

THE SUPREME COURT OF THE FEDERATED STATES OF MICRONESIA: THE FIRST TWENTY FIVE YEARS

By the Honorable Dennis K. Yamase¹

INTRODUCTION

On July 12, 1981, in a cramped and inadequate wooden building shared by two other governmental agencies² in Kolonia, Ponape (now Pohnpei), the Supreme Court of the Federated States of Micronesia (FSM Supreme Court) had already begun hearing cases assigned to it under the Constitution of the Federated States of Micronesia (FSM Constitution).³ At this time, the recently established FSM Supreme Court had just two justices and two temporarily assigned staff, and no courtrooms, offices, or staff of its own in the other three FSM states of Kosrae, Chuuk, and Yap.

From those humble beginnings, the FSM Supreme Court has grown and established its place as one of the three separate, but co-equal branches of the FSM National Government⁴ established under the FSM Constitution.⁵ The Court has helped to provide

¹ Associate Justice, Supreme Court of the Federated States of Micronesia. Associate Justice Yamase served as a legal extern to the Court and the Congress of the Federated States of Micronesia (FSM Congress) while in his second year at the University of Hawai'i Richardson School of Law in the fall of 1981 and then law clerk to the FSM Supreme Court after graduating during 1982. He was a direct participant and observer of the early formative years of the Court. He was sworn in as an Associate Justice of the Court on October 3, 2002.

² Bruce M. Turcott, Note, *The Beginnings of the Federated States of Micronesia Supreme Court*, 5 U. HAW. L. REV. 364-365 (1983). This 1983 note discusses the challenges and logistical problems involved in establishing a new FSM national judicial system during the start-up years of the Court.

³ The Constitution was ratified on July 12, 1978 by Kusaie (now Kosrae), Ponape (now Pohnpei), Truk (now Chuuk), and Yap by majority vote. The Constitution provided that its effective date would be not later than one year after ratification to allow a time for transition to the new constitutional government. The Constitution became effective on May 10, 1979, upon the convening of the First FSM Congress. FSM CONST. art. XVI, § 1.

⁴ The FSM is an independent, sovereign nation made up of the four states of Chuuk, Kosrae, Pohnpei, and Yap. The FSM Constitution and its constitutional government formally came into effect on May 10, 1979. Prior to this, the FSM was part of the Trust Territory of the Pacific Islands (TTPI) under the administration of the United States (U.S.) Government pursuant to a United Nations (U.N.) Trusteeship Agreement for the Formerly Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301. See, DONALD F. MCHENRY, MICRONESIA, TRUST BETRAYED: ALTRUISM VS. SELF-INTEREST IN AMERICAN FOREIGN POLICY (1975). The FSM entered into a Compact of Free Association (Compact) with the U.S. on November 3, 1986. Proclamation of President Tosiwo Nakayama, Nov. 3, 1986; Proclamation No. 5564, 51

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a strong foundation for the young nation and over its first 25 years of existence has proven itself a capable judiciary. The Court has played a significant role in maintaining the rule of law and acting as a guardian of human rights, good governance, and transparency throughout the FSM.⁶

The purpose of this review is to reflect on the Court's first 25 years and to highlight and analyze some of the major legal precedents established by the Court during that time. This review also examines the Court's current status by providing an overview of its

Fed. Reg. 40,399 (Nov. 3, 1986). The trusteeship agreement was terminated in that same year. See, Roger S. Clark, *Self-Determination and Free Association—Should the United Nations Terminate the Pacific Islands Trust?*, 21 HARV. INT'L L. J. 1 (1980); J. Ross Macdonald, *Termination of the Strategic Trusteeship: Free Association, the United Nations and International Law*, 7 BROOKLYN J. INT'L L. 235 (1981). The Compact provides for U.S. economic assistance and defense of the FSM, and other benefits in exchange for U.S. defense and certain other operating rights in and denial of access to FSM territory by other nations, and other agreements. See, Howard L. Hills, *Compact of Free Association for Micronesia: Constitutional and International Law Issues*, 18 INT'L LAWYER 583 (1984). The Compact, amended Compact, and related subsidiary agreements can be accessed at the FSM Joint Committee on Compact Economic Negotiations (JCN) website at <http://www.fm/jcn/>. The FSM was admitted to the U.N. on September 17, 1991. For articles on the FSM's sovereign status, see, Larry Wentworth, *The International Status and Personality of Micronesian Political Entities*, 16 ISLA J. INT'L L. 23-37 (1993); Naomi Hirayasu, *The Process of Self-Determination and Micronesia's Future Political Status Under International Law*, 9 U. HAW. L. REV. 487 (1987).

⁵ The FSM Constitution is reprinted at 5 U. HAW. L. REV. 372 (1983). The Constitution and proposed constitutional amendments from the 1990 and 2001 Constitutional Conventions can be accessed at the FSM Legal Information System (LIS) website at <http://www.fsmlaw.org/fsm/constitution/index.htm>. For an article describing and analyzing the FSM Constitution, see, Alan B. Burdick, *The Constitution of the Federated States of Micronesia*, 8 U. HAW. L. REV. 419 (1986). For an article on the Constitution and the 2001 Constitutional Convention, see, John R. Haglegam, *The FSM Constitution and the 2001 Constitutional Convention*, at <http://comfsm.fm/socscie/johnresearch.htm>.

⁶ The FSM is comprised of approximately 607 small islands in the western Pacific Ocean lying just north of the equator about 2,500 miles southwest of Hawai'i and about 1,800 miles north of eastern Australia above Papua New Guinea. While the land area of the FSM is relatively small at approximately 207 square miles (about four times the size of Washington, D.C.), the FSM exclusive economic zone (EEZ) occupies about a million square miles of Pacific Ocean. The terrain of the islands varies geographically from high mountainous islands to low, coral atolls. The climate is tropical with year round rainfall. The FSM sits on the southern edge of the typhoon belt and is occasionally hit by typhoons. The FSM population is approximately 108,000 (July, 2006 estimate). Central Intelligence Agency, THE WORLD FACTBOOK, (last updated June 6, 2006) at <http://www.odci.gov/cia/publications/factbook/geos/fm.html#Intro>.

operations, facilities, and staff. Finally, this article looks to the future of the Court by discussing some of the challenges facing the Court in the years to come.

I. DESCRIPTION OF THE COURT

A. Structure and Jurisdiction

The FSM Supreme Court is established under FSM Const., art. XI, § 2 as the highest court in the nation. While the Constitution allows for the creation of inferior national courts by statute,⁷ none have yet been enacted by the Congress of the Federated States of Micronesia (FSM Congress).⁸

The Supreme Court consists of a Chief Justice and not more than five associate justices.⁹ All justices are members of both the trial and appellate divisions. Proceedings of the trial division are held by one justice and no justice may sit in the appellate division in reviewing a case heard by him or her in the trial division. At least three justices hear and decide appeals, which are decided by a majority of those sitting.¹⁰ Appeals are heard in the state where the trial was held so as to be accessible to the parties and the public.

The trial division of the Court has original and exclusive jurisdiction in cases involving officials of foreign governments, disputes between FSM states, admiralty and maritime cases,¹¹ and in cases in which the national government is a party, except where

⁷ F.S.M. CONST. art. XI, § 1 states: “The judicial power of the national government is vested in a Supreme Court and inferior courts established by statute.”

⁸ The FSM Congress is the unicameral national legislature of the FSM established pursuant to FSM Const. art. IX (Legislative). The Congress is made up of 14 members, two each from the states of Kosrae and Yap, six from the State of Chuuk, and four from Pohnpei State. The Congress Chamber and offices are located at the National Capitol in Palikir, Pohnpei. The FSM Congress has a website at <http://www.fsmcongress.fm/> that contains selected public laws, resolutions, committee reports, congressional journals, press releases, Congress rules, background information on current and past congressmen and staff, committee composition, public hearing schedules, and other Congress related information.

⁹ FSM CONST. art. XI, § 3. The Court has never had more than three associate justices at any one time, and then only briefly.

¹⁰ *Id.* § 2.

