<sup>491</sup>

Following *Decherong*, the “right to counsel” guarantee of Article IV, Section 7 has been specifically construed to “confer a right to *effective* assistance of counsel” and “to give rise to a constitutional claim where counsel’s performance was deficient and the deficiency prejudiced the defense.”<sup>492</sup> In *Saunders v. Republic of Palau*, the Appellate Division confirmed the dictum of *Decherong* directing ineffective assistance of counsel claims to be made by collateral attack rather than on direct appeal.<sup>493</sup> Only where the “record is sufficiently developed” to allow a reviewing court to rule on an ineffective assistance of counsel claim without any additional evidence is it proper to bring such a claim by direct appeal.<sup>494</sup> This holding clarifies the *Decherong* dictum stating that direct appeal is appropriate where “plain error” by the trial court occurs.<sup>495</sup>

Citing *Saunders*, Chief Justice Ngiraklsong stated that ineffective assistance of counsel claims cannot be brought or resolved until after judgment is entered in the trial court because no prejudice can be

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<sup>489</sup> *Id.* at 170 (Ngiraklsong, J., concurring). Justice Ngiraklsong has since succeeded Chief Justice Nakamura as Chief Justice.

<sup>490</sup> *Id.* at 171.

<sup>491</sup> *Id.* at 172.

<sup>492</sup> *Saunders v. Republic of Palau*, 8 ROP Intrm. 90, 90-91 (1999).

<sup>493</sup> *Id.* at 91.

<sup>494</sup> *Id.* at 92.

<sup>495</sup> *Id.* at 92 n.5 (citing *Decherong*, 2 ROP Intrm. at 167-68). The *Saunders* decision does not, however, limit ineffective assistance of counsel claims to actions of counsel, rather than actions of the trial court. A trial court could limit counsel’s ability to defend her client so stringently that the defendant is deprived of effective assistance of her counsel. Such a possibility was overlooked in *Ngirailild v. Republic of Palau*, 11 ROP 173, 174 (2004) (“[A]n ineffective assistance claim turns on decisions made and actions taken by counsel, not by the court.”). The *Ngirailild* Court should not have summarily rejected the appellant’s claim that the trial court’s order to limit disclosure of the identity of a confidential informant to defense counsel and not to the defendant violated his right to effective assistance of counsel. While that order may not have violated the defendant’s constitutional right to counsel, an order severely restricting the length of time defense counsel could speak to a defendant (or another similarly stringent restriction) could—by the act of the court, not the act of counsel—violate the defendant’s right to effective assistance of counsel.

demonstrated before that time.<sup>496</sup> Although the record is usually inadequate for a trial court to assess the effectiveness of counsel, and few attorneys would move for a finding of their own ineffectiveness, a trial judge should be free to find ineffective assistance when the ineffectiveness of counsel is clear from conduct before the judge. A trial judge should not be forced to turn a blind eye to gross ineffectiveness, find the defendant guilty, and hope that justice is served on collateral attack.

An important aspect of the constitutional right to counsel is the right to an attorney unencumbered by conflicts of interest.<sup>497</sup> In safeguarding the right to counsel, a court may refuse to accept a criminal defendant's waiver of her attorney's conflicts.<sup>498</sup> The rejection of such a waiver is questionable and perhaps overly paternalistic because a criminal defendant's right to counsel is wholly waivable. By extension, it seems reasonable that a facet of that right—the right to *unconflicted* counsel—should also be waivable.

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<sup>496</sup> *Republic of Palau v. Wolff*, 10 ROP 180, 181 (Trial Div. 2002) (Ngiraklsong, C.J.) (stating that ineffective assistance of counsel claims should be raised in post-trial habeas proceedings). Even given the perceived prematurity of the motion, the Chief Justice found that an ineffective assistance of counsel claim could not stand where it was the actions of the defendant that “destroyed” the attorney-client relationship. *See id.* at 182-83.

<sup>497</sup> *See generally Republic of Palau v. Taunton*, 15 ROP 170 (Trial Div. 2008) (Ngiraklsong, C.J.).

<sup>498</sup> *See id.* at 174-75 (adopting the holding of *Wheat v. United States*, 108 S. Ct. 1692, 1698-99 (1988)).

## XII. DOUBLE JEOPARDY CLAUSE

Section 6 of Article IV states that “[n]o person shall be placed in double jeopardy for the same offense.”<sup>499</sup> This relatively simple statement raises substantial questions, such as when it is applicable, when jeopardy attaches, and what qualifies as the “same offense.” The Supreme Court has resolved these questions to some degree.

A. *Jeopardy Limited to Criminal Prosecutions*

The double jeopardy clause is a right to be free from *criminal* prosecution. As the Court declared in *Sugiyama v. Republic of Palau*: “The Double Jeopardy Clause does not prohibit multiple civil actions by the government.”<sup>500</sup> In *Sugiyama*, officers confiscated two illegally undersized sea creatures from a restaurant and the Trial Division imposed a civil fine of \$1,000 per illegal sea creature upon each of the three defendants: the employee who procured the sea creatures, the employee’s supervisor, and the owner of the restaurant.<sup>501</sup> Although the *Sugiyama* proceeding may have been facially “civil” in nature, the defendants argued that the “penalties” imposed were punitive in purpose.<sup>502</sup> Despite the Court’s dicta to the contrary, it seems that multiple suits seeking civil penalties may raise constitutional questions.<sup>503</sup> Thus, careful consideration of the nature of a proceeding must form the basis of any

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<sup>499</sup> ROP CONST. Art. IV, § 6.

<sup>500</sup> *Sugiyama v. Republic of Palau*, 9 ROP 5, 7 (2001).

<sup>501</sup> *Id.* at 6.

<sup>502</sup> The Marine Protection Act of 1994 provides for civil penalties in 27 PNC § 1210. The owner of the restaurant in *Sugiyama* claimed a double jeopardy violation because he paid three fines in total—his own fine plus the fines of his employees. *Id.* at 7. The Appellate Division was unimpressed, stating that “[t]he fact that one defendant chooses to pay the others’ fines does not result in violation of the Double Jeopardy Clause.” *Id.* This result is sensible because defendants could otherwise raise double jeopardy violations by conspiring to have one defendant pay the fines of all co-defendants. Double jeopardy is analyzed based on whom the punishment is assessed against, not based on who actually pays the fine.

<sup>503</sup> Double jeopardy considerations should likewise apply to restitution awards in criminal actions. In *Blanco v. Republic of Palau*, 16 ROP 205 (2009), the Appellate Division left open the question of whether a subsequent upward modification of restitution damages violates the double jeopardy clause. *See Blanco*, 16 ROP at 208. Because the Appellate Division disallowed the upward modification in restitution on non-constitutional grounds (finding that the Trial Division’s jurisdiction to modify the sentence expired seven days after imposition of the sentence per ROP R. CRIM. P. 35), it properly declined to address the double jeopardy implications of the modification of a restitution award five months after sentencing.

double jeopardy analysis.

### B. *The Attachment of Jeopardy*

In wrestling with the question of whether jeopardy had attached, the Appellate Division laid much of the foundation for later interpretations of the double jeopardy clause in the early case of *Akiwo v. Supreme Court of the Republic of Palau Trial Division*.<sup>504</sup> Upon defense counsel's motion that the prosecuting attorney was not qualified to serve as special prosecutor, the *Akiwo* defendant's first prosecution ended in dismissal after the presentation of the first witness.<sup>505</sup> A second information was then filed and the defendant objected on grounds of double jeopardy per Article IV, Section 6.<sup>506</sup> Citing United States case law, the Court outlined the interests involved in the double jeopardy clause:

The double jeopardy provision manifests a constitutional policy of finality in criminal proceedings for the benefit of the defendant. If a defendant is acquitted, or if he is convicted and the conviction is upheld on appeal, he may not be retried for the same offense. In cases culminating in an acquittal, this will prevent the Government from having another opportunity to supply evidence which it failed to offer in the earlier proceeding.<sup>507</sup>

The Court also noted that a defendant has the right to have her guilt or innocence decided in a single proceeding in front of a particular tribunal, that the government should not be allowed multiple attempts to prosecute, and that a defendant should not be punished multiple times for the same offense.<sup>508</sup> However, these interests must be balanced against "society's interests in the fair and prompt administration of justice."<sup>509</sup>

The Court found two general rules in United States case law: (1) "[w]hen a mistrial is declared upon the motion of defendant, or otherwise with his consent, the general rule is that the double jeopardy bar to re prosecution is removed" except where the reason for the mistrial is prosecutorial or judicial misconduct intended to provoke the defendant

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<sup>504</sup> *Akiwo v. Sup. Ct. of the Republic of Palau Trial Division*, 1 ROP Intrm. 96 (1984).

<sup>505</sup> *Id.* at 97-98.

<sup>506</sup> *Id.* at 98.

<sup>507</sup> *Id.* at 99 (citations omitted).

<sup>508</sup> *Id.* at 99-100.

<sup>509</sup> *Id.* at 100.

into moving for a mistrial, and (2) “[w]hen a mistrial is declared over a defendant’s objection or where he has not consented to the mistrial, the general rule is that double jeopardy bars retrial” except where mistrial was justified by “manifest necessity.”<sup>510</sup> The Court found that jeopardy (“exposure to danger”) had attached in *Akiwo* (a bench trial) because the first witness had been sworn and had given testimony.<sup>511</sup> However, the Court ruled that the defendant could be retried because the motion for dismissal could have been brought before jeopardy attached and the Trial Division specifically stated that the Government could re-file the case.<sup>512</sup>

### C. Multiple Punishments

Aside from barring multiple prosecutions, the double jeopardy clause also protects against multiple punishments for the same offense. This guarantee raises the issue of how to define a single “offense” and when multiple charges are permissible. In *Kazuo v. Republic of Palau*, the Appellate Division laid out its analysis of this issue in concluding that aggravated assault and use of a firearm constitute different offenses and are therefore separately punishable.<sup>513</sup> In its analysis, the Appellate Court applied the so-called “*Blockburger* test,” imported from the United States.<sup>514</sup> The *Blockburger* test finds that two offenses are “separate” if each of the offenses requires proof of a different statutory element.<sup>515</sup> A single act can therefore be punished as two separate offenses without offending the constitutional prohibition against double jeopardy.<sup>516</sup>

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<sup>510</sup> *Id.* at 101.

<sup>511</sup> *Id.* at 102.

<sup>512</sup> *Id.* at 104-05. Jeopardy has attached—and retrial is barred by the double jeopardy clause—where the appellate court overturns a conviction for lack of legally sufficient evidence. See *Republic of Palau v. Tmetuchl*, 1 ROP Intrm. 443, 465 (1988) (noting that retrial was barred where Appellate Division overturned the convictions of the alleged assassins of Palau’s first President for lack of reasonable evidence). Justice King, writing separately, opined that the majority’s application of the double jeopardy clause to pre-deny retrial of the defendants was premature. See *id.* at 511-13 (King, J., concurring-in-part and dissenting in-part). Although unnecessary dictum, the majority likely made this note to discourage further prosecution in a politically and emotionally charged case. (Justice King opined that the prosecutorial misconduct in the case was so great that the convictions should be overturned for a violation of Article IV, Section 6’s due process guarantee. See *id.* at 506-07.)

<sup>513</sup> *Kazuo v. Republic of Palau*, 3 ROP Intrm. 343 (1993).

<sup>514</sup> See *id.* at 346-47 (citing *Blockburger v. United States*, 52 S. Ct. 180 (1932)).