¹¹ The maritime jurisdiction conferred on the Court by the Constitution is not to be decided with reference to the details of U.S. cases and statutes concerning admiralty jurisdiction, but instead with reference to the general maritime law of seafaring nations of the world, and to the law of nations. *Federal Business Dev. Bank v. S.S. Thorfinn*, 4 FSM Intrm.

an interest in land is at issue.¹²

The trial division has concurrent original jurisdiction in cases arising under the Constitution, national law or treaties and in disputes between a state and a citizen of another state, between citizens of different states, and between a state or citizen of a state, and a foreign state, citizen, or subject.¹³

For diversity of citizenship, minimum diversity is required where any plaintiff has a different citizenship from any of the defendants, as opposed to complete diversity where none of the plaintiffs hold the same citizenship as any of the defendants.¹⁴ The diversity jurisdiction provisions of FSM Const. art. XI, § 6(b) do not apply to criminal proceedings.¹⁵

No jurisdiction is conferred on state courts by FSM Const. art. XI, § 6(b), but neither does the diversity jurisdiction of § 6(b) preclude state courts from acting under state law, unless or until a party to the litigation invokes national court jurisdiction.¹⁶ To invoke such jurisdiction in a diversity case, a removal petition must be filed within 60 days of a party's receipt of papers from which his right to remove the case may first be ascertained.¹⁷

The Court's appellate division has jurisdiction to hear cases from an FSM state or local court if the case requires interpretation of the FSM Constitution¹⁸, national law, or a

367, 374 (App. 1990).

¹² FSM CONST. art. XI, § 6(a).

¹³ *Id.* § 6(b).

¹⁴ *Luzama v. Ponape Enterprises Co.*, 7 FSM Intrm. 43, 48 (App. 1995).

¹⁵ *Hawk v. Pohnpei*, 4 FSM Intrm. 85, 94 (App. 1989).

¹⁶ *Id.* at 85, 89.

¹⁷ *Pernet v. Woodruff*, 10 FSM Intrm. 239, 243 (App. 2001). FSM General Court Order 1992-2.

¹⁸ The Court's jurisdiction is derived from the FSM Constitution which grants the appellate division the jurisdiction to review cases heard in state or local courts if they require interpretation of the FSM Constitution, and a state constitution cannot deprive the FSM Supreme Court of this jurisdiction. *Damarlane v. United States*, 8 FSM Intrm. 23, 26-27 (App. 1997).

treaty.¹⁹ The appellate division may review cases on appeal from the highest state court if permitted under the respective state constitution²⁰ even though there is no issue of national law or diversity present. Appeals from the highest state court are authorized under the constitutions of the states of Chuuk²¹ and Kosrae.²²

B. Justices

The current composition of the Court includes the Chief Justice and two associate justices. The justices of the Court are appointed by the FSM President with the approval of two-thirds of the FSM Congress.²³ The justices qualifications are set by statute²⁴ and provides that justices must be at least 30 years old and be either a graduate of an accredited law school and admitted to practice in any jurisdiction, or be a person of “equivalent and extraordinary legal ability obtained through at least five years experience practicing law.”²⁵ The justices serve life terms during good behavior.²⁶

Chief Justice Andon L. Amaraich²⁷ sits in Pohnpei at the National Capitol in Palikir.

¹⁹ FSM CONST. art. XI, § 7.

²⁰ *Id.* § 6(c).

²¹ CHUUK CONST. art. VII, § 4. The Chuuk State Constitution permits such appeals, which, in civil cases, Chuuk statute provides be made by certiorari. *Gustaf v. Mori*, 6 FSM Intrm. 284, 285 (App. 1993). The full text of the Chuuk Constitution and constitutional amendment proposals can be accessed from the FSM LIS website at <http://www.fsmlaw.org/chuuk/constitution/index.htm>.

²² KOSRAE CONST. art. VI, § 6. Decisions of the Kosrae State Court may be appealed to the FSM Supreme Court appellate division. See, *Kosrae v. Langu*, 9 FSM Intrm. 243, 246 (App. 1999). The full text of the Kosrae Constitution and constitutional amendment proposals can be accessed from the FSM LIS website at <http://www.fsmlaw.org/kosrae/constitution/index.htm>.

²³ FSM CONST. art. XI, § 3.

²⁴ *Id.* § 5.

²⁵ 4 F.S.M.C. § 107 (1997). The 1997 FSM Code (updated through P. L. No. 12-12, August 19, 2001) can be accessed from the FSM LIS website at <http://www.fsmlaw.org/fsm/code/index.htm>.

²⁶ FSM CONST. art. XI, § 3.

²⁷ Andon L. Amaraich was nominated by President Bailey Olter for Chief Justice on May 20, 1993. Pres. Comm. No. 8-30 (May 20, 1993)(nominating Andon L. Amaraich for Chief

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At the time of his appointment as Associate Justice he had over 36 years of high level experience in government service which included Clerk of Court, Chief Public Defender, and Assistant District Administrator for the Truk District. Member of the Truk District Congress and Congress of Micronesia where he served as Chairman, Committee on Judiciary and Governmental Operations. He was a member of the Micronesian Political Status Negotiations and Chairman and consultant to the Micronesian Delegation for the U.N. Law of the Sea Conference. He served as legal staff to the Micronesian Constitutional Convention in 1975. He was Chairman, Commission on Future Political Status and Transition and in that capacity served for 15 years as the Chief Negotiator of the Compact of Free Association with the United States. He was the Secretary of the Department of External Affairs with the national government when appointed as Associate Justice of the Court in 1992. In 1994 his nomination as Chief Justice was confirmed by the FSM Congress and he became the first FSM citizen Chief Justice of the FSM Supreme Court.

Associate Justice Martin G. Yinug²⁸ sits in Colonia, Yap. He is a 1980 graduate of Catholic University Law School. Prior to law school he served as an interpreter for the Yap Delegation to the 1975 Micronesian Constitutional Convention and an Administrative Assistant to the Yap Delegation to the Congress of Micronesia from 1972 to 1976. At the time of his appointment he had over 15 years of legal experience which began as Directing Attorney, Micronesian Legal Services Corporation, Yap Office from 1980 to 1982. In 1982, he served as the Floor Leader for the Yap State Constitutional Convention. He served as Legislative Counsel of the Yap State Legislature from 1982 to 1988. In 1990, he served as Floor Leader and Chairman, Committee on Style and Arrangement, Second FSM Constitutional Convention. He served as an Associate Justice of the Yap State Court from 1988 to 1992, when he was confirmed by the FSM Congress as the first FSM citizen Associate Justice of the FSM Supreme Court in 1992.

Associate Justice Dennis K. Yamase²⁹ sits in Weno, Chuuk. He is a 1982 graduate of the University of Hawai'i Richardson School of Law. At the time of his appointment, he

Justice). Chief Justice Amaraich was confirmed by the FSM Congress on December 17, 1994. FSM C. R. No. 8-15.

²⁸ Martin G. Yinug was nominated by President Bailey Olter for Associate Justice on October 17, 1991, Pres. Comm. No. 7-85 (October 17, 1991)(nominating Martin G. Yinug for Associate Justice). Associate Justice Yinug was confirmed by the FSM Congress on December 14, 1991. FSM C. R. No. 7-48.

²⁹ Dennis K. Yamase was nominated by President Leo A. Falcam for Associate Justice on April 9, 2002. Pres. Comm. No. 12-116 (April 9, 2002)(nominating Dennis K. Yamase for Associate Justice). Associate Justice Yamase was confirmed by the FSM Congress on June 25, 2002. FSM C. R. No. 12-43.

had over 20 years of primarily public service legal experience in all three branches of government. He served as a law clerk for the FSM Supreme Court and the Supreme Court of the Republic of Palau (ROP). He served as the Legislative Counsel, Senate of the Olbiil Era Kelulau (ROP National Congress), Executive Secretary, ROP National Code Commission, Legislative Counsel, FSM Congress, Special Legal Counsel to the ROP Vice President/Minister of Administration, and Executive Director of the Commonwealth of the Northern Mariana Islands (CNMI) Law Revision Commission. He developed the FSM Legal Information System (LIS) as a Consultant to the Asian Development Bank (ADB) for the improving access to laws project in the FSM. His experience also includes codification work on the Yap State Code, the FSM Code, the draft Chuuk State Code, the ROP National Code, and the Commonwealth Code for the CNMI.

The Court has had a total of five constitutionally appointed justices. The other two justices, in addition to the three current full time justices listed above, are the first Chief Justice, Edward C. King³⁰ and the first Associate Justice, Richard H. Benson.³¹ Both of these justices were appointed by the first President of the FSM, Tosiwo Nakayama in 1980.

Chief Justice King³² served on the Court until his resignation on June 1, 1992. He is currently the Executive Director of the National Senior Citizens Law Center in Washington, D.C. Associate Justice Benson³³ served on the Court until his retirement on

³⁰ Edward C. King was nominated by President Tosiwo Nakayama for Chief Justice on May 17, 1980. Pres. Comm. No. 1-181 (May 17, 1980)(nominating Edward C. King for Chief Justice). Chief Justice King was confirmed by the FSM Congress on October 24, 1980. FSM C. R. No. 1-96.

³¹ Richard H. Benson was nominated by President Tosiwo Nakayama for Associate Justice on October 31, 1980. Pres. Comm. No. 1-258 (October 31, 1980)(nominating Richard H. Benson for Associate Justice). Associate Justice Benson was confirmed by the FSM Congress on November 8, 1980. FSM C. R. No. 1-137.

³² Chief Justice King was a 1964 graduate of Indiana University School of Law. At the time of his appointment he had 16 years of legal experience, the first six years in private practice at a corporate law firm in Detroit, Michigan and teaching part-time at the University of Detroit Law School. The next 10 years he spent in public service law, including two years as the supervising attorney of the Center for Urban Law and Housing in Detroit, four years as the Deputy Director of the Micronesian Legal Services Corporation in Saipan, CNMI, and four years as the Directing Attorney, then Executive Director, of the National Senior Citizens' Law Center in Washington, D.C.

³³ Associate Justice Benson was a 1956 graduate of the University of Michigan Law School. At the time of his appointment he had over 24 years of legal experience, the first 14 years in private practice in South Carolina and in Guam. During the 10 years prior to his

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July 30, 2001. He is currently a Pro Tem Justice on the Supreme Court of Guam and Pro Tem Judge on the Superior Court of Guam. Senior Justice Benson continues to serve the FSM Supreme Court as a temporary justice on appeals and on trial division cases where the constitutionally appointed justices have found it necessary to recuse themselves.

Each justice has primary responsibility for cases filed in their respective state, with Associate Justice Yinug also responsible for FSM Supreme Court trial division cases in Kosrae. Where a conflict requires a recusal of a justice in a case, another justice will be assigned by the Chief Justice to preside.³⁴

The Court has requested the appointment of another associate justice primarily because it has experienced an increase in situations where justices have had to recuse themselves and found itself in appeal situations where all three of the current full time constitutionally appointed justices have been disqualified.³⁵ Ideally, at least one full time constitutionally appointed justice should sit on all appeals.

The FSM Constitution provides that the Chief Justice may give special assignments to retired FSM Supreme Court justices and judges of state and other courts.³⁶ Justices and judges from outside the FSM Supreme Court have been routinely used on appeals. Over the years, the appellate division has used judges from the Chuuk State Supreme Court, Kosrae State Court, Pohnpei Supreme Court, the Yap State Court, the ROP Supreme Court, the Superior Court of Guam, the Supreme Court of the Northern Mariana Islands (CNMI), the Commonwealth Trial Court (CNMI), the U.S. Ninth Circuit Court of Appeals, the U.S. District Court for the District of Hawaii, and a former justice of Western Samoa.

The usual practice is for the two other constitutionally appointed FSM Supreme Court justices who did not sit at the trial division and one state court justice to sit on an appeal. There have been occasions when all three of the constitutionally appointed justices have been disqualified from an appeal. In a recent case, retired Senior Justice Benson and

confirmation as Associate Justice, he presided over the Island Court of Guam and subsequently the Superior Court of Guam.

³⁴ Factors requiring the disqualification of a justice from a court matter are provided for by statute in 4 F.S.M.C. §124. Justices of the Court must adhere to the Code of Judicial Conduct of the American Bar Association (ABA). 4 F.S.M.C. §122.

³⁵ In 2005, a nominee for associate justice from Chuuk was rejected by the FSM Congress. FSM C. R. No. 14-5. Stand. Comm. Rept. No. 14-37 (Adopted September 20, 2005). Resolution defeated September 29, 2005.

³⁶ FSM CONST. art. XI, § 9(b).

two state court justices sat on an appeal.³⁷

Justices of the Court have also sat on state court matters when requested to do so by the state court.³⁸ Chief Justice Amaraich has sat on a Chuuk State Supreme Court trial division matter. Associate Justice Yinug has sat on Kosrae State Court trial division and Yap State Court appellate division matters. Associate Justice Yamase has sat on Chuuk State Supreme Court trial and appellate division matters,³⁹ as did Senior Justice Benson before him.⁴⁰

C. Administration, Staff, and Facilities

From the Court's humble beginnings 25 years ago when it had just two justices and two temporarily assigned staff, and no presence in the states other than in Pohnpei, the Court now has three justices and 24 full-time staff, and either owns or shares courthouses and offices in each of the four FSM states.

The FSM Supreme Court's main courthouse, offices, and library operations are located at the FSM National Capitol in Palikir, Pohnpei. The Court's permanent staff in Pohnpei include Chief Clerk of Courts Kohsak Keller and two Assistant Clerk of Court/Court Reporters, Director of Administration Kapilly Capelle and one Administrative Officer, Secretary to the Chief Justice Marlyn Tom, General Counsel Craig Reffner and two Staff Attorneys, National Justice Ombudsman John Williams and Pohnpei State Justice Ombudsman Dahker Daniel, a Chief Law Librarian, a Chief of Maintenance, and one maintenance person. The Chief Clerk of Courts also serves as the Clerk of the Appellate Division.

In Chuuk, the Court has a courthouse, offices, and library in Weno, Chuuk that is built on leased private land. The Court's permanent staff in Chuuk include Assistant Clerk

³⁷ Arthur et al. v. FSMDB, App. No. P6-2004.

³⁸ FSM CONST. art. XI, § 10, states: "The Congress shall contribute to the financial support of state judicial systems and may provide other assistance." 4 F.S.M.C. § 115(2), states: "(2) The Justices of the Supreme Court shall make themselves available, to the extent not inconsistent with the proper performance of their duties as Supreme Court Justices, for appointment as temporary judges of State or District courts or assessors on matters of law on State courts."

³⁹ *E.g.* Nikichiw v. O'Sonis, 13 FSM Intrm. 132 (Chk. S. Ct. App. 2005).

⁴⁰ *E.g.* Chuuk v. Arnish, 6 FSM Intrm. 611 (Chk. S. Ct. Tr. 1994); Election Comm'r v. Petewon (Chk. S. Ct. App. 1994); and Cholymay v. Chuuk State Election Comm'n (Chk. S. Ct. App. 2001).

of Court/Court Reporter Rolina Otto, a Secretary/Court Reporter, Chuuk State Justice Ombudsman Harry Narruhn, Staff Attorney Larry Wentworth, and a Webmaster for the FSM Legal Information System (LIS), and a maintenance person.

In Yap, the Court has its own offices and shares a courthouse and library with the Yap State Court in Colonia, Yap. The Court's permanent staff in Yap include Assistant Clerk of Court/Court Reporter Georgia Rungun, Yap State Justice Ombudsman Fidelis Thiyer, and a staff attorney.

In Kosrae, the Court has an office and shares a courthouse and library with Kosrae State Court in Tofol, Kosrae. The Court's permanent staff in Kosrae is Kosrae State Justice Ombudsman Hillman Sigrah who also acts as an assistant clerk of court.

In each state, because the staffs are relatively small, personnel serve multiple roles. Often the assistant clerks of court also serve as legal secretaries and court reporters and the state justice ombudsmen also serve as probation officers, court marshals, bailiffs, and interpreters for court hearings.

The Court has or shares library facilities at each state office, with the largest library at the court building at Palikir, Pohnpei. The library contains the United States Supreme Court and most of the Federal Reporter, Federal Supplement, and Federal Rules Decisions volumes along with the Pacific 2d, and other West regional reporters, American Law Reports, AmJur3d, and United States Code Annotated. The library also contains FSM Public Laws and Congressional Journals, U.S. Law Week, the Supreme Court digest and all three federal digests, Moore's Federal Practice, and various hornbooks and other treatises. The libraries in the other three states are considerably smaller and contain a limited amount of the various legal documents listed above. While legal reference books are limited, the Court utilizes the services of WestLaw for some legal research.