<sup>515</sup> See *id.*

<sup>516</sup> See *id.* at 347. Quite sensibly, “[i]f the two convictions are based on different acts then the Double Jeopardy Clause is not violated.” *Mechol v. Republic of Palau*, 9 ROP 17, 19 (2001). The defendant in *Mechol* had forged the Director of the Palau

The Court applied the test to find separate offenses because each offense required proof of an element that the other did not.<sup>517</sup> Specifically, aggravated assault requires an unlawful assault while the use of a firearm requires use of a gun.<sup>518</sup> The Court further noted that the legislative intent did not favor a fifteen-year mandatory minimum which accompanies “use of a firearm” to envelope all crimes involving the use of a firearm. The Court sensibly concluded that “[a] person who shoots a human and is convicted of Aggravated Assault and Use of a Firearm would face no greater sentence than the person who shoots a beer can on a tree stump and is convicted of only Use of a Firearm.”<sup>519</sup>

In an earlier opinion, *Republic of Palau v. Ngiraboi*, the Court had held that attempted murder in the second degree merged with use of a firearm because the “same evidence” was required to establish each of those offenses in that case.<sup>520</sup> The *Kazuo* decision overruled *Ngiraboi* to the extent it was inconsistent, thereby eviscerating the “same evidence” test for future offenders. However, because *Kazuo* broke new ground in applying the *Blockburger* test, the Court applied the old “same evidence” rule of *Ngiraboi* to the *Kazuo* defendant and vacated the sentence on aggravated assault.<sup>521</sup> While applying an overruled standard to a constitutional issue is questionable, the *Ngiraboi* “same evidence” test resulted in a more favorable result to the *Kazuo* defendant than the *Kazuo-Blockburger* test, so no harm was visited on the defendant’s rights.<sup>522</sup>

The Appellate Division further refined the double jeopardy right in *Scott v. Republic of Palau*.<sup>523</sup> The defendant in *Scott* was convicted of four counts of arson after a fire she set in one apartment spread and

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Maritime Agency’s signature on fishing permits and then later photocopied his own signature onto the same permits in an attempt to conceal the forgeries. *See id.* The Appellate Division found that these two acts constituted separate offenses and therefore could be separately punished without violation of the double jeopardy clause. *See id.*

<sup>517</sup> *See Kazuo*, 3 ROP Intrm. at 347.

<sup>518</sup> *See id.*

<sup>519</sup> *Id.* at 348.

<sup>520</sup> *Republic of Palau v. Ngiraboi*, 2 ROP Intrm. 257, 272 (1991).

<sup>521</sup> *Kazuo*, 3 ROP Intrm. at 349.

<sup>522</sup> The Court engaged in dicta in a footnote, stating that “[w]here the question is whether the Double Jeopardy Clause prevents a subsequent prosecution following an acquittal or conviction,” the subsequent prosecution will be barred if, in order to establish any element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted. *See id.* at 348 n.3. Because this scenario was not even tangentially before the Court, the Court should have refrained from commentary or said merely that a different rule may apply in such a situation.

<sup>523</sup> *Scott v. Republic of Palau*, 10 ROP 92 (2003).

destroyed numerous adjacent buildings.<sup>524</sup> The Court recounted that the double jeopardy clause protects three separate interests: to avoid being tried, convicted, or punished for the same offense more than once.<sup>525</sup> The issue in *Scott* was whether the defendant was subjected to multiple punishments for the same offense. While recognized as good law, the *Kazuo-Blockburger* test was not applied because its application is limited to when a defendant is tried under two different statutory provisions. Conversely, the *Scott* defendant was convicted four times under a single statutory provision.<sup>526</sup> The Court therefore sought to determine what “unit of prosecution” was intended by the statutory provision. This approach is also referred to elsewhere as the “same transaction” test.<sup>527</sup>

The arson statute punishes every person who, with the requisite intent, “set[s] fire to or burn[s] any [building].”<sup>528</sup> The Court inspected whether the “unit of prosecution” intended by the statute was the act of “setting fire to or burning” or whether it focused on “any building.”<sup>529</sup> After attempting to review the legislative history (and finding none) and identifying an analogue in United States law, the Court concluded that the proper unit of prosecution was the act of setting the fire. Therefore, “where a defendant starts only one fire, the statute permits only one conviction.”<sup>530</sup> The Appellate Division found that two of the defendant’s arson convictions violated her double jeopardy rights because only one fire was set.<sup>531</sup>

The terms “multiplicity” and “duplicity” are sometimes employed when referring to double jeopardy violations:

Multiplicity of charges refers to the improper charging of the same offense in several counts in the information. This should not be confused with duplicity, which is the charging of separate offenses in a single count.<sup>532</sup>

The *Scott* Court found that the sentences imposed for the remaining two arson counts were multiplicitous because only one crime had actually been

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<sup>524</sup> *Id.* at 94.

<sup>525</sup> *Id.* at 96.

<sup>526</sup> *See id.*

<sup>527</sup> *See id.* & n.4.

<sup>528</sup> 17 PNC § 401(a).

<sup>529</sup> *See Scott*, 10 ROP at 96-97.

<sup>530</sup> *Id.* at 97.

<sup>531</sup> *See id.*

<sup>532</sup> *Republic of Palau v. Avenell*, 13 ROP 268, 269 n.2 (Trial Div. 2006) (Ngiraklsong, C.J.) (citations omitted).

committed.<sup>533</sup> The first count charged the arson of a dwelling and the apartments, including a laundry and two salons.<sup>534</sup> The second count charged the arson of an office and the apartments, including a laundry and two salons.<sup>535</sup> The only difference between the counts was the presence of the “dwelling” in the first count, thereby subjecting the defendant to the enhanced penalty provision applicable only to arson of dwellings. The Court found the charges multiplicitous and vacated the sentence that resulted from the conviction of the latter count.<sup>536</sup>

Chief Justice Ngiraklsong addressed a multiplicity argument in a later case in which the defendant had removed a porthole and possibly other items from a shipwreck in the Palau Lagoon.<sup>537</sup> The government charged, in separate counts, violation of the Palau Lagoon Monument Act, grand larceny, malicious mischief, conversion of public funds and property, and improper removal from territorial waters.<sup>538</sup> Despite finding that the issue of multiplicity was waived because the defendant did not file a timely motion, the Court went on to analyze the hypothetical merits of the defendant’s arguments.<sup>539</sup>

The Chief Justice identified three protections afforded by the double jeopardy clause: “against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense.”<sup>540</sup> Even though multiplicity in charging does not fall into any of the three categories, it offends the double jeopardy clause because it creates the potential for multiple punishments for a single offense.<sup>541</sup> Applying the *Kazuo-Blockburger* test, Chief Justice Ngiraklsong found no double jeopardy violation because each of the charges required proof of separate elements.<sup>542</sup>

The appellant in *Uehara v. Republic of Palau* alleged the government’s charging document was duplicitous because Counts 87-89 (perjury) and Counts 90-92 (misconduct in public office) were each

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<sup>533</sup> See *Scott*, 10 ROP at 98.

<sup>534</sup> *Id.*

<sup>535</sup> *Id.*

<sup>536</sup> *Id.* at 99.

<sup>537</sup> See *Avenell*, 13 ROP at 269.

<sup>538</sup> *Id.*

<sup>539</sup> *Id.* at 270.

<sup>540</sup> *Id.*

<sup>541</sup> *Id.* at 270 n.4.

<sup>542</sup> *Id.* at 271-72 (“[I]t is possible to violate the Palau Lagoon Monument Act without committing grand larceny, and it is possible to commit grand larceny without violating the Palau Lagoon Monument Act.”).

contained in a single paragraph.<sup>543</sup> The Appellate Division defined duplicity as “where a single count charges the defendant with more than one criminal offense” and stated it is “troublesome because it may be unclear whether a subsequent conviction rests on merely one of the offenses within a single count and, if so, which one.”<sup>544</sup> Upon reviewing the information, the *Uehara* Court found no double jeopardy violation because although three counts were consolidated into one paragraph, each count was separated within the paragraph.<sup>545</sup>

#### D. Double Jeopardy Implications of Suspended Sentences

A later imposition of a suspended sentence does not violate a defendant’s double jeopardy rights, even if the entirety of the sentence is imposed (e.g., the defendant does not receive credit for the time during which the sentence was suspended). In *Blesoch v. Republic of Palau*, the appellant, Blesoch, pled guilty to two counts of trafficking of a controlled substance.<sup>546</sup> On August 12, 2008, the Trial Division sentenced Blesoch to three years imprisonment, but suspended the entire sentence and placed the defendant on probation for that period.<sup>547</sup>

After more than a year on probation, on August 28, 2009, Blesoch pled guilty to five new charges (larceny, burglary-related, and traffic offenses) and was sentenced to five years in prison on these new convictions, but the Trial Division suspended the final three years of the sentence (and ordered probation for that time).<sup>548</sup> These 2009 convictions constituted violations of Blesoch’s 2008 probation and, at an October 14, 2009 revocation hearing, the Trial Division ordered Blesoch to serve one year of his suspended three-year sentence on the 2008 trafficking convictions.<sup>549</sup> That year of imprisonment was to be served consecutively to Blesoch’s two-year prison term for the 2009 convictions.<sup>550</sup>

Meting out the dates, if Blesoch had served three years in prison for his trafficking conviction starting on August 12, 2008, he would have

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<sup>543</sup> *Uehara v. Republic of Palau*, Crim. App. No. 09-001, slip op. at 13 (Apr. 29, 2010).

<sup>544</sup> *Id.* at 13-14.

<sup>545</sup> *See id.* at 14 (“Even a quick read makes apparent that each paragraph charged three counts of perjury and three counts of misconduct in public office.”).

<sup>546</sup> *Blesoch v. Republic of Palau*, Crim. App. No. 09-003, slip op. at 1-2 (May 21, 2010).

<sup>547</sup> *Id.* at 2.

<sup>548</sup> *Id.*

<sup>549</sup> *Id.*

<sup>550</sup> *Id.*

completed his sentence by August 12, 2011. In reality, however, Blesoch was sentenced to serve two years for the 2009 convictions starting on August 28, 2009 and then was set to serve his one-year sentence for the 2008 trafficking convictions. Therefore, Blesoch would not finish his prison sentence on the 2008 trafficking convictions until August 28, 2012—more than four years after he had been sentenced for the 2008 convictions—for which he had only received a sentence of three years. Blesoch appealed, arguing that this sentencing arrangement violated his right to be free from double jeopardy. He argued that “all punishment for his 2008 offense—whether probation or jail time—must conclude within three years of the date of the original sentence, that is, by August 12, 2011.”<sup>551</sup>

The Appellate Division interpreted Blesoch’s argument to be that “he should receive credit against his original three-year prison sentence for time spent on probation, such that the court cannot impose a prison sentence that would, when added to his probation, exceed a *total* of three years.”<sup>552</sup> The Court rejected this argument, citing United States case law holding that “[t]he general rule is that, upon revocation of probation, the sentencing court may execute the entire sentence that it originally imposed and suspended.”<sup>553</sup> Upon revocation of a convicted person’s probation for violation of its terms, the Trial Division “has the discretion to impose the entire suspended prison sentence or any lesser term.”<sup>554</sup> The execution of a suspended sentence does not violate a defendant’s double jeopardy rights because it does not amount to multiple punishments for the same offense—it is merely the execution of the original punishment.<sup>555</sup>

### XIII. ADDITIONAL CRIMINAL PROCEDURE RIGHTS AND RIGHTS OF THE ACCUSED

#### A. Overview

Article IV, Section 7 guarantees numerous rights to “accused” persons. Such basic rights include the right to “be presumed innocent until proven guilty beyond a reasonable doubt,” the right to “be informed of the nature of the accusation,” and the right “to a speedy, public and

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<sup>551</sup> *Id.* at 2-3.

<sup>552</sup> *Id.* at 3.

<sup>553</sup> *Id.* at 4.

<sup>554</sup> *Id.* at 5.

<sup>555</sup> *Id.*

impartial trial.”<sup>556</sup> Accused persons in custody are to be “separated from convicted criminals” and further separated “on the basis of sex and age.”<sup>557</sup> Those in pre-trial custody are guaranteed non-excessive bail. Section 6 of Article IV prohibits ex post facto punishment, conviction or punishment by legislation, and imprisonment for debt. Article IV was amended to include a limited jury-trial right for qualifying criminal defendants in Section 14.