Some of the Court's former staff have moved on to take important positions in the national and state governments and the private sector. Two former national justice ombudsmen have become Pohnpei Supreme Court associate justices, with one of them serving as Chief Justice of a municipal court at the time of his appointment. Former directors of administration have served as Governor of the State of Chuuk, Pohnpei Public Auditor, Lt. Governor of Pohnpei State, national government budget officer, Yap State Senator, and trial counselor in private practice. Many current government and private legal practitioners have served in the past as staff attorneys, law clerks, interns, and externs for the Court over the years.

D. Judicial Functions

Court Rules. The FSM Constitution authorizes the Chief Justice to make, publish, and amend rules governing national courts, including establishing rules of procedure and

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evidence.⁴¹ Judicial rules may be amended by statute.⁴²

The Court has rules of civil, criminal, and appellate procedure, Rules of Evidence, Rules for Admission to Practice, Supplemental Rules for Certain Admiralty and Maritime Claims, Model Rules of Professional Conduct, Disciplinary Rules, Parole Requests and Review Procedures, and Bankruptcy Procedures.⁴³ The Court's rules of procedure, evidence, and bankruptcy are generally modeled after the U.S. federal court rules.

Publication of Judicial Opinions. The selected decisions of the trial division and all decisions of the appellate division of the FSM Supreme Court and the selected decisions of the state courts of Chuuk, Kosrae, Pohnpei, and Yap are published in the 13 volumes of the FSM Supreme Court Interim Reporter.⁴⁴ The states of Chuuk and Pohnpei have independently established state court reporter systems for their decisions,⁴⁵ but these reporters have not been kept updated.

The later FSM Supreme Court decisions are headnoted and a digest containing just over a thousand pages has been produced. An updater has also been established so that the current status of cases can be determined and court decisions interpreting constitutional provisions, statutes, and rules of court can be tracked. The reporter, digest, and updater are kept current by Staff Attorney Larry Wentworth at the Court's Chuuk Office.

⁴¹ FSM CONST. art. XI, § 9(c).

⁴² *Id.* § 9(f).

⁴³ The Court's rules, general court orders, staff, and contact information can be accessed at the FSM LIS website at <http://www.fsmlaw.org/fsm/rules/index.htm>.

⁴⁴ The FSM Supreme Court reporter citation format is: name of the case (underlined), volume number FSM Intrm. page number (state or appellate division; year). Examples are: trial division – FSM v. Boaz (I), 1 FSM Intrm. 22 (Pon. 1981); appellate division – Alaphanso v. FSM, 1 FSM Intrm. 209 (App. 1982); state court appellate division – Narruhn v. Aisek, 13 FSM Intrm. 97 (Chk. S. Ct. App. 2004). Supreme Court decisions can be accessed on the FSM LIS website at <http://www.fsmlaw.org/fsm/decisions/index.htm>.

⁴⁵ The Chuuk State Supreme Court Reports (cited as ___ CSR ___[Year]) was established in 1994 and has one volume of selected appellate division decisions beginning from August 23, 1994. The Pohnpei Supreme Court Reports (cited as ___ P.L.R. ___ for volumes one and two, and ___ P.S.Ct.R. ___ for volumes after two) was established in 1989 and has six volumes of selected trial and appellate division decisions beginning from March 21, 1984.

*FSM Legal Information System (LIS).*⁴⁶ The FSM LIS website was first developed in 2001 as part of a project funded by a Technical Assistance (TA) grant to improve access to laws, from the law and governance program of the Asian Development Bank (ADB).⁴⁷ The LIS website contains the constitutions, statutes, selected court decisions and court rules, and selected rules and regulations of the FSM national government and the four state governments.⁴⁸ Additional legal reference documents include the Trusteeship Agreement for the Formerly Japanese Mandated Islands, the Compact of Free Association, as amended, and its subsidiary agreements, and other governmental authority documents from the TT period, including executive and secretarial orders (Secretary, Department of the Interior) of the U.S . The LIS website has links to other related external websites, as well internal links between documents within the website. The LIS website can be accessed at <http://www.fsmlaw.org/index.htm>.

Selected decisions and other information from the LIS website are also found on the Pacific Legal Information Institute (PacliI) website of the University of South Pacific (USP) Law School at <http://www.pacli.org/>. The PacliI website is hosted out of the USP Law School in Vanuatu where a number of FSM citizens attend its law program.

Interpreters. The FSM has numerous local languages including, but not limited to, Chuukese, Kosraen, Kapingamarangi, Mokilese, Mortlockese, Nukuoran, Pingelapese, Pohnpeian, Ulithian, Woleaian, and Yapese. English usually serves as the common language where a court proceeding involves persons who speak different languages and most proceedings in the Court are conducted in English. This necessitates the use of interpreters. Additionally, the Court may need interpreters when foreign fishermen or foreign businessmen have appeared in court. The clerk of court is normally responsible for providing interpreters.

Transcript Preparation. Proceedings before the Court are recorded with sound equipment and when necessary are transcribed by the Court's assistant clerks of court who

⁴⁶ For a description of the LIS project and how the project was completed, see, Yamase, D. K., *The Law of the Federated States of Micronesia Over the Internet: How to Sustain It?* COMP. L. RES. 7 (2003) at <http://bar.austlii.edu.au/au/other/CompLRes/2003/7.html>.

⁴⁷ The overall objectives of the TA grant were to improve efficiency and responsiveness of the FSM legal systems by making existing and future laws more available to the public and by advancing public understanding of the legal system.

⁴⁸ Dan McMeekin, a Washington, D.C. attorney, who has established the Island Law website at <http://www.macmeekin.com/Links/documents/docsfsm.htm>, had this to say about the FSM LIS website: "The Federated States of Micronesia has established one of the most modern and accessible national online legal resources available anywhere."

also act as court reporters and legal secretaries. This process has produced satisfactory results, but could be improved with the use of more technically advanced recording systems for producing transcripts of court proceedings. Limitations of the current system are that the staff must transcribe in English, a second language, compounded by the need to transcribe unfamiliar legal terms.

Assessors. Assessors may be employed in disputes that raise issues of local law or custom.⁴⁹ Procedures for appointment of assessors were issued on February 24, 1982 in General Court Order (GCO) 1982-1 (February 24, 1982).⁵⁰ Assessors generally haven't been used because they aren't required and circumstances have not arisen to require their use.⁵¹

FSM Law Day. On July 12 of each year the FSM Supreme Court celebrates the anniversary of the Court⁵² by sponsoring the FSM National Law Day Debate. The participating debaters come from high schools in each of the states and debate an issue of contemporary importance to the nation. Each of the debaters receives a post-secondary education scholarship which comes from the Court's budget and private donations. The debates are rotated among the states and are broadcast live by radio across the nation.

E. Legal Practice

Legal practice before the Court is governed by the Rules for Admission to Practice.⁵³

⁴⁹ 4 F.S.M.C. §113, reads, "Any Justice of the Supreme Court may appoint one or more assessors to advise him at the trial of any case with respect to local law or custom or such other matters requiring specialized knowledge. All such advice shall be of record and the assessors shall be subject to examination and cross-examination by any party."

⁵⁰ Amended on November 13, 1985 by GCO 1985-8.

⁵¹ See, *In re Raitoun*, 1 FSM Intrm 561 (App. 1984).

⁵² July 12 is a significant date in FSM history. In addition to the anniversary of the FSM Supreme Court, it is the anniversary date of the original convening of the First Congress of Micronesia on July 12, 1965, the convening of the Micronesian Constitutional Convention on July 12, 1975, and the date of the plebiscite wherein the citizens of the FSM approved the FSM Constitution on July 12, 1978.

⁵³ FSM SUPREME COURT RULES OF ADMISSION TO PRACTICE, § II. These rules were originally promulgated on June 30, 1981. They have been amended on December 28, 1982 by GCO 1982-5, September 2, 1983 by GCO 1983-2, May 9, 1985 by GCO 1985-2, July 11, 1985 by GCO 1985-3, April 10, 1986 by GCO 1986-2, January 17, 1997 by GCO 1997-1, and January 15, 2001 by GCO 2001-1.

The Constitution places control over admission of attorneys to practice before the

These rules provide for admission through written examination⁵⁴ and for an application to appear for a particular case.⁵⁵

The rules provide that an FSM citizen may sit for the written examination upon graduation from law school or from the completion of the Trial Counselor Certificate Program of the College of Micronesia – FSM (COM–FSM). If the graduation is from a law school outside the FSM or the U.S., then a one year period of internship must be completed prior to applying to take the written examination.⁵⁶ Non-FSM citizens may sit for the written examination if they have been admitted to practice in another jurisdiction and have established residency.⁵⁷

Many of the legal practitioners throughout the FSM are trial counselors, many of whom lack formal legal training, but who have practical legal experience and are authorized to practice under the supervision of an attorney through a grandfather clause in the rules of admission.⁵⁸ Trial counselors who acquire legal knowledge mainly through experience may be admitted to practice upon passing the written examination.⁵⁹

Free access to legal services⁶⁰ are made available to FSM citizens in criminal and

national courts, and regulation of the professional conduct of the attorneys, in the Chief Justice, as the chief administrator of the national judiciary. *Carlos v. FSM*, 4 FSM Intrm. 17, 27 (App. 1989).

⁵⁴ *Id.* § II. Written examinations are held semi-annually on the first Thursday in March and August of each year.

⁵⁵ *Id.* § IV. A motion to appear *pro hac vice* requires a Rule II(B) certification as to the morals and character of the applying attorney. *In re Certification of Belgrove*, 8 FSM Intrm. 74, 77 (App. 1997).

⁵⁶ *Id.* § II(A)(2).

⁵⁷ *Id.* § II(C).

⁵⁸ *Id.* § I(B).

⁵⁹ *Id.* § I(A)(3).

⁶⁰ FSM CONST. art. XIII, § 1 states: “The national government of the Federated States of Micronesia recognizes the right of the people to education, health care, and legal services and shall take every step reasonable and necessary to provide these services.”

The Professional Services Clause of the Constitution demands that when any part of the national government contemplates action that may be anticipated to affect the availability of education, health care or legal services, the national officials involved must consider the right of

civil matters through the Office of the Public Defender (PD) and the Micronesian Legal Services Corporation (MLSC),⁶¹ respectively. The PD is funded primarily by appropriation of the FSM Congress and is headed by an FSM citizen attorney who is situated at the National Capitol in Palikir, Pohnpei. The MLSC is supported by the U.S. Legal Aid Society, with additional funds from the national and state governments, and is headed by an FSM citizen attorney who is situated in Saipan, CNMI.

There were concerns in the past regarding the heavy reliance on expatriate attorneys holding key positions in both the national and state governments. In recent years, however, FSM citizen attorneys and trial counselors have come to head most key national and state government legal positions.

Two out of the three justices of the FSM Supreme Court and all state court justices are FSM citizens. The Secretary of the Department of Justice and three of the four state attorney generals (in Chuuk, Pohnpei, and Yap) are FSM citizens. The overall head of the Office of the Public Defender, as well as the heads of three of the four state PD offices (in Chuuk, Kosrae, and Pohnpei) are FSM citizens. The FSM Congress Legislative Counsel is an expatriate, while two out of the four legislative counsel for the state legislatures (in Chuuk and Yap) are FSM citizens. Court attorneys for the FSM Supreme Court and two of the state courts (in Kosrae and Chuuk) are expatriates. The regional head of the MLSC offices in Saipan, as well as the heads of the MLSC offices located in each of the states are FSM citizens.

F. Judicial and Legal Education

The FSM Judicial Education Committee (JEC) composed of the Chief Justices of the FSM national and state courts have formulated a draft “FSM Judicial Education Development Plan for the Judiciaries of the Federated States of Micronesia” (JEDP).⁶² The JEDP includes goals, objectives, and outputs for judicial training programs projected over 10 years. While the JEDP is primarily focused on training initiatives for national, state, and

the people to such services and make a reasonable effort to take "every step reasonable and necessary" to avoid unnecessarily reducing the availability of the services. *Carlos v. FSM*, 4 FSM Intrm. 17, 30 (App. 1989).

⁶¹ The goal of MLSC is to help assure that the Constitutions of Micronesia, which establish judicial systems based on principles of equality and fairness, have real meaning for all, rich and poor alike. MLSC strives to make equal access to civil legal assistance a reality for low-income islanders who have no where else to turn.

⁶² FSM JUDICIAL EDUCATION COUNCIL, FSM JUDICIAL EDUCATION DEVELOPMENT PLAN FOR THE JUDICIARIES OF THE FEDERATED STATES OF MICRONESIA (2005).

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municipal court judges and judicial staff, it also includes components for prosecutors, public defenders, and law enforcement officers.

Primary funding support for training initiatives by the FSM courts will come from judicial training funds included in the Compact of Free Association, as amended in 2003.⁶³ Other training and funding support may come from the Pacific Judicial Council (PJC)⁶⁴ and the Pacific Judicial Development Programme (PJDP)⁶⁵. Both regional organizations have conducted beneficial training programs in which a number of the judges and staff of the FSM courts have participated.

The PJDP conducts a training for trainers program which has so far created a pool of four certified trainers from the FSM national and state courts to improve local in-country training capacity.⁶⁶ These local certified trainers have conducted training programs for the FSM Judicial Conference, the Kosrae Land Court, the Pohnpei Court of Land Tenure, and FSM national and state court clerks. Additional training programs for the municipal courts and other judicial staff training are being planned.

A bench book project has also been started, but has not yet been completed. The bench book project for state and national courts would be a valuable reference tool for the

⁶³ Section 105(i)(2) of U.S. Pub. Law No. 108-188, the Compact of Free Association Amendments Act of 2003 (Compact II), provides for a yearly allocation of \$300,000 for each fiscal year from 2004 to 2023, for the training of judges and officials of the judiciaries of the FSM and the RMI. Approximately \$59,600.00 per year goes to the U.S. Ninth Circuit Court of Appeals for administrative costs related to training programs in the FSM and the Republic of the Marshall Islands (RMI). The remaining funds are divided between the FSM and the RMI.

⁶⁴ The PJC has received support from the U.S. Department of Interior (DOI) and the Ninth Circuit Court of Appeals and includes the courts of the FSM (FSM Supreme Court, Chuuk State Supreme Court, Kosrae State Court, Pohnpei Supreme Court, and Yap State Court), the courts of the RMI, the Republic of Palau Supreme Court, the courts of the CNMI, the courts of Guam, and the courts of American Samoa.

⁶⁵ The PJDP receives its funding support from the Australian Agency for International Development (AusAID) and the New Zealand Agency for International Development (NZAID) and includes the courts of the Cook Islands, FSM, Fiji, Kingdom of Tonga, Kiribati, Nauru, New Zealand, Niue, Papua New Guinea (PNG), RMI, ROP, Samoa, Solomon Islands, Tokelau, Tuvalu, and Vanuatu.

⁶⁶ Associate Justice Yamase and Chief Clerk of Courts Kohsak Keller, Pohnpei Supreme Court Associate Justice Benjamin Rodriguez, and Kosrae State Court Chief Justice Aliksa B. Aliksa have been certified by the PJDP training for trainers program and have conducted local training programs.

training of judges and court staff.

In the next several years, it is anticipated that as many as ten additional judge and staff trainers from the FSM courts will complete the program and become certified trainers. This will significantly increase local capacity to conduct training programs and is necessary because of the various language barriers, especially in judges and staff from the municipal and local courts.

The Court tries to conduct yearly FSM Judicial Conferences which are rotated among the four states which include training programs for national and state court judges and judicial staff on various topics selected by the JEC. Every other year, FSM national and state court judges and staff participate in a PJC Judicial Conference which includes judicial training programs. The venue of the PJC Judicial Conference is rotated among PJC member countries and entities.