### B. *Bail Provision*

The Appellate Division has cited the bail provision of Section 7 as authority to grant post-conviction bail.<sup>558</sup> The Constitution, however, only provides for bail to be set for those “detained before trial.”<sup>559</sup> Section 7 offers no authority to offer and affords no right to request release on bail after conviction.

### C. *Habeas Corpus*

Article IV, Section 7 “recognizes” the writ of habeas corpus and prohibits its suspension. Although useful to accused persons in pre-trial custody,<sup>560</sup> the writ of habeas corpus is often invoked by convicted criminals and others in physical detention.<sup>561</sup>

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<sup>556</sup> ROP CONST. Art. IV, § 7.

<sup>557</sup> *Id.* Convicted criminals do not enjoy an explicit constitutional right to be separated by sex or age.

<sup>558</sup> See *Republic of Palau v. Tmetuchl*, 1 ROP Intrm. 296, 297 (1986) (grant of bail pending appeal to criminal defendants convicted of murder and conspiracy); *Republic of Palau v. Decherong*, 1 ROP Intrm. 438 (1988) (grant of bail and release pending appeal to defendant convicted by plea to charges of embezzlement).

<sup>559</sup> ROP CONST. Art. IV, § 7.

<sup>560</sup> See e.g., *In re Oiwil*, 1 ROP Intrm. 238 (Trial Div. 1985) (Nakamura, C.J.) (granting writs of habeas corpus to petitioners arrested in Palau on arrest warrants issued by the United States District Court for the Territory of Guam).

<sup>561</sup> The Appellate Division reversed the Trial Division’s grant of a writ of habeas corpus in *Ringang v. Chiang*, 16 ROP 129 (2009). The issuance of the writ was a moot point, however, because the petitioner’s conviction had been overturned by the time the appeal of the issuance of the writ was decided. Despite noting the mootness of the appeal, the Appellate Division addressed the merits of the appeal and the issuance of the writ and found that the petitioner had not been denied effective assistance of counsel. See *Ringang*, 16 ROP at 131, 133-34.

D. *Liability of National Government for Unlawful Arrest and Damage to Private Property*

Section 7 of Article IV states that “[t]he national government may be held liable in a civil action for unlawful arrest or damage to private property” but then limits that liability “as prescribed by law.”<sup>562</sup> In the early days of the Constitution, the Trial Division ruled that “prescribed by law” included laws of the Trust Territory government.<sup>563</sup> As Justice Lane stated, “no requirement is expressed that the Palau Congress must prescribe them.”<sup>564</sup> Therefore, the Constitution did not supersede the Trust Territory laws waiving immunity from civil suit.<sup>565</sup> The provision permitting suits against the national government for unlawful arrest or damage to private property does not apply to a suit for non-payment for work rendered.<sup>566</sup>

E. *The Accused’s Right to Be Informed of the Nature of the Accusation*

An accused person “enjoy[s] the right to be informed of the nature of the accusation” against her.<sup>567</sup> Violation of this right also implicates due process concerns, discussion of which may be found in section VII.F, *supra*.

Charges for minor offenses are often issued by citation. The defendant in *An Guiling v. Republic of Palau*, argued that his charge by citation failed to plead the essential elements of the crime and therefore violated his constitutional right to be informed of the nature and cause of the accusation against him.<sup>568</sup> The constitutional requirement that a charging instrument must sufficiently allege all essential elements of the charged offense may not be waived, and therefore may be challenged for

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<sup>562</sup> ROP CONST. Art. IV, § 7.

<sup>563</sup> See *Ngirausui v. Nat’l Gov’t of the Republic of Palau*, 1 ROP Intrm. 185 (Trial Div. 1985) (Lane, J.).

<sup>564</sup> *Id.* at 186.

<sup>565</sup> *Id.* (applying ROP CONST. ART. XV, § 3(a), which provides that all existing laws in effect at the time of the Constitution remain in force).

<sup>566</sup> See *Renguul v. Ililau*, 1 ROP Intrm. 188, 190 (Trial Div. 1985) (Sutton, J.) (“This section clearly is not applicable to the present case.”). The *Renguul* case dealt with a complaint by a plaintiff who had contracted to haul lumber to a sawmill and saw it to specification in return for a sum of money, but had not been paid for the services. See *id.* at 188.

<sup>567</sup> ROP CONST. Art. IV, § 7.

<sup>568</sup> *An Guiling v. Republic of Palau*, 11 ROP 132 (2004).

the first time on appeal.<sup>569</sup> On the other hand, an objection that the charging instrument fails as to its factual specificity may be waived if not raised at the appropriate juncture.<sup>570</sup> As set forth by 18 PNC § 101(c), a criminal citation briefly describes the criminal charge and instructs the defendant to appear at a specified time and place to answer the charge.<sup>571</sup> The Court of Common Pleas may accept a criminal citation in lieu of a formal information for misdemeanor offenses.<sup>572</sup>

The brevity of criminal citations creates the potential for violation of the constitutional guarantee that an accused has the right to have “the offense charged [] set forth with sufficient certainty so that the defendant will be able to intelligently prepare a defense.”<sup>573</sup> A charging instrument is also constitutionally required to be specific enough “to provide protection against [the defendant] being tried a second time for the same offense” in violation of the double jeopardy clause.<sup>574</sup>

The *An Guiling* Court held that the restriction of the use of criminal citations to “simple misdemeanors” and the issuance of such a citation “soon after the offense is committed” with a reference to the time and place of the offense sufficiently “put[s] the defendant on notice of charges relating to a particular incident.”<sup>575</sup> The information contained in the *An Guiling* defendant’s citation—the approximate time, date, and location of the offense and the name of the offense charged (“disturbing the peace”)—was held to be sufficient to allow him to prepare his defense and to protect him from a second trial arising out of the same offense.<sup>576</sup>

The *An Guiling* “simple misdemeanor” restriction is worrisome. The constitutional right to be informed of the charges applies to misdemeanors as well as felonies. The emphasis must therefore be placed on the word “simple” rather than the word “misdemeanors.” Misdemeanors may be complex and a brief citation may not pass constitutional muster for such allegations. Only when the allegations are simple—and therefore detailed explanation is unnecessary to put the defendant on notice of the nature of the charges—should the limited information contained in a criminal citation pass constitutional muster.

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<sup>569</sup> See *id.* at 134.

<sup>570</sup> See *id.*

<sup>571</sup> See *id.* at 134-35.

<sup>572</sup> See *id.*

<sup>573</sup> *Id.* at 135.

<sup>574</sup> *Id.*

<sup>575</sup> *Id.*

<sup>576</sup> See *id.* at 136.

F. *The Accused's Right to a Speedy Trial*

Charging within the statute of limitations does not guarantee that an accused's right to a speedy trial is met.<sup>577</sup> The *Republic of Palau v. Decherong* majority recognized Palau's pre-Constitution adoption of the four speedy trial factors laid out in *Barker v. Wingo*:<sup>578</sup> length of delay, the reason(s) for the delay, the defendant's assertion of the right to a speedy trial, and prejudice to the defendant.<sup>579</sup> "[M]ost important[ly]," because the *Decherong* defendant did not articulate any prejudice caused by the delay between the start of her prosecution and the planned trial, the majority found no violation of her speedy trial right despite a seventeen month delay between arrest and guilty plea.<sup>580</sup>

The Appellate Division found no merit in the defendants' contention that they were denied their constitutional and statutory speedy trial rights in *Republic of Palau v. Sisor*.<sup>581</sup> A twenty-one month period intervened between the time of the *Sisor* defendants' arrest and the issuance of the information charging them with a crime.<sup>582</sup> At the time of their arrest, the defendants signed a statement and were released from custody.<sup>583</sup> Citing *Decherong*, the Court stated that the speedy trial right is "relative to the circumstances of the case and permits certain delays."<sup>584</sup> Because the defendants were not subjected to pre-charging restraint following arrest, the speedy trial right did not attach until the filing of the information.<sup>585</sup> The Court noted but ultimately did not decide that a delay in the filing of a charging document could potentially violate the due process clause of Article IV, Section 6.<sup>586</sup> The Court went on to find that the six and one-half month delay between the filing of the information and trial was not presumptively prejudicial and did not, under a *Decherong*-

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<sup>577</sup> See *Republic of Palau v. Decherong*, 2 ROP Intrm. 152, 163 (1990) ("[O]n rare occasions there are speedy trial considerations even for prosecutions begun within the limitations period.").

<sup>578</sup> *Barker v. Wingo*, 92 S. Ct. 2182, 2186-95 (1972).

<sup>579</sup> See *Decherong*, 2 ROP Intrm. at 164 (citing *Trust Territory v. Waayan*, 7 TTR 560, 563-66 (1977)).

<sup>580</sup> See *id.* at 165-66. Justice Ngiraklsong concurred in the result, but opined that the Court should not have even engaged in speedy trial analysis because that issue had not been appealed. See *id.* at 172-73 (Ngiraklsong, J., concurring).

<sup>581</sup> *Republic of Palau v. Sisor*, 4 ROP Intrm. 152 (1994).

<sup>582</sup> *Id.* at 154.

<sup>583</sup> *Id.*

<sup>584</sup> *Id.* at 158.

<sup>585</sup> *Id.* at 159.

<sup>586</sup> *Id.* at 159 n.1.

*Barker* analysis, violate the speedy trial right of the defendants.<sup>587</sup>

As stated by Chief Justice Ngiraklsong in *Republic of Palau v. Wolff*, even a lengthy pre-trial delay does not violate the speedy trial right if the delay is attributable to the defendant.<sup>588</sup> The Chief Justice applied the *Decherong-Barker* factors and found that the defendant's freedom from confinement for the entirety of the pre-trial period, the defendant's lack of attempts to press for a trial, and the defendant's failure to show prejudice resulting from the delay all weighed against the finding of a constitutional violation.<sup>589</sup>

### G. *The Accused's Right to an Impartial Trial*

The constitutional right to an "impartial trial" may be more appropriately labeled the right to an "impartial judge" or "impartial fact-finder," as the trial itself cannot be partial or impartial. A defendant convicted of rape appealed his conviction on, inter alia, the constitutional basis that he was denied a "fair trial" by the bias of the trial judge in *Liep v. Republic of Palau*.<sup>590</sup> In scrutinizing the partiality of the trial judge, the *Liep* Court examined the "entire record" of the case to determine whether it was left with an "abiding impression" of partiality.<sup>591</sup> Upon conclusion of its analysis, the Appellate Division was left with no such "abiding impression."

Post-*Liep*, the Appellate Division has employed more stringent language, stating that a judge's bias violates a defendant's right to an impartial trial "only in the most extreme of cases."<sup>592</sup> Without hinting at what those extreme cases might be, the Court quoted a United States case to say that "[m]atters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion."<sup>593</sup> If these matters, particularly "kinship" and "personal bias," are to be taken out of the mix, it would indeed take an "extreme" case for a judge's bias to be found to constitute a constitutional violation.

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<sup>587</sup> *Id.* at 160.

<sup>588</sup> *Republic of Palau v. Wolff*, 10 ROP 180, 183-84 (Trial Div. 2002) (Ngiraklsong, C.J.) (finding thirty month pre-trial delay after the filing of the information constitutional because the delay was attributable to the defendant's health and his off-island travel seeking medical treatment).

<sup>589</sup> *Id.*

<sup>590</sup> *Liep v. Republic of Palau*, 5 ROP Intrm. 5 (1994).

<sup>591</sup> *Id.* at 9.

<sup>592</sup> *Sandei v. Tungelel Lineage*, 8 ROP Intrm. 228, 299 (2000).

<sup>593</sup> *Id.* (quoting *Aetna Life Ins. Co. v. Lavoie*, 106 S. Ct. 1580, 1584-85 (1986)).

#### H. *Ex Post Facto Laws*

The ex post facto clause of Article IV, Section 6 “is violated when a law defining a crime or increasing punishment for a crime is applied to events that occurred before its enactment to the ‘disadvantage’ of the offender.”<sup>594</sup> The ex post facto clause is not violated by the application of a statute describing a “continuing offense” to an enterprise that began prior to, but continued after, the effective date of the statute.<sup>595</sup>

In *Republic of Palau v. Siang*, Justice Miller found that the retroactive application of an extended statute of limitations for criminal prosecution of grand larceny violated neither the ex post facto nor the due process clauses of Article IV, Section 6.<sup>596</sup> Justice Miller borrowed United States law to find that prosecution under an extended statute of limitations does not violate the Constitution unless the time for prosecution had expired before the extension went into effect.<sup>597</sup> Because the three-year statute of limitations had not run before it was enlarged to six years, the Court found that the extension to six years was constitutionally permissible.<sup>598</sup>

#### I. *The Accused’s Right to a Jury Trial*

The Ninth Amendment added a fourteenth section to Article IV. Section 14 permits the legislature to provide for jury trials in both criminal and civil cases.<sup>599</sup> The legislature was not previously banned from instituting jury trial by statute, so this clause of Section 14 carried little significance. Of more consequence, however, is the second clause of Section 14 which creates an accused’s “right to a trial by jury, as prescribed by law” for criminal offenses alleged to have been committed after December 31, 2009 and punishable by a sentence of imprisonment of

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<sup>594</sup> *Pamintuan v. Republic of Palau*, 16 ROP 32, 41 (2008) (citing *Collins v. Youngblood*, 110 S. Ct. 2715, 2718 (1990)).

<sup>595</sup> *Id.* The *Pamintuan* Court found no ex post facto clause violation in a human trafficking conviction where the criminalized conduct—“harboring” a trafficked person—continued after the enactment of the statute. *Id.* at 43.

<sup>596</sup> *Republic of Palau v. Siang*, 10 ROP 202 (Trial Div. 2002) (Miller, J.). The court need not have reached the constitutional question, however, because it found that the defendant’s absence from the Republic tolled the statute of limitations so that neither the three year (nor extended six year) statute of limitations had run. *Id.* at 203.

<sup>597</sup> *Id.* at 204.

<sup>598</sup> *Id.*

<sup>599</sup> ROP CONST. amend. 9.

twelve years or longer.<sup>600</sup> In calculating the relevant trigger, it is the alleged offense that must have occurred after December 31, 2009, not the allegation itself. It is unclear to what degree the legislature could narrow this right “as prescribed by law.”

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<sup>600</sup> *Id.*

## XIV. FREEDOM FROM INHUMANE PUNISHMENT AND EXCESSIVE FINES

Article IV, Section 10 prohibits “[t]orture, cruel, inhumane or degrading treatment or punishment” as well as “excessive fines.”<sup>601</sup> This section is not limited to government action—broadly read, it secures protection from cruel or degrading treatment from private individuals.<sup>602</sup>

A. *Firearm-Related Punishments*

Article XIII, section 13(2) requires the legislature to impose a mandatory minimum sentence of imprisonment of fifteen years “for violation of any law regarding importation, possession, use or manufacture of firearms.”<sup>603</sup> Interestingly, the legislature is not required to outlaw these practices—only to provide for the fifteen-year mandatory minimum sentence in the event that they are outlawed.<sup>604</sup>

In Palau’s post-Constitution, pre-independence days, the Appellate Division, over a strongly-worded dissent, effectively suspended Article XIII, Section 13(2)—specifically the fifteen-year mandatory minimum sentence for *possession* of a firearm—for violation of the Trusteeship Agreement for the Former Japanese Mandated Islands between the United States and the United Nations.<sup>605</sup> In *Kazuo v. Republic of Palau*, the Court read the right to be free from “cruel and unusual punishment” as secured by the United States Constitution into the Trusteeship Agreement under the mantle of the agreement’s guarantee of “human rights.”<sup>606</sup> Applying

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<sup>601</sup> ROP CONST. Art. IV, § 10.

<sup>602</sup> Appreciating that Article IV, Section 10 includes “treatment” as well as “punishment,” the Appellate Division has stated that the government is prohibited from employing torture or cruel, inhumane or degrading treatment regardless of the cause (be it as punishment or because of antipathy or indifference to a person or a group of people). *See Eller v. Republic of Palau*, 10 ROP 122, 130 (2003). This reading of the provision is still overly constricting—by its terms, Article IV, Section 10 prohibits torture, cruel, inhumane or degrading treatment (or punishment) by anyone, not just by the government. Article IV secures “Fundamental Rights,” not just fundamental rights vis a vis the government. The Constitution need not be construed to only limit governmental action—it may proscribe private action as well.

<sup>603</sup> ROP CONST. Art. XIII, § 13(2).

<sup>604</sup> Article XIII, Section 12 provides that “[n]o persons except armed forces personnel lawfully in Palau and law enforcement officers acting in an official capacity shall have the right to possess firearms or ammunition unless authorized by legislation which is approved in a nationwide referendum by a majority of the votes cast on the issue.” But this constitutional section does not provide for punishment for noncompliance.

<sup>605</sup> *Kazuo v. Republic of Palau*, 1 ROP Intrm. 154 (1984).

<sup>606</sup> *See id.* at 161-64.

United States case law, the *Kazuo* majority found that the fifteen-year mandatory minimum for firearm possession violated that right.<sup>607</sup> Justice Gibson, in dissent, read the Trusteeship Agreement's provision that the administering authority should promote self-governance and recognize the "freely expressed wishes of the people" as giving power and effect to the Palau Constitution and its imposition of a fifteen-year mandatory minimum for possession of a firearm.<sup>608</sup>

In other pre-independence cases, the Court established that the fifteen-year mandatory minimum for *use* of a firearm did not violate the Trusteeship Agreement and therefore was permissible. Again, the analysis was not under the Palau Constitution, but under the United States Constitution as imported by the Trusteeship Agreement.<sup>609</sup> Indeed, the same defendant from *Kazuo* came before the Court again on separate firearm charges—this time for "use" instead of "possession"—and argued that the fifteen-year mandatory minimum sentence for "use" of a firearm violated the Trusteeship Agreement as cruel and unusual punishment.<sup>610</sup>

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<sup>607</sup> See *id.* at 164-72.

<sup>608</sup> See *id.* at 177-80 (Gibson, J., dissenting). In a concurring opinion in a later case, Justice Ngiraklsong voiced his disagreement with the majority's holding in *Kazuo*:

I do not see a conflict between Article XIII, Section 13 (2) of the Palau Constitution with its enabling legislation and the Trusteeship Agreement. The primary purpose of the Trusteeship Agreement is to provide "self government" or "i[n]dependence" to the inhabitants of the Trusteeship. I see the Constitution as perhaps the best living expression of what the people of Palau want.... I accept and recognize, as I believe we must, the supremacy of the Palau Constitution.

*Republic of Palau v. Ngiraboi*, 2 ROP Intrm. 257, 275-76 (1991) (Ngiraklsong, J., concurring). Had Justice Ngiraklsong been on the *Kazuo* panel along with Justice Gibson, the decision may have turned out far differently.

<sup>609</sup> See *Republic of Palau v. Ngiraboi*, 2 ROP Intrm. 257, 265 (1991) ("The findings of [] *Kazuo v. ROP; Yano v. ROP*, 1 ROP Intrm. 154 (App. Div. Nov. 1984), which are specifically limited to the 'grave and serious' crime of Possession of a Firearm, are not applicable to a case involving Use of a Firearm."); *Republic of Palau v. Sakuma*, 2 ROP Intrm. 23, 40-41 (1990) ("[Use of a firearm to shoot at an occupied dwelling] is so fraught with peril to the safety of the Republic's citizens, and to the safety of the Republic of Pal[a]u itself, and the legislative intent is so clear, that the 15 year minimum sentence does not constitute cruel and unusual punishment, irrespective of whether the sentence is longer than the sentence for other more violent crimes in Palau, and irrespective of comparisons with foreign jurisdictions."); *Republic of Palau v. Singeo*, 1 ROP Intrm. 551, 560 (1989) (in case where defendant was convicted of use of a firearm for discharging ammunition in a deserted area: "Here, appellant clearly used the pistol and, therefore, *Kazuo/Yano* simply does not apply. *Kazuo/Yano* is therefore clearly and factually distinguishable from this case. Accordingly, we affirm the Trial Court's sentence imposing 15 years imprisonment for use of a pistol."). (The *Kazuo* opinion involved the consolidated appeal of *Kazuo v. Republic of Palau* and *Yano v. Republic of Palau*. See *Kazuo*, 1 ROP Intrm. at 154.)

<sup>610</sup> See *Kazuo v. Republic of Palau*, 3 ROP Intrm. 343, 345 (1993) ("*Kazuo II*").

The Court summarily rejected the argument as previously decided, which, by that time, it was.<sup>611</sup>

Although still “suspended” because of its “conflict” with the Trusteeship Agreement, the fifteen-year mandatory minimum for possession of a firearm was found constitutional and, specifically, not in violation of the Article IV, Section 10 prohibition against cruel and inhumane punishment.<sup>612</sup> The Court also upheld the five-year statutory maximum punishment for possession of ammunition against an Article IV, Section 10 challenge despite the “disproportionality” of the punishment for possession of ammunition to the “suspended” punishment for possession of a firearm.<sup>613</sup> The Court stated that, except for instances of capital punishment, the proportionality approach is not favored and creation of the boundaries of punishment for separate crimes should generally be left to the legislature.<sup>614</sup>

Since Palau gained its independence in 1994 and the Trusteeship Agreement is no longer in effect, the fifteen-year mandatory minimum sentence for firearm possession, use, importation, or manufacture mandated by Article XIII, Section 13(2) cannot be unconstitutional.<sup>615</sup> Any future challenges to this provision based on Article IV, Section 10 must fail.<sup>616</sup>

Because the Constitution requires a punishment of fifteen years of *imprisonment* for firearms-related violations, suspension of such a sentence by the sentencing court is not constitutionally permissible.<sup>617</sup>

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<sup>611</sup> *Id.* (“In [*Sakuma*] we held that the minimum sentence of fifteen years was not cruel and unusual punishment under the Eighth Amendment to the United States Constitution.”). In its double jeopardy analysis, the *Kazuo II* Court held that *Ngiraboi* was overruled to the extent it was inconsistent. *See id.* at 348-49. This aspect of the decisions is discussed at section XII.C, *supra*.

<sup>612</sup> *See Ngiraboi*, 2 ROP Intrm. at 268 (“The Constitutional prohibition against cruel or inhumane treatment set forth in Article IV, Section 10 of Palau’s Constitution cannot be used to subordinate or delete the equally weighty mandate contained in Article XIII, Section 13.”).

<sup>613</sup> *See id.* at 265-68.

<sup>614</sup> *See id.* at 267 (“[Except in extraordinary cases], it would be inappropriate for this Court to second guess the Legislature as to whether a given sentence of imprisonment is excessive in relation to the crime.”).

<sup>615</sup> The fifteen year mandatory minimum does not extend to convictions for *attempted* firearm possession. *See Ongalibang v. Republic of Palau*, 8 ROP Intrm. 219, 220 (2000) (reviewing firearms mandatory minimum as a matter of statutory construction).

<sup>616</sup> Indeed, such challenges have always failed. But, pre-independence, the “cruel and unusual punishment” guarantee of the United States Constitution as imported through the Trusteeship Agreement provided an alternate—and stricter—basis for challenge.

<sup>617</sup> *See Ngemaes v. Republic of Palau*, 4 ROP Intrm. 250, 252 (1994) (“We

Nor does a firearm sentence permit work release during the fifteen-year mandatory period of imprisonment.<sup>618</sup> The structure of the work release system permits prisoners to work during the day, but requires them to return to and sleep in the jail each night.<sup>619</sup> The Parole Reform Act of 1992, however, categorizes work release as a type of “parole” and a “release from imprisonment.”<sup>620</sup> Because any “release from imprisonment” would offend the Article XIII, Section 13(2) mandatory minimum imprisonment requirement, the Court held that work release is not permissible within the mandatory minimum sentence period.<sup>621</sup> Oddly, the Court noted that it was declining to pass on the question of “whether the Parole Board may parole a convict before the conclusion of his 15 year term of imprisonment.”<sup>622</sup> It is not odd that the Court declined to rule on that question—as that question was not before it. But it is odd that the Court specifically noted that it was declining to rule on that question, because its holding that any “release from imprisonment” is impermissible during the mandatory period of imprisonment all but made the answer to the question a foregone conclusion. Under the current case law, no parole or release from imprisonment is permissible before the conclusion of the mandatory minimum sentencing period.