The JEDP provides for training for municipal and land court judges and their staff. Pohnpei has a Court of Land Tenure⁶⁷ and Kosrae has a Land Court.⁶⁸ There are 40 municipalities in Chuuk,⁶⁹ 11 municipalities in Pohnpei,⁷⁰ and 28 municipalities in Yap.⁷¹ All judges at the municipal level are lay judges, most have limited English speaking abilities and little training or background in the law, conducting court proceedings, and handling court administrative matters. The greatest training need in the FSM courts are with this group of municipal judges and their judicial staff.

⁶⁷ S.L. No. 3L-99-95, §§17-1 to 17-19.

⁶⁸ KOSRAE STATE CODE, tit. 11, part 1, chap. 6. The Kosrae State Code (1997 Revision) can be accessed at the FSM LIS website at <http://www.fsmlaw.org/kosrae/code/index.htm>.

⁶⁹ CHUUK CONST. art. XIII, § 2. The municipal courts shall consist of one full-time judge, but a municipality may have more than one judge. Appointment is made by the mayor with the advice and consent of the municipal council. The municipal court may not adjudicate a case in which the amount in controversy exceeds \$1,000, or a criminal case where the maximum punishment which may be imposed exceeds a fine of \$1,000, or imprisonment for more than one year, or both.

⁷⁰ POHNPEI CONST. art. 14, § 1. The full text of the Pohnpei Constitution can be accessed at the FSM LIS website at <http://www.fsmlaw.org/pohnpei/constitution/index.htm>.

⁷¹ YAP CONST. art. VIII; 5 YSC § 301. The full text of the Yap Constitution can be accessed at the FSM LIS website at <http://www.fsmlaw.org/yap/constitution/index.htm>. The draft 2000 Yap State Code can be accessed at the FSM LIS website at <http://www.fsmlaw.org/yap/code/index.htm>.

The Court is involved in training of legal practitioners and has had various Court legal staff and justices teaching various courses for the Trial Counselor Certificate Program of the COM–FSM. The program involves 30 credit hours of basic legal courses leading up to certification as a trial counselor. Certified graduates of this program are eligible to take the FSM Supreme Court written examination for admission to practice before the Court.⁷² This program has had success in Pohnpei and Kosrae, as graduates of the program have passed the FSM Supreme Court written examination. Unfortunately, because of a lack of funding and other support for students and the program in Chuuk, the program has yet to graduate any students there. Of all the states, Chuuk has the greatest need for legal practitioners before the Court.

The Court in Chuuk has also participated in the placement component of the Professional Diploma in Legal Practice of the Institute of Justice and Applied Legal Studies, University of the South Pacific in Suva, Fiji. In the summer of 2006, a law student from Chuuk was working with the justice and staff attorney on legal assignments and court observation to meet the requirements of the program. In the past, the Court has hosted legal externs from the law school in Port Moresby, Papua New Guinea, and the University of Hawai'i Richardson School of Law.

II. ASSESSMENT OF THE JUDICIARY

The FSM Judiciary Act of 1979⁷³ set forth the organization and composition of the Court, the qualification of the justices, and the general powers of the Court. The FSM Supreme Court was certified as operational on May 5, 1981 by TT High Court Chief Justice Harold W. Burnett.⁷⁴

In its formative years, Chief Justice King and Associate Justice Benson established a solid foundation for the Court. An enormous amount of work was put in to begin the new FSM national judicial system, including, but not limited to promulgating rules of procedure and practice, arranging for and obtaining facilities and staff, creating filing, case management, and case reporter systems, establishing and developing the jurisprudence for the new nation, assisting the state courts in their start-up, and conducting training for judicial staff and for state court judges and their staff.

Transition matters also preoccupied the Court in its early years with conflicts arising

⁷² FSM RULES OF ADMISSION TO PRACTICE, § II(A)(4).

⁷³ 4 F.S.M.C. §§ 101-125 (1997).

⁷⁴ Letter from Harold W. Burnett to Edward C. King (May 5, 1981)(certifying the FSM Supreme Court).

between the newly established independent FSM judicial system and the TT High Court.⁷⁵ Some of the early transition problems ranged from the sharing of judiciary facilities to the TT High Court's retention of final appellate review of FSM Supreme Court decisions by way of writ of certiorari.⁷⁶

In spite of these early transitional challenges and having to deal with the significant distances between FSM states, diversity in ethnicity, language, and culture, the limitations imposed by the FSM's geographical isolation and remoteness, and a lack of basic infrastructure development, observers of the Court recognized that Chief Justice King and Associate Justice Benson had developed a capable court system. In a congressional resolution thanking Chief Justice King, it was stated that “. . . Chief Justice King, with the invaluable assistance of his wife Joan, has weathered some difficult times, but has never wavered from his devotion and hard work to set up a solid foundation for the National Judiciary”.⁷⁷

Law professor and legal scholar, Brian Z. Tamanaha, who worked in Yap as an Assistant Attorney General and has written extensively on Micronesian law observed that, “Steadily and with industrious effort, Judge King, along with Judge Benson, has developed a stable national court system for the FSM.”⁷⁸

Under Chief Justice Amaraich and Associate Justice Yinug, the Court continued to provide a solid, stable judiciary and further built upon the foundation laid by their predecessors. Chief Justice Amaraich has emphasized alternative dispute resolution methods for court cases. He is also implementing training initiatives for the FSM Supreme Court, as well as FSM state and municipal courts.⁷⁹ He has also put into place projects which have helped the Court keep up with changes in computer technology and the internet. The FSM LIS website project and the acquisition and networking of computers in the Court's office in Pohnpei are examples.

⁷⁵ Secretarial Order No. 3039, § 5(b).

⁷⁶ Addison M. Bowman, *Legitimacy and Scope of Trust Territory High Court Power to Review Decisions of Federated States of Micronesia Supreme Court: The Otokichy Cases*, 5 U. HAWAII L. REV. 57 (1983).

⁷⁷ FSM C. R. No. 7-92 (Adopted May 18, 1992).

⁷⁸ Brian Z. Tamanaha, *Understanding Law in Micronesia - An Interpretive Approach to Transplanted Law*, Studies in Human Society at 57 (1993).

⁷⁹ Chief Justice Amaraich sits on the Executive Committee that oversees the programs of the Pacific Judicial Development Programme.

The Court has also developed its court reporter system, including its updater and digest to a high degree and importantly has kept it maintained and updated. The FSM LIS website has helped assure wide accessibility and transparency to the nation's basic legal documents including the constitutions, statutes, court rules and decisions, and other governmental authority documents.

In 2004, a Transparency International National Integrity Systems report observed that, "The FSM justice system reflects the robustness of its American counterparts." The report further went on to observe that, ". . . the judiciary and legal system are generally seen to be unaffected by corruption."⁸⁰

The Executive Director of the Micronesian Seminar, a long time Micronesia observer and respected scholar, Francis X. Hezel, SJ,⁸¹ spoke of the judiciaries of the FSM, the RMI, and the ROP, stating that: "The judicial systems in these governments are well organized and the personnel is highly respected . . . the national justice systems in Palau and the FSM are looked upon as incorruptible."⁸²

III. MAJOR DECISIONS

The following are descriptions and discussions of some of the major decisions of the Court⁸³ over the past 25 years. In its early years the Court dealt with establishing basic legal principles and standards that it would apply in its decisions.⁸⁴ The Court carefully laid

⁸⁰ Hill, Edward R., Transparency International, Country Study Report, Federated States of Micronesia, at 20 (2004).

⁸¹ Father Hezel is the Executive Director of the Micronesian Seminar (MicSem) and has written extensively on social issues facing the Micronesian entities and their people. MicSem is a research-pastoral institute founded by the Catholic Church in 1972. Its main mission is community education and for 30 years, MicSem has served the people of the FSM, ROP, RMI, and the CNMI. MicSem was officially turned over to the Jesuits of Micronesia in 1992, and is currently registered as a non-profit organization in the FSM. MicSem's goal is to assist the people of Micronesia in reflecting on life in their islands under the impact of change in recent years. MicSem has a website at <http://www.micsem.org/home.htm>.

⁸² Hezel, Francis X., *Micronesian Governance: A View from Outside*, Micronesian Counselor, (April 2005).

⁸³ An index of the first 27 opinions and orders of the FSM Supreme Court are found in 5 U. HAW. L. REV. 391-409 (1983).