#### B. *Controlled Substance-Related Punishments*

A defendant, sentenced to twenty-five years for importing methamphetamine, challenged the twenty-five year mandatory minimum sentence for that crime in *Eller v. Republic of Palau*.<sup>623</sup> The Court deferred strongly to the legislative will:

[A]bsent circumstances that compel the conclusion that a particular sentence is properly characterized as cruel, inhumane, or degrading, “it would be inappropriate for the Court to second guess the Legislature as to whether a given

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believe it plain that the framers of the Constitution intended by this [mandatory minimum imprisonment] language that the mandated punishment not be subject to suspension.”). In *Ngemaes*, the Appellate Division stated that whether parole before the conclusion of fifteen years of imprisonment is constitutional is a “separate question from whether a sentencing court may suspend a portion of the fifteen year term of imprisonment” and withheld judgment. *See id.* at 254.

<sup>618</sup> *See Teriong v. Republic of Palau*, 15 ROP 88 (2008).

<sup>619</sup> *See id.* at 90.

<sup>620</sup> *See id.* (quoting 18 PNC § 1202(b)).

<sup>621</sup> *See id.* at 91.

<sup>622</sup> *Id.*

<sup>623</sup> *Eller v. Republic of Palau*, 10 ROP 122, 129 (2003).

sentence is excessive in relation to the crime.”<sup>624</sup>

In considering the severity of a sentence in relation to the offense, it is appropriate to consider the availability of parole.<sup>625</sup> The Court reviewed the legislative history of the methamphetamine statutes, identified the legislative will to be tough on drugs, and held that the twenty-five year mandatory minimum sentence could not be called “cruel, inhumane, or degrading” by any reasonable standard.<sup>626</sup>

In reaching this decision the Court did not independently measure the harshness of the punishment to the severity of the crime—it merely identified legislative history demonstrating that the legislature had made an affirmative choice to punish drug importation harshly. Although some deference to the legislature is appropriate, the Court’s analysis did not answer the constitutional question—whether the punishment was cruel, inhumane or degrading—but rather centered on a different question—whether the legislature purposefully arrived at the mandatory minimum sentence. Such deference to the legislature is not appropriate in constitutional matters.

The Court extended the *Eller* holding in *Silmai v. Republic of Palau*.<sup>627</sup> Basing its decision on the reasoning of *Eller* regarding importing methamphetamine, the *Silmai* Court held that the twenty-five year mandatory minimum sentence for the crime of trafficking methamphetamine was constitutional.<sup>628</sup>

### C. Excessive Fines

In *Gotina v. Republic of Palau*<sup>629</sup> the Appellate Division’s first application of the excessive fines clause,<sup>630</sup> the Court found otherwise non-excessive fines were not made excessive by the criminal defendants’

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<sup>624</sup> *Id.* at 130 (quoting *Republic of Palau v. Ngiraboi*, 2 ROP Intrm. 257, 267 (1991)).

<sup>625</sup> *See id.* at 131 & n.9 (considering availability of parole after completion of one-third of sentence for a sentence for methamphetamine importation).

<sup>626</sup> *See id.* at 131.

<sup>627</sup> *Silmai v. Republic of Palau*, 10 ROP 139 (2003).

<sup>628</sup> *See id.* at 141.

<sup>629</sup> *Gotina v. Republic of Palau*, 8 ROP 65 (1999).

<sup>630</sup> In an earlier decision—decided on other grounds—the Appellate Division stated that forfeiture of a four-million dollar vessel for remaining in Palauan waters for two months beyond the expiration of its permit in violation of the statute prohibiting passage in Palauan waters without a permit “would raise substantial issues as to possible violation of the constitutional prohibition against excessive fines.” *Republic of Palau v. M/V Aesarea*, 1 ROP Intrm. 429, 434 (1988). But the *M/V Aesarea* decision contained only excessive fines dicta, not an actual application of the clause.

inability to pay the fines. The four *Gotina* defendants were each convicted of two counts of unlawful fishing.<sup>631</sup> Two defendants were fined \$10,000 per count and two were fined \$25,000 per count.<sup>632</sup>

In construing the excessive fines clause, the Court found it appropriate to consider United States case law.<sup>633</sup> The Court's review of the case law uncovered "many cases that have declined to scrutinize inability to pay as an element of the constitutional excessiveness inquiry, and have held that indigence becomes relevant only as a defense to any attempt on the part of the government to enforce payment of the fine."<sup>634</sup> The Court therefore found that arguments regarding ability to pay "fail to raise a cognizable challenge under the Excessive Fines Clause" and therefore upheld the constitutionality of the fines.<sup>635</sup>

Less than a month after *Gotina*, the Appellate Division revisited the same issue in *Flaga v. Republic of Palau*.<sup>636</sup> The *Flaga* defendant, sentenced to twenty-five years imprisonment and a \$50,000 fine, appealed the fine on the basis of her inability to pay.<sup>637</sup> The Court was unimpressed with her argument, holding that a defendant's "ability to pay ha[s] no bearing on the constitutionality of the fine."<sup>638</sup> The Court affirmed the imposition of the fine stating that a "fine can only violate the Excessive Fines Clause if the fine[] bears no relationship to 'the gravity of the offense that it is designed to punish.'"<sup>639</sup>

In measuring the size of a fine, the Court has found the \$50,000 mandatory minimum fine for trafficking in methamphetamine to be constitutionally un-excessive.<sup>640</sup> In doing so, the Court measured the gravity of the offense against the magnitude of the fine.<sup>641</sup> The Court found two considerations particularly relevant: (1) courts should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of criminal punishments; and (2) any judicial determination regarding the gravity of a particular offense

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<sup>631</sup> See *Gotina*, 8 ROP at 65.

<sup>632</sup> See *id.*

<sup>633</sup> See *id.*

<sup>634</sup> *Id.* at 66.

<sup>635</sup> *Id.* at 67.

<sup>636</sup> *Flaga v. Republic of Palau*, 8 ROP Intrm. 79 (1999).

<sup>637</sup> See *id.* at 79.

<sup>638</sup> *Id.* at 80 (citing *Gotina*, 8 ROP Intrm. at 67).

<sup>639</sup> *Id.* (quoting *Gotina*, 8 ROP at 66).

<sup>640</sup> See *Silmai v. Republic of Palau*, 10 ROP 139, 141-42 (2003).

<sup>641</sup> See *id.* at 142 (quoting *United States v. Bajakajian*, 118 S. Ct. 2028, 2036 (1998) ("The amount of the forfeiture must bear some relationship to the gravity of the offense.")).

will be “inherently imprecise.”<sup>642</sup> Deferring to the legislature’s determination that methamphetamine trafficking is a “grave offense” deserving of a punishment eliciting a “strong deterrent effect,” the Court found that the \$50,000 mandatory minimum fine “bears a constitutionally adequate relationship to the gravity of the crime of trafficking methamphetamine.”<sup>643</sup>

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<sup>642</sup> *See id.* (citing *Bajakajian*, 118 S. Ct. at 2037).

<sup>643</sup> *Id.* at 142.

## XV. ADDITIONAL RIGHTS AND LIBERTIES

A. *Victims' Compensation*

Although compensation of victims is included in the “Fundamental Rights” article of the Constitution, victims are not “fundamentally” guaranteed compensation. A victim of a criminal offense “may” be compensated by the government “as prescribed by law or at the discretion of the court.”<sup>644</sup> This section, therefore, only states that the legislature or the court has the power to prescribe victim compensation by the government, a power that certainly the legislature (and perhaps the judiciary) held without this explicit grant of power.

B. *Freedom from Slavery and Protection of Children*

Slavery or involuntary servitude—whether it be imposed by the government or by a private entity—is prohibited by Section 11 of Article IV. The only exception to the slavery and involuntary servitude ban is as punishment for a crime.<sup>645</sup> Section 11 also includes an open-ended directive that “[t]he government shall protect children from exploitation.”<sup>646</sup> Although a worthy sentiment, the vagueness of this provision dooms it to carry little weight.

C. *Familial Rights*

As amended by the Twenty-Second Amendment, Section 13 of Article IV contains three distinct ideas.<sup>647</sup> First, the grant of a right: the government is required to “provide for marital and related parental rights, privileges and responsibilities on the basis of equality between men and women, mutual consent and cooperation.”<sup>648</sup> Second, a restriction of liberty: marriages contracted in Palau must “be between a man and a woman.”<sup>649</sup> Lastly, an imposition of liability: parents (or those acting as

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<sup>644</sup> ROP CONST. Art. IV, § 8.

<sup>645</sup> ROP CONST. Art. IV, § 11.

<sup>646</sup> *Id.*

<sup>647</sup> ROP CONST. Art. IV, § 13 & amend. 22.

<sup>648</sup> *Id.*

<sup>649</sup> This second clause, restricting the nature of marriage, was added by the Twenty-Second Amendment in 2008.

parents) are “legally responsible for the support and for the unlawful conduct of their minor children as prescribed by law.”<sup>650</sup> This last clause carries no weight on its own, but only provides for the enactment of effectuating statutes.

#### D. *Academic Freedom*

The Sixteenth Amendment added Section 15 to Article IV, guaranteeing “academic freedom” in “post secondary education and any institution of higher learning.”<sup>651</sup> It is unclear what the promise of “academic freedom” provides, especially in post secondary education. It is uncertain whether this section grants “freedom” to students, teachers, administrators or, if to all, how these competing freedoms should be reconciled.

#### E. *Prohibition on Land Tax*

Article XIII, Section 9 prohibits the imposition of tax on land.<sup>652</sup> But the taxation forbidden by this section is only a “direct tax on the land itself.”<sup>653</sup> A tax on revenue derived from land is not barred by this section.<sup>654</sup> And the profit-sharing arrangement whereby the national government collects twenty-five percent of the revenue realized by a state public lands authority from the administration of public lands does not qualify as a “tax” on land.<sup>655</sup>

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<sup>650</sup> ROP CONST. Art. IV, § 13 & amend. 22.

<sup>651</sup> ROP CONST. amend. 16.

<sup>652</sup> ROP CONST. Art. XIII, § 9.

<sup>653</sup> *Koror State Gov't v. Republic of Palau*, 3 ROP Intrm. 314, 320 (1993).

<sup>654</sup> *See id.* (addressing revenue generated from the operation of a quarry).

<sup>655</sup> *See id.* at 318-19.

## XVI. TRADITIONAL RIGHTS

A. *Prohibition from Diminishing Roles of Traditional Leaders*

Section 1 of Article V provides that—other than through the Constitution—the government is not to infringe upon the role or function of traditional leaders.<sup>656</sup> This section formed the basis of the challenge in *House of Traditional Leaders v. Seventh Koror State Legislature*.<sup>657</sup> The HOTL traditional leaders argued that several amendments to the Koror State Constitution that diminished their roles in the legislative affairs of the state (as previously granted by the Koror State Constitution) violated their traditional rights under Article V.<sup>658</sup> The post-amendment state constitution altered the traditional leaders' status from “the supreme authority of the State of Koror” to “more of a consultative role.”<sup>659</sup>

Despite the Article V, section 1 language proscribing actions of the “government,” the Court found no relevance in the fact that the amendments to the Koror State Constitution were proposed via legislative resolution rather than voter petition or citizen initiative.<sup>660</sup> This section applies regardless of the method of constitutional amendment.<sup>661</sup>

The Court interpreted Article V, Section 1 restrictively:

The amendments [to the Koror State Constitution] also do not prevent traditional leaders from being “recognized, honored, or given a formal or functional role” in the Koror State Government. As the trial court explained, “[e]ven taking the language of Article V, Section 1, at face value, the Court does not believe it requires that traditional leaders be accorded any particular role in the government.” A plain reading of Article V indicates that this article merely intends to ensure that no impediments are placed in the way of traditional leaders holding a governmental position. Instead of preventing the traditional leaders from holding office, the amendments merely adjust the role played by HOTL in the current structure of the Koror State

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<sup>656</sup> ROP CONST. Art. V, § 1.

<sup>657</sup> *House of Traditional Leaders v. Seventh Koror State Legislature*, 14 ROP 52 (2007) (“HOTL”).

<sup>658</sup> *See id.* at 53-54.

<sup>659</sup> *Id.*

<sup>660</sup> *See id.* at 54-55.

<sup>661</sup> *See id.* at 55.

government.<sup>662</sup>

The Court's ultimate inquiry boiled down to whether the amendments prevented traditional leaders from running for office in their individual capacities.<sup>663</sup>

The Court specifically rejected the argument that, once granted, powers of traditional leaders in state government can never be diminished or removed.<sup>664</sup> According to the Court, the right of the people to choose the structure of their government includes the right to change it.<sup>665</sup> However (as argued by the traditional leaders) Article V, Section 1—explicitly made applicable to the state government through Article XI, Section 1's guarantee that the structure and organization of state governments shall not be inconsistent with the national Constitution—freezes the roles and functions of traditional leaders as recognized by custom and tradition. Therefore, no constitutional issue would arise with a state granting a traditional leader a non-traditional power and then subsequently taking it away. But, under the terms of the Constitution, a state should not be able to take away power of a traditional leader, regardless of whether the process by which the power is removed comports with the state constitution.

A similar conflict played out in *Gibbons v. Koror State Government*.<sup>666</sup> In *Gibbons*, Koror State passed a law vesting the power to select all seven members of the Koror State Public Lands Authority Board of Trustees (the "Board") in the hands of the Governor.<sup>667</sup> One seat on the Board had previously been reserved for the High Chief Ibedul, who had the authority to select three additional board members.<sup>668</sup> The appellants, including the Ibedul, argued that the statute unconstitutionally stripped the Ibedul of his customary role in deciding and allocating use of public lands in Koror.<sup>669</sup> The Appellate Division reviewed earlier case law stating that traditional leaders have no "customary or traditional" function in state or national constitutional governments.<sup>670</sup> The Court concluded that the

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<sup>662</sup> *Id.* at 56.

<sup>663</sup> *See id.*

<sup>664</sup> *See id.* at 56-57.

<sup>665</sup> *See id.* at 57.

<sup>666</sup> *Gibbons v. Koror State Gov't*, 13 ROP 156 (2006).

<sup>667</sup> *See id.* at 157.

<sup>668</sup> *See id.*

<sup>669</sup> *See id.* at 158.

<sup>670</sup> *See id.* at 159-60 (citing *Becheserrak v. Koror State Gov't*, Civ. No. 166-86 (Trial Div. May 16, 1995), *rev'd on other grounds*, 6 ROP Intrm. 74 (1997); *Ngara-Irrai Traditional Council of Chiefs v. Airai State Gov't*, 6 ROP Intrm. 198 (1997)). *See* section XVIII.B, *infra*, for a discussion of the *Becheserrak* appellate opinion and *Ngara-Irrai*

statute at issue was constitutional because “traditional leadership had no customary and traditional role in selecting members of the KSPLA Board” and:

[I]nsofar as Article V, Section 1 [and a similar provision of the Koror State Constitution] protects the roles and functions of traditional leaders *as recognized by custom and tradition*, it does not protect their role with respect to the KSPLA Board, a part of the *constitutional* government of Koror, for, as the Trial Division noted, there was and is no customary role or function of traditional leaders in the constitutional government.<sup>671</sup>

This restrictive reading essentially eviscerates any protection provided to traditional leaders by Article V, Section 1 by permitting exclusion of traditional leaders from their traditional roles by merely statutorily assigning another to that role. In *Gibbons*, the state government assigned the role of allocating public lands (a role allegedly traditionally occupied by the Ibedul) to a statutorily-created Board and the Court held that the Ibedul need not be afforded a place on the Board because his place as a Board member was not a “traditional” one. A better result in *Gibbons* would have been to find that the power over state land had been constitutionally granted to the states (and therefore taken from the Ibedul) by Article I, Section 2 rather than relying on the statutorily-created Koror State Public Lands Authority.

### B. *Conflict Between Statutory and Traditional Law*

Section 2 of Article V states that statutes and traditional law are “equally authoritative.”<sup>672</sup> Section 2 goes on to provide that statutory law prevails over conflicting traditional law “only to the extent it is not in conflict with the underlying principles of the traditional law.” Traditional law thus trumps statutory law when the statutory law is in conflict with the “underlying principles” of the traditional law. It seems unlikely that

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*Traditional Council of Chiefs.*

<sup>671</sup> *Gibbons*, 13 ROP at 161. In concurrence, Chief Justice Ngiraklsong found the majority’s constitutional determinations unnecessary and stated that he found the statute constitutional because insufficient evidence was presented at trial to demonstrate the Ibedul’s traditional powers over public lands. *See id.* at 166 (Ngiraklsong, C.J., concurring).

<sup>672</sup> ROP CONST. Art. V, § 2. No mention is made of the Constitution’s weightiness in relation to traditional law, but, based on the transitive property, the superiority of the Constitution to statutory law should mean that the Constitution is also superior to traditional law (given that statutory law and traditional law are “equally authoritative”).

contradictory laws would not also conflict with the “underlying principles” of each other. Therefore, despite its wording, Section 2 may imbue greater superiority to traditional laws than to statutory laws. When no statute is on point, customary law applies.<sup>673</sup>

Chief Justice Ngiraklsong has explained the effect of Article V, Section 2 in the following way: “Perhaps an appropriate statutory rule to use here, given the equal status of both statutes and Palauan custom, is that a statute should be read in a way to avoid nullifying Palauan custom more than the statute prescribes.”<sup>674</sup> Although not precisely in concert with the constitutional language, the Chief Justice’s formulation is certainly more straight-forward and leaves less uncertainty about the effectiveness of Palauan statutes.

In dicta and without decision, the Appellate Division has stated that “[t]here may be an argument... that the statute of limitations should not be applied at all to actions involving some issues of custom and traditional law” based upon Article V, Section 2.<sup>675</sup> The Court noted such an argument was supported in some degree by “[t]he fact that certain Palauan customary processes take longer in their normal course to work themselves out within the parameters of traditional law than would be allowed by the statute of limitations.”<sup>676</sup>

The Court has consistently denied application of Article V, Section 2 to disposition of assets belonging to a person who died before the enactment of the Constitution. Such analysis, first articulated by Justice Miller, is proper in light of Article XV, Section 3(b)’s protection of “rights, interests, obligations, judgments and liabilities arising under the existing law” before the Constitution took effect.<sup>677</sup> The Appellate Division has subsequently adopted this approach.<sup>678</sup>

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<sup>673</sup> See *Marsil v. Telungalk ra Iterkerkill*, 15 ROP 33, 36 (2008) (“Absent an applicable [] statute, customary law applies.”).

<sup>674</sup> *Bandarii v. Ngerusebek Lineage*, 11 ROP 83, 88C (2004) (Ngiraklsong, C.J., concurring).

<sup>675</sup> *Kumangai v. Isechal*, 1 ROP Intrm. 587, 588 (1989).

<sup>676</sup> *Id.* Given that the Court was called upon in *Kumangai* only to rule whether the trial judge erred in raising the statute of limitations issue sua sponte, it was imprudent of the Court to offer such constitutional musings.

<sup>677</sup> See *Morei v. Ngetchuang Lineage*, 5 ROP Intrm. 292, 293 (Trial Div. 1995) (Miller, J.) (“It is clear that as of 1973, statutory law did prevail over traditional law.”).

<sup>678</sup> See *Nakamura v. Markub*, 8 ROP Intrm. 39, 40 n.4 (1999) (finding that the intestacy statute could not violate the yet-to-be-enacted Article V, section 2: “We merely note that the Palau Constitution did not exist in 1962, at the time of Markub’s death. We apply the law in effect at the time of his death.”); *Ngirchokebai v. Reklai*, 8 ROP Intrm. 151, 152 n.2 (2000) (“[T]he application of [statutory law] to property disposed of [at an] *eldecheduc* before the adoption of the Constitution does not conflict with article V, § 2 of the Constitution.”).

C. *Preservation and Promotion of Palauan Heritage*

In 2008 the Twenty-First Amendment added Section 3 to Article V. This new section mandates that the “national government shall take affirmative action to assist traditional leaders in the preservation, protection, and promotion of Palauan heritage, culture, languages, customs and tradition.”<sup>679</sup> While an admirable display of support for traditional leaders and culture, Section 3 bears little teeth as far as enforceability.

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<sup>679</sup> ROP CONST. amend. 21.

## XVII. RESPONSIBILITIES OF THE NATIONAL GOVERNMENT

According to Article VI (as altered by the Twenty-Third Amendment), the national government is required to “take positive steps” in the interest of the following:

conservation of a beautiful, healthful, and resourceful natural environment; promotion of the national economy; protection of the safety and security of persons and property; promotion of health and social welfare of the citizens through the provision of free or subsidized health care; and provision of public education for citizens which shall be free from grades one (1) to twelve (12) and compulsory as prescribed by law.<sup>680</sup>

The first three “responsibilities,” conservation of the environment, promotion of the economy, and security, are amorphous and provide little limitation on the actions of the national government. Furthermore, it is unclear who bears responsibility for their provision—the legislature, the executive, or some combination of the two.<sup>681</sup> The buck could assuredly be passed between governmental branches and amongst ministries in almost any challenge to non-provision of these responsibilities.

The latter two responsibilities—free or subsidized health care and free and compulsory public education for citizens—are more measurable and thus more enforceable. However, questions still exist, such as what level of health care or quality of public education must be provided for the national government to meet its responsibilities. Although included in Article IV (“Fundamental Rights”) rather than Article VI (“Responsibilities of the National Government”), the Twenty-Fourth Amendment added a new section mandating that the national government “provide free preventive health care for every citizen as prescribed by law.”<sup>682</sup> As with its Article VI responsibility to provide free or subsidized health care, this free preventive health care provision also leaves questions to be answered regarding the quantum and quality of care that is required.

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<sup>680</sup> The Twenty-Third amendment, enacted in 2008, clarified this provision by adding the “from grades one (1) to twelve (12)” language.

<sup>681</sup> Justice Gibson cited Article VI as evidence that the framers of the Constitution intended a “strong central government.” See *Nakatani v. Nishizino*, 1 ROP Intrm. 289, 295 (Trial Div. 1985) (Gibson, J.). Although Justice Gibson perhaps overstated the implication of Article VI to some degree, Article VI does inferentially grant the national government “powers” to carry out its enumerated responsibilities.

<sup>682</sup> ROP CONST. amend. 24.

## XVIII. POWERS AND RESPONSIBILITIES OF STATE GOVERNMENTS

A. *State Governance Overview*

Palau comprises sixteen states. Each state is granted exclusive ownership over the natural resources within its territories by Article I, Section 2.<sup>683</sup> States may not secede from Palau and new states—comprising territory “historically or geographically part of Palau”—may be admitted upon approval by the national legislature and not less than three-fourths of the states.<sup>684</sup>

Article XI addresses (some of) the powers and responsibilities of state governments. Section 1 concerns the structure of state governments and contains the “guarantee clause.”<sup>685</sup> Section 2 grants all undelegated powers to the national government, while Sections 3 and 4 delegate powers to the state governments (subject to national statutes).