⁸⁴ See generally, Brian Z. Tamanaha, *Looking at Micronesia for Insights About the Nature of Law and Legal Thinking*, 41 AM. J. COMP. L. 9, 32-33 (1993).

out its reasoning in its early decisions so as to establish a solid foundation for future Court rulings.

In some of its earliest decisions, the Court addressed the basic legal standards and concepts to be applied in criminal cases.⁸⁵

Standard of Proof in Criminal Cases; Due Process. In the first appeal case to the appellate division of the FSM Supreme Court, the Court ruled on what standard of proof to apply in criminal cases under the FSM Constitution's due process clause.⁸⁶ The appellate court upheld a criminal conviction for assault with a dangerous weapon and in doing so affirmed the trial court's use of the beyond a reasonable doubt standard,⁸⁷ stating that many of the concepts and actual words and phrases employed in the FSM Constitution's Declaration of Rights⁸⁸ are derived from the U.S. Constitution's Bill of Rights. Alaphonso v. FSM, 1 FSM Intrm. 209, 211 (App. 1982).

Probable Cause. After prosecution has been initiated, the Court may dismiss litigation if there is no probable cause to believe that a crime has been committed or that the defendant has committed it. FSM v. Carl, 1 FSM Intrm. 1 (Pon. 1981).

Prosecutorial Discretion. Under the constitutional legal system, a decision as to whether to initiate, continue or terminate a particular criminal prosecution is, with limited

⁸⁵ Prior to 1990, the national government was provided authority to legislate concerning major crimes pursuant to FSM Const., art. IX, § 2(p). The FSM Congress had enacted the National Criminal Code providing that any crime permitting incarceration for three years or more was a major crime. 11 F.S.M.C. §§ 101-1401. In 1990, a constitutional amendment was passed to restrict the legislative power of the Congress to designate "national" instead of major crimes. Proposal 90-13, S.D. 1 (adopted Aug. 29, 1990). This amendment effectively shifted most of the major crimes jurisdiction to the states. P. L. No. 11-72, the Revised Criminal Code, codified at 11 F.S.M.C. chapters 1 to 10 and 12 (1997) was signed into law by the President on January 25, 2001.

⁸⁶ FSM CONST. art. IV, § 3 states: "A person may not be deprived of life, liberty, or property without due process of law, or be denied the equal protection of the laws."

⁸⁷ The Court discussed the three reasons for upholding the reasonable doubt standard as set forth in the U.S. Supreme Court case of *In re Winship*, 397 U.S. 358, 378, 90 S. Ct. 1068, 1080, 25 L. Ed. 2d 368, 383 (1970) (Black, J., dissenting): (1) use of the standard in almost all common law jurisdictions; (2) historically grounded right developed to safeguard men from unjust convictions; and (3) a standard which would command the respect and confidence of the community in the application of the criminal law. Alaphonso, 1 FSM Intrm. at 219-223.

⁸⁸ FSM CONST. art. IV.

exceptions, within the discretion of the prosecutor. Nix v. Ehmes, 1 FSM Intrm. 114 (Pon. 1982).

Vagueness. A criminal statute must not be so vague and indefinite as to fail to give fair notice of what acts will be punished but the right to be informed of the nature of the accusation does not require absolute precision or perfection of criminal statutory language. Laion v. FSM, 1 FSM Intrm. 503, 507 (App. 1984).

Lesser Included Offense. A trial court may in its discretion permit a case involving separate charges based upon the same act to proceed to trial. The court, however, should render a decision and enter a conviction only on the more major of the crimes proven beyond a reasonable doubt. After appeal, if any, has been completed, and the greater charge is reversed, the trial court may then find it necessary to enter a judgment on the lesser charge. Laion v. FSM, 1 FSM Intrm. 503, 529 (App. 1984).

Constitutional Law; Criminal Law and Procedure. The Chapman rule, which holds that a constitutional error can be found harmless only when it is harmless beyond a reasonable doubt, is suitable for the FSM. Jonah v. FSM, 5 FSM Intrm. 308, 314 (App. 1992).

Criminal Law and Procedure; Right to Confront Witnesses. A criminal conviction of a defendant who has failed to appear for trial violates the accused's constitutional right to confront witnesses against him, and other rights, such as due process and the effective assistance of counsel, may also be implicated.⁸⁹ But a defendant who appears at the beginning of trial and voluntarily absents himself before the trial's end waives any further right to be present. Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 471, 477 & n.7 (App. 1996).

Criminal Law and Procedure; Right to Counsel. Defense counsel's performance must be both deficient and prejudicial to the defendant to be ineffective assistance. Under the first prong of the test, the proper standard for attorney performance is that of reasonably effective assistance, and under the second prong, an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment, but in certain contexts prejudice is presumed. Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 471, 478 (App. 1996).

⁸⁹ FSM CONST. art. IV, § 6 states: "The defendant in a criminal case has a right to a speedy public trial, to be informed of the nature of the accusation, to have counsel for his defense, to be confronted with the witnesses against him, and to compel attendance of witnesses in his behalf."

Constitutional Law; Ex Post Facto Laws. The concept of *ex post facto* laws⁹⁰ is limited to legislation which does any of the following: 1) makes criminal and punishable an act innocent when done; 2) aggravates a crime, or makes it greater than it was when committed; 3) increases the punishment for a crime and applies the increase to crimes committed before the enactment of the laws; or 4) alters the legal rules of evidence so that testimony insufficient to convict for the offense when committed would be sufficient as to that particular offense and accused person. The ban on *ex post facto* law applies, however, to criminal acts only. This means retroactive noncriminal laws may be valid. Robert v. Mori, 6 FSM Intrm. 394, 400 (App. 1994).

Search and Seizure. For purposes of FSM Const., art. IV, § 5⁹¹ protection, a search is any governmental intrusion into an area where a person has a reasonable expectation of privacy. Thus, the constitutional protections do not attach unless the search or seizure can be attributed to governmental conduct and the defendant had a reasonable expectation of privacy in the items searched. FSM Social Sec. Admin. v. Weilbacher, 7 FSM Intrm. 137, 142 (Pon. 1995).

Constitutional Law; Search and Seizure; Arrest. A police officer making an arrest has a limited right to conduct a search incident to that arrest. This right to search is for the limited purposes of preventing the arrested person from reaching concealed weapons to injure the officer or others, and from destroying evidence. Although the right to search is of limited scope, it plainly authorizes a reasonable search of the person being arrested. Ludwig v. FSM, 2 FSM Intrm. 27, 34 (App. 1985).

Criminal Law and Procedure; Sentencing. The National Criminal Code⁹² does not contemplate routine application of the maximum or any other specific punishment but instead requires individualized sentencing, that is, court consideration of a broad range of alternatives, with the court's focus at all times on the defendant, the defendant's background and potential, and the nature of the offense, with the "overall objective" of the exercise of discretion being to "make the punishment fit the offender as well as the offense." Tammed v. FSM, 4 FSM Intrm. 266, 272-73 (App. 1990).

⁹⁰ FSM CONST. art. IV, § 11 states: "A bill of attainder or ex post facto law may not be passed."

⁹¹ FSM CONST. art. IV, § 5 states: "The right of the people to be secure in their persons, houses, papers, and other possessions against unreasonable search, seizure, or invasion of privacy may not be violated. A warrant may not issue except on probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized."

⁹² The National Criminal Code has been replaced by the Revised Criminal Code Act (P.L. No. 11-72) at 11 F.S.M.C. chapters 1 to 10 and 12.

Criminal Law and Procedure; Judgments. A judgment that is reversed and remanded stands as if no trial has yet been held. A party whose convictions have been reversed stands in the position of an accused who has not yet been tried. Ting Hong Oceanic Enterprises v. Supreme Court, 8 FSM Intrm. 1, 5 (App. 1997).