B. *Guarantee Clause*

The most litigated portion of Article XI, located in section 1, is the guarantee clause. It “guarantees” that the “structure and organization of state governments shall follow democratic principles, traditions of Palau, and shall not be inconsistent” with the Constitution.<sup>686</sup> As found in *Teriong v. Government of State of Airai*, the issue of whether a state constitution “conforms” to Article XI, Section 1 of the Constitution is a justiciable issue.<sup>687</sup> Because the Airai State Constitution did not afford citizens the right to vote for key public officials—an “essential democratic principle” as guaranteed by Article VII<sup>688</sup>—it violated the guarantee clause of Article XI, Section 1.<sup>689</sup>

Like a state constitution, the structure of a state government may be challenged under the guarantee clause.<sup>690</sup> The Court revisited the

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<sup>683</sup> See section II.A, *supra*.

<sup>684</sup> ROP CONST. Art. XIII, §§ 4-5.

<sup>685</sup> Or, as some prefer, the “guaranty clause.”

<sup>686</sup> ROP CONST. Art. XI, § 1.

<sup>687</sup> *Teriong v. Gov’t of State of Airai*, 1 ROP Intrm. 664, 673-74 (1989).

<sup>688</sup> See section III.C, *supra*.

<sup>689</sup> See *Teriong*, 1 ROP Intrm. at 675-76 (“Without the right to vote, a state constitution does not conform with the minimum requirement of ‘democratic principles.’”); see also *id.* at 681 (“We further hold that Article VII and Section 1, Article XI of the Constitution require that key state officials be elected and that the electorate be given the opportunity periodically to determine whether to retain or replace those officials through elections.”).

<sup>690</sup> See *Becheserrak v. Koror State*, 3 ROP Intrm. 53, 56 (1991) (“We hold that the issue of whether the Koror State government complies with the Guarantee Clause of the Palau Constitution is a justiciable issue which does not bar judicial review.”).

*Teriong* decision in *Koror State Government v. Becheserrak*.<sup>691</sup> It clarified that the *Teriong* decision focused on a state constitution that did not provide for the election of *any* key government officials and stated that “[t]he *Teriong* court did not hold that a constitution that failed to provide for the election of *every* key government official would be in violation of Article XI, section 1.”<sup>692</sup> The Court reasoned that democratic governments regularly have unelected key public officials and that a requirement that *all* key public officials must be elected would create an overly broad reading of the guarantee clause.<sup>693</sup>

Justice Beattie, writing separately, voiced his view that the majority, in an attempt to avoid *Teriong* without overruling it, created a mischievous brand of jurisprudence by inserting a post facto “some” into the holding of *Teriong*.<sup>694</sup> In Justice Beattie’s view, the proper course would be to admit that *Teriong*’s requirement of election of *all* key public officials was too broad and overrule it.<sup>695</sup> The concurring justice did not agree that *any* key state officials need be elected to comport with the constitutional guarantee—only that the state constitutions permit the electorate to alter the structure of their state government should the citizens tire of non-elected leadership.<sup>696</sup>

Just as a state government cannot constitutionally run with wholly unelected officials, it also cannot constitutionally run without any role for traditional leaders.<sup>697</sup> It is, however, for the states to decide in what capacity the traditional leaders should serve.<sup>698</sup>

In the most recent addition to its guarantee clause jurisprudence, the Appellate Division upheld the Trial Division’s order finding the amendment provision of the Ngatpang State Constitution unconstitutional in *The Ngaimis v. Republic of Palau*.<sup>699</sup> The Ngatpang government was

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<sup>691</sup> *Koror State Gov’t v. Becheserrak*, 6 ROP Intrm. 74 (1997).

<sup>692</sup> *Id.* at 77 (emphasis added).

<sup>693</sup> *See id.*

<sup>694</sup> *See id.* at 79-80 (Beattie, J., concurring).

<sup>695</sup> *See id.* at 80 (Beattie, J., concurring).

<sup>696</sup> *See id.* at 80-82 (Beattie, J., concurring). For Chief Justice Ngiraklsong’s overview of *Teriong* and *Koror State Government v. Becheserrak*, see *Gibbons v. Seventh Koror State Legislature*, 13 ROP 156, 164 n.1 (2006) (Ngiraklsong, C.J., concurring).

<sup>697</sup> *See Ngara-Irrai Traditional Council of Chiefs v. Airai State Gov’t*, 6 ROP Intrm. 198, 202-04 (1997).

<sup>698</sup> *See id.* at 204 (finding use of traditional leaders in purely advisory roles to be constitutional).

<sup>699</sup> *The Ngaimis v. Republic of Palau*, 16 ROP 26 (2009). The Trial Division’s treatment of the Ngaimis—affirmed on appeal—can be found at *Republic of Palau v. Ngatpang State*, 13 ROP 292 (Trial Div. 2003) (Ngiraklsong, C.J.) and *Republic of Palau v. Ngatpang State*, 13 ROP 297 (Trial Div. 2006) (Ngiraklsong, C.J.).

configured so that all state legislative and executive power was held by the Ngaimis, an unelected traditional council of ten chiefs.<sup>700</sup> The amendment provision of the Ngatpang Constitution required approval of eight members of the Ngaimis before any amendment would take effect.<sup>701</sup> When a constitutional convention sought to place amendments on the ballot that would potentially restructure the government to drastically reduce the power of the Ngaimis, the Ngaimis canceled the vote and removed the proposed amendments from the ballot.<sup>702</sup>

Finding that “the *Teriong* and *Beches[er]ak* decisions establish that the right to change one’s constitution and government as one chooses is fundamental to achieving democratic principles,” the Appellate Division held that the Ngaimis-controlled constitutional amendment provision was unconstitutional under the Guarantee Clause of the national Constitution.<sup>703</sup> The right for the populous to change the structure of government is the heart of the Guarantee Clause as interpreted in the *Teriong-Becheserrak-Ngaimis* trilogy of cases. State governments need not be run by elected officials to comport with Article XI, Section 1’s requirement to “follow democratic principles.” The main requirement is that a majority of the population can choose to alter the organization of government (and, presumably, shift away from unelected leaders) if they so desire.

### C. Delegation of Powers to the States

Section 2 of Article XI reserves to the national government all powers not expressly delegated to the state governments. The national government may, by statute, delegate powers to the state governments. But the lack of reservation of powers to the states does not mean that the states are akin to “municipal corporations,” the actions of which are subject to judicial review because of lack of separation of powers concerns.<sup>704</sup>

In assessing whether a state has a certain power, “[t]he limiting language of Article XI, Section 2 significantly narrows the relevant inquiry... to whether either the Palau Constitution or the national

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<sup>700</sup> See *The Ngaimis*, 16 ROP at 27. Ngatpang had one elected official, but that official’s capacities were largely administrative and under the supervision of the (unelected) governor. See *id.* at 27.

<sup>701</sup> See *id.*

<sup>702</sup> See *id.*

<sup>703</sup> *Id.* at 30. The Court attempted to explain the relationship between its previous *Teriong* and *Koror State Government v. Becheserrak* decisions, avoiding any mention of “overruling”: “[t]he *Teriong* holding was followed and clarified in *Koror State Government v. Becheserrak* . . .” *Id.* at 28.

<sup>704</sup> See *Tudong v. Sixth Kelulul A Ngardmau*, 13 ROP 111, 113 n.2 (2006).

government has expressly delegated to the states the power.”<sup>705</sup> Delegation by the national government has been found to grant states the power to prosecute their own criminal laws<sup>706</sup> and to enact and enforce zoning laws.<sup>707</sup> State legislatures also possess the constitutional power to tax.<sup>708</sup> The national government, however, may limit a state’s taxing power by legislation.<sup>709</sup>

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<sup>705</sup> *State of Koror v. Blanco*, 4 ROP Intrm. 208, 209 (1994) (finding that states have the power to prosecute their own criminal laws through a legislative delegation by the national government).

<sup>706</sup> *See id.* at 211-12.

<sup>707</sup> *See Koror State Planning Comm’n v. Haruo*, 8 ROP Intrm. 361, 361 (Trial Div. 2001) (Ngiraklsong, C.J.).

<sup>708</sup> ROP CONST. Art. XI, § 3.

<sup>709</sup> *See id.*; *see also Koror State Gov’t v. Republic of Palau*, 3 ROP Intrm. 127, 128 (1992) (upholding statute prohibiting states “from enacting any taxes or fees on persons, goods, services, sales, income, activities, objects, or other matters already taxed or charged by the national government” on the grounds that “[t]he language of Article XI, Section 3 is a clear pronouncement that the Olbiil Era Kelulau (‘OEK’) has authority to regulate state taxation.”).

APPENDIX: SELECTED TEXT OF THE PALAU CONSTITUTION<sup>710</sup>*Article I (Territory), as amended by the Twenty-Sixth Amendment***Section 1**

(a) The Republic of Palau shall have jurisdiction and sovereignty over its territory which shall consist of all the islands, atolls, reefs, and shoals that have traditionally been in the Palauan archipelago, including Ngeruangel Reef and Kayangel Island in the north and Hatohobei Island (Tobi Island) and Hocharihie (Helen's Reef) in the south and all land areas adjacent and in between, and also consist of the internal waters and archipelagic waters within these land areas the territorial waters around these land areas and the airspace above these land and water areas extending to a two hundred (200) nautical miles exclusive economic zone, unless otherwise delimited by bilateral agreements or as may be limited or extended under international law.

(b) The archipelagic baselines, from which the breadths of maritime zones are measured for the Palau Archipelago shall be drawn from the northernmost point of Ngeruangel Reef, thence east to the northernmost of Kayangel Island and around the island to its easternmost point, south to the easternmost point of the Babeldaob barrier reef, south to the easternmost point of Angaur Island and then around the island to its westernmost point, thence north to the reef to the point of origin. The normal baselines, from which the breadths of maritime zones for the Southwest Islands are measured, shall be drawn around the islands of Fanna, Sonsorol (Dongosaro), Pulo Anna and Merir, and the Island of Hatohobei (Tobi Island), including Hocharihie (Helen's Reef).

**Section 2**

(a) The Republic of Palau shall have exclusive ownership and shall exercise its sovereign rights to conserve, develop, exploit, explore, and manage at a sustainable manner, all living and non-living resources within its exclusive economic zone and its continental shelf in accordance with

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<sup>710</sup> Selected text reproduced by and on file with the author. For an official version, consult the Singichi Ikesakes Law Library in Koror, Palau. An unamended English version may be found on the website of the Senate of the Republic of Palau at [www.palauoek.net/senate/legislation/PalauConstitutionEnglish.pdf](http://www.palauoek.net/senate/legislation/PalauConstitutionEnglish.pdf).

applicable treaties, international law and practices. The Republic of Palau shall have exclusive ownership and sovereign jurisdiction over all mineral resources in the seabed, subsoil, water column, and insular shelves within its continental shelf.

(b) Each state shall have exclusive ownership of all living and non-living resources, except highly migratory fish, within the twelve (12) nautical mile territorial sea, provided, however, that traditional fishing rights and practices shall not be impaired.

### **Section 3**

The national government shall have the power to add territory and to extend jurisdiction.

### **Section 4**

Nothing in this Article shall be interpreted to violate the right of innocent passage and the internationally recognized freedom of the high seas.

## *Article II (Sovereignty and Supremacy)*

### **Section 1**

This Constitution is the supreme law of the land.

### **Section 2**

Any law, act of government, or agreement to which a government of Palau is a party, shall not conflict with this Constitution and shall be invalid to the extent of such conflict.

### **Section 3**

Major governmental powers including but not limited to defense, security, or foreign affairs may be delegated by treaty, compact, or other agreement between the sovereign Republic of Palau and another sovereign nation or international organization, provided such treaty, compact or agreement shall be approved by not less than two-thirds (2/3) of the members of each house of the Olbiil Era Kelulau and by a majority of the votes cast in a nationwide referendum conducted for such purpose, provided, that any such agreement which authorizes use, testing, storage or disposal of nuclear, toxic chemical, gas or biological weapons intended for use in warfare shall require approval of not less than three-fourths (3/4) of the votes cast in such

referendum.

*Article III (Citizenship)*

**Section 1**

A person who is a citizen of the Trust Territory of the Pacific Islands immediately prior to the effective date of this Constitution and who has at least one parent of recognized Palauan ancestry is a citizen of Palau.

**Section 2, repealed by the Seventeenth Amendment**

[A person born of parents, one or both of whom are citizens of Palau is a citizen of Palau by birth, and shall remain a citizen of Palau so long as the person is not or does not become a citizen of any other nation.]

**Section 3, repealed by the Seventeenth Amendment**

[A citizen of Palau who is a citizen of another nation shall, within three (3) years after his eighteenth (18) birthday, or within three (3) years after the effective date of this Constitution, whichever is later, renounce his citizenship of the other nation and register his intent to remain a citizen of Palau. If he fails to comply with this requirement, he shall be deprived of Palauan citizenship.]

**Section 4, as amended by the Seventeenth Amendment**

A person born of parents, one or both of whom are citizens of Palau or are of recognized Palauan ancestry, is a citizen of Palau. Citizenship of other foreign nations shall not affect a person's Palauan citizenship.

**Section 5**

The Olbiil Era Kelulau shall adopt uniform laws for admission and exclusion of noncitizens of Palau.

*Article IV (Fundamental Rights)*

**Section 1**

The government shall take no action to deny or impair the freedom of conscience or of philosophical or religious belief of any person nor take any action to compel, prohibit or hinder the exercise of religion. The government shall not recognize or establish a national religion, but may provide assistance to private or parochial schools on a fair

and equitable basis for nonreligious purposes.

### **Section 2**

The government shall take no action to deny or impair the freedom of expression or press. No bona fide reporter may be required by the government to divulge or be jailed for refusal to divulge information obtained in the course of a professional investigation.

### **Section 3**

The government shall take no action to deny or impair the right of any person to peacefully assemble and petition the government for redress of grievances or to associate with others for any lawful purpose including the right to organize and to bargain collectively.

### **Section 4**

Every person has the right to be secure in his person, house, papers and effects against entry, search and seizure.

### **Section 5**

Every person shall be equal under the law and shall be entitled to equal protection. The government shall take no action to discriminate against any person on the basis of sex, race, place of origin, language, religion or belief, social status or clan affiliation except for the preferential treatment of citizens, for the protection of minors, elderly, indigent, physically or mentally handicapped, and other similar groups, and in matters concerning intestate succession and domestic relations. No person shall be treated unfairly in legislative or executive investigations.

### **Section 6**

The government shall take no action to deprive any person of life, liberty, or property without due process of law nor shall private property be taken except for a recognized public use and for just compensation in money or in kind. No person shall be held criminally liable for an act which was not a legally recognized crime at the time of its commission, nor shall the penalty for an act be increased after the act was committed. No person shall be placed in double jeopardy for the same offense. No person shall be found guilty of a crime or punished by legislation. Contracts to which a citizen is a party shall not be impaired by legislation. No person shall be imprisoned for debt. A warrant for search and seizure may not issue except from a

justice or judge on probable cause supported by an affidavit particularly describing the place, persons, or things to be searched, arrested, or seized.

#### **Section 7**

A person accused of a criminal offense shall be presumed innocent until proven guilty beyond a reasonable doubt and shall enjoy the right to be informed of the nature of the accusation and to a speedy, public and impartial trial. He shall be permitted full opportunity to examine all witnesses and shall have the right of compulsory process for obtaining witnesses and evidence on his behalf at public expense. He shall not be compelled to testify against himself. At all times the accused shall have the right to counsel. If the accused is unable to afford counsel, he shall be assigned counsel by the government. Accused persons lawfully detained shall be separated from convicted criminals and on the basis of sex and age. Bail may not be unreasonably excessive nor denied those accused and detained before trial. The writ of habeas corpus is hereby recognized and may not be suspended. The national government may be held liable in a civil action for unlawful arrest or damage to private property as prescribed by law. Coerced or forced confessions shall not be admitted into evidence nor may a person be convicted or punished solely on the basis of a confession without corroborating evidence.

#### **Section 8**

A victim of a criminal offense may be compensated by the government as prescribed by law or at the discretion of the court.

#### **Section 9**

A citizen of Palau may enter and leave Palau and may migrate within Palau.

#### **Section 10**

Torture, cruel, inhumane or degrading treatment or punishment, and excessive fines are prohibited.

#### **Section 11**

Slavery or involuntary servitude is prohibited except to punish crime. The government shall protect children from exploitation.

**Section 12**

A citizen has the right to examine any government document and to observe the official deliberations of any agency of government.

**Section 13, as amended by the Twenty-Second Amendment**

The government shall provide for marital and related parental rights, privileges and responsibilities on the basis of equality between men and women, mutual consent and cooperation. All marriages contracted within the Republic of Palau shall be between a man and a woman. Parents or individuals acting in the capacity of parents shall be legally responsible for the support and for the unlawful conduct of their minor children as prescribed by law.

**Section 14, as added by the Ninth Amendment**

The Olbiil Era Kelulau may provide for a trial by jury in criminal and civil cases, as prescribed by law; provided, however, that where a criminal offense is alleged to have been committed after December 31, 2009, and where such criminal offense is punishable by a sentence of imprisonment of twelve (12) years or more, the accused shall have the right to a trial by jury, as prescribed by law.

**Section 15, as added by the Sixteenth Amendment**

In post secondary education and any institution of higher learning, academic freedom is guaranteed.

**Section 16, as added by the Twenty-Fourth Amendment**

The national government shall provide free preventive health care for every citizen as prescribed by law.

*Article V (Traditional Rights)***Section 1**

The government shall take no action to prohibit or revoke the role or function of a traditional leader as recognized by custom and tradition which is not inconsistent with this Constitution, nor shall it prevent a traditional leader from being recognized, honored, or given formal or functional roles at any level of government.

**Section 2**

Statutes and traditional law shall be equally authoritative. In case of conflict between a statute and a traditional law,

the statute shall prevail only to the extent it is not in conflict with the underlying principles of the traditional law.

**Section 3, as added by the Twenty-First Amendment**

The national government shall take affirmative action to assist traditional leaders in the preservation, protection, and promotion of Palauan heritage, culture, languages, customs and tradition.

*Article VI (Responsibilities of the National Government), as amended by the Twenty-Third Amendment*

The national government shall take positive action to attain these national objectives and implement these national policies: conservation of a beautiful, healthful and resourceful natural environment; promotion of the national economy; protection of the safety and security of persons and property; promotion of the health and social welfare of the citizens through the provision of free or subsidized health care; and provision of public education for citizens which shall be free from grades one (1) to twelve (12) and compulsory as prescribed by law.

*Article VII (Suffrage), as amended by the Eighteenth Amendment*

A citizen of Palau eighteen (18) years of age or older may vote in national and state elections. The Olbiil Era Kelulau shall prescribe a minimum period of residence and provide for voter registration for national elections. Each state shall prescribe a minimum period of residence and provide for voter registration for state elections. A citizen who is in prison, serving a sentence for a felony, or mentally incompetent as determined by a court may not vote. Voting shall be by secret ballot. Voting shall only be by absentee ballot for voters who are outside the territory of Palau during an election.

*Article IX (Olbiil Era Kelulau)*

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**Section 5**

The Olbiil Era Kelulau shall have the following powers:

\* \* \*

12) to regulate the ownership, exploration and exploitation of natural resources;

*Article XI (State Governments)*

**Section 1**

The structure and organization of state governments shall follow democratic principles, traditions of Palau, and shall not be inconsistent with this Constitution. The national government shall assist in the organization of state government.

**Section 2**

All governmental powers not expressly delegated by this Constitution to the states nor denied to the national government are powers of the national government. The national government may delegate powers by law to the state governments.

**Section 3**

Subject to laws enacted by the Olbiil Era Kelulau, state legislatures shall have the power to impose taxes which shall be uniformly applied throughout the state.

**Section 4**

Subject to the approval of the Olbiil Era Kelulau, the state legislatures shall have the power to borrow money to finance public programs or to settle public debt.

*Article XIII (General Provisions)*

**Section 1**

The Palauan traditional languages shall be the national languages. Palauan and English shall be the official languages. The Olbiil Era Kelulau shall determine the appropriate use of each language.

**Section 2, as amended by the Twenty-Fifth Amendment**

The Palauan and English versions of this Constitution shall be equally authoritative; in case of conflict the Palauan version shall prevail.

\* \* \*

**Section 4**

No state may secede from Palau.

**Section 5**

An area which was historically or geographically part of Palau may be admitted as a new state upon the approval of the Olbiil Era Kelulau and not less than three-fourths (3/4) of the states.

**Section 6**

Harmful substances such as nuclear, chemical, gas or biological weapons intended for use in warfare, nuclear power plants, and waste materials therefrom, shall not be used, tested, stored, or disposed of within the territorial jurisdiction of Palau without the express approval of not less than three-fourths (3/4) of the votes cast in a referendum submitted on this specific question.

**Section 7**

The national government shall have the power to take property for public use upon payment of just compensation. The state government shall have the power to take private property for public use upon payment of just compensation. No property shall be taken by the national government without prior consultation with the government of the state in which the property is located. This power shall not be used for the benefit of a foreign entity. This power shall be used sparingly and only as a final resort after all means of good faith negotiation with the land owner have been exhausted.

**Section 8, as amended by the Nineteenth and Twentieth Amendments**

Only citizens of Palau and corporations wholly owned by citizens of Palau may acquire title to land or waters in Palau. Foreign countries, with which Palau establishes diplomatic relations, may acquire title to land for diplomatic purposes pursuant to bilateral treaties or agreements. While non-citizens may not acquire title to land, Palauan citizens may lease land in Palau to non-citizens or corporations not wholly owned by citizens for up to 99 Years.

**Section 9**

No tax shall be imposed on land.

\* \* \*

**Section 11**

The provisional capital shall be located in Koror; provided, that not later than ten (10) years after the effective date of this Constitution, the Olbiil Era Kelulau shall designate a place in Babeldaob to be the permanent capital.

**Section 12**

The national government shall have exclusive power to regulate importation of firearms and ammunition. No persons except armed forces personnel lawfully in Palau and law enforcement officers acting in an official capacity shall have the right to possess firearms or ammunition unless authorized by legislation which is approved in a nationwide referendum by a majority of the votes cast on the issue.

**Section 13**

Subject to Section 12, the Olbiil Era Kelulau shall enact laws within one hundred and eighty (180) days after the effective date of this Constitution:

- 1) providing for the purchase, confiscation and disposal of all firearms in Palau;
- 2) establishing a mandatory minimum imprisonment of fifteen (15) years for violation of any law regarding importation, possession, use or manufacture of firearms.

*First Amendment***Section 14**

(a) To avoid inconsistencies found prior to this amendment by the Supreme Court of Palau to exist between section 324 of the Compact of Free Association and its subsidiary agreements with the United States of America and other sections of the Constitution of the Republic of Palau, Article XIII, section 6 of the Constitution and the final phrase of Article II, section 3, reading “provided, that any such agreement which authorizes use, testing, storage or disposal of nuclear, toxic chemical, gas or biological weapons intended for use in warfare shall require approval of not less than three fourth (3/4) of the votes cast in such referendum,” shall not apply to votes to approve the Compact of Free Association and its subsidiary agreements

(as previously agreed to and signed by the parties or as they may hereafter be amended, so long as such amendments are not themselves inconsistent with the Constitution) or during the terms of such compact and agreements. However, Article XIII, section 6 and the final phrase of Article II, section 3 of the Constitution shall continue to apply and remain in full force and effect for all other purposes, and this amendment shall remain in effect only as long as such inconsistencies continue.

(b) This amendment shall enter into force and effect immediately upon its adoption.

#### *Second Amendment*

A person born of parents, one or both of whom are of recognized Palauan ancestry, is a citizen of Palau by birth. United States citizenship shall not affect a person's Palauan citizenship, nor shall a person of recognized Palauan ancestry be required to renounce United States citizenship to become a naturalized citizen of Palau. Persons of recognized Palauan ancestry who are citizens of other foreign nations may retain their Palauan citizenship or become naturalized Palauan citizens as provided by law. Palauan citizens may renounce their Palauan citizenship. Renunciations made prior to the effective date of this amendment are not affected by this amendment.