The Court also addressed how it would analyze cases in light of the judicial guidance clause⁹³ and dealt with attempts to deal with issues of custom and tradition. The Court was criticized in its early years for too heavy a reliance on U.S. precedent and for a lack of the development of a system of indigenous jurisprudence.⁹⁴

Judicial Guidance Clause; Court's Analysis. In the context of the disputes here concerning the meaning of a contractual provision and possible liability for negligence, the judicial guidance clause imposes the following requirements on the Court's analysis. First, in the unlikely event that a constitutional provision bears upon the case, that provision would prevail over any other source of law. Second, any applicable Micronesian custom or tradition would be considered and the Court's decision must be consistent with it. If there is no directly applicable constitutional provision, custom or tradition, or if those sources are insufficient to resolve all issues in the case, then the Court may look to the law of other nations. Any approach drawn from those other sources, however, must be consistent with the letter and spirit of the Constitution as well as principles of, and values inherent in, Micronesian custom and tradition. Even then, the approach selected for the common law of the FSM should reflect sensitive consideration of the "pertinent aspects of Micronesian society and culture," including Micronesian values and the realities of life here in general and the nation-building aspirations set forth in the Preamble of the Constitution in particular.⁹⁵ Semens v. Continental Air Lines, Inc., 2 FSM Intrm. 131, 139 (Pon. 1985).

⁹³ FSM CONST. art. XI, § 11 states: "Court decisions shall be consistent with this Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia. In rendering a decision, a court shall consult and apply sources of the Federated States of Micronesia."

⁹⁴ Brian Z. Tamanaha, *A Proposal for the Development of a System of Indigenous Jurisprudence in the Federated States of Micronesia*, 13 HASTINGS INT'L AND COMP. L. REV. 71, 94-106 (1989).

⁹⁵ The Preamble of the Constitution states:
"WE, THE PEOPLE OF MICRONESIA, exercising our inherent sovereignty, do hereby establish this Constitution of the Federated States of Micronesia.
*With this Constitution, we affirm our common wish to live together in peace and harmony, to preserve the heritage of the past, and to protect the promise of the future.
To make one nation of many islands, we respect the diversity of our cultures. Our differences enrich us. The seas bring us together, they do not separate us. Our islands sustain us, our island nation enlarges us and makes us stronger.*

Judicial Guidance Clause; Precedent; Contracts; Torts. Common law decisions of the U.S. are an appropriate source of guidance for this Court for contract and tort issues unresolved by statutes, decisions of constitutional courts here, or custom and tradition within the FSM. Review of decisions of courts of the U.S., and any other jurisdictions, must proceed however against the background of "pertinent aspects of Micronesian society and culture." Semens v. Continental Air Lines, Inc., 2 FSM Intrm. 131, 142 (Pon. 1985).

*Custom and Tradition.*⁹⁶ The duty of a national court justice to give full and careful consideration to a request to consider a particular customary practice or value in arriving at a decision requires careful investigation of the nature and customary effect of the specific practice at issue, a serious effort to reconcile the custom and tradition with other constitutional requirements, and an individualized decision as to whether the specific custom or tradition should be given effect in the particular contexts of the case before the court. Tammed v. FSM, 4 FSM Intrm. 266, 279 (App. 1990).

Custom and Tradition; Criminal Procedure; Sentencing. Sentencing courts are not free to bar from considering beatings that were grounded upon, or were products of custom and tradition when considering sentencing, and failure to consider the customary implications of those beatings violates not only the implicit statutory requirement of individualized sentencing, but also mandate of 11 F.S.M.C. 1003, enacted pursuant to FSM

Our ancestors, who made their homes on these islands, displaced no other people. We, who remain, wish no other home than this. Having known war, we hope for peace. Having been divided, we wish unity. Having been ruled, we seek freedom.

Micronesia began in the days when man explored seas in rafts and canoes. The Micronesian nation is born in an age when men voyage among stars; our world itself is an island. We extend to all nations what we seek from each: peace, friendship, cooperation, and love in our common humanity. With this Constitution we, who have been the wards of other nations, become the proud guardian of our own islands, now and forever."

⁹⁶ 11 F.S.M.C. §108 requires consideration of customary law in criminal proceedings and states:

§ 108. Customary law.

(1) Generally accepted customs prevailing within the Federated States of Micronesia relating to crimes and criminal liability shall be recognized and considered by the national courts. Where conflicting customs are both relevant, the court shall determine the weight to be accorded to each.

(2) Unless otherwise made applicable or given legal effect by statute, the applicability and effect of customary law in a criminal case arising under this act shall be determined by the court of jurisdiction in such criminal case.

(3) The party asserting applicability of customary law has the burden of proving by a preponderance of the evidence the existence, relevance, applicability, and customary effect of such customary law.

Const., art. V, § 2,⁹⁷ as well as the judicial guidance clause. Tammed v. FSM, 4 FSM Intrm. 266, 278 (App. 1990).⁹⁸

Judicial Guidance Clause; Social Configuration of Micronesia. Resistance to what was thought to be an invalid search warrant is contrary to social configuration of FSM which prefers peaceful dispute settlement. FSM v. Wainit, 11 FSM Intrm. 424, 436-37 (Chk. 2003).

The Court has ruled on issues of whether there is a case or dispute, whether a case is justiciable, whether the parties have standing, and whether a case is moot or ripe for adjudication.

Constitutional Law; Case or Dispute; Constitutional Law Case or Dispute; Mootness. A case must be one appropriate for judicial determination, that is, a justiciable controversy, as distinguished from a difference or dispute of a hypothetical or abstract character, or one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. FSM v. Louis, 9 FSM Intrm. 474, 482 (App. 2000).

Constitutional Law; Case or Dispute; Mootness. The FSM Supreme Court's lack of jurisdiction over, or inability to decide, a moot case is firmly rooted in the FSM Constitution's requirement that there be a case or a dispute. A case or dispute becomes moot when the parties lack a legally cognizable interest in the outcome. If an appellate court finds that any relief it could grant would be ineffectual, it must treat the case as moot. FSM v. Louis, 9 FSM Intrm. 474, 482 (App. 2000).

Appellate Review; Decisions Reviewable; Constitutional Law; Case or Dispute; Mootness. Under an exception to the mootness doctrine, when the court's rulings will have a continuing effect on future events and future litigation and will offer guidance to future litigants, which should have the positive effect of eliminating or lessening unwarranted attempts at interlocutory appeals, thus conserving judicial resources, the court will review the matter. FSM Dev. Bank v. Adams, 12 FSM Intrm. 456, 460 (App. 2004).

⁹⁷ FSM CONST. art. V, § 2 states: "The traditions of the people of the Federated States of Micronesia may be protected by statute. If challenged as violative of Article IV, protection of Micronesian tradition shall be considered a compelling social purpose warranting such governmental action."

⁹⁸ For an analysis of the Court's decision dealing with sentencing, and custom and tradition, see, Ankush Sharma, *Customary Law and Received Law in the Federated States of Micronesia*, Journal of South Pacific Law, Vol. 10 2006 – Issue 1. This article can be accessed at <http://www.paclii.org/journals/fJSPL/index.shtml>.

Constitutional Law; Case or Dispute; Standing. Two factors are central to the determination of whether a party has standing. First, the party must allege a sufficient stake in the controversy's outcome and it must have suffered some threatened or actual injury resulting from the allegedly illegal action or erroneous court ruling. Second, the injury must be such that it can be traced to the challenged action and must be of the kind likely to be redressed by a favorable decision. While not constitutionally based, three additional rules need to be applied before the question of standing can be resolved. First, generalized grievances shared by substantially the whole population do not normally warrant standing. Second, even when an injury sufficient to satisfy the constitutional requirement is alleged, the party generally must assert its own legal rights and interests, and cannot rest its claim to relief on the legal rights or interests of third parties. Third, the interests which the party is seeking to protect must fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. FSM v. Udot Municipality, 12 FSM Intrm. 29, 40 (App. 2003).

Constitutional Law; Case or Dispute; Ripeness. An objection based on lack of ripeness in a case concerning appropriated funds that have not yet been distributed cannot prevail when the manner of the funds' distribution appears (at this stage of the proceedings) to violate the Constitution. Udot Municipality v. FSM, 9 FSM Intrm. 560, 562-63 (Chk. 2000).

Political Question; Justiciability. Where there is in the Constitution a textually demonstrable commitment of the issue to a coordinate branch of government, such as Congress being the sole judge of the elections of its members, it is a nonjusticiable political question not to be decided by the Court because of the separation of powers provided for in the Constitution. Aten v. National Election Comm'r (III), 6 FSM Intrm. 143, 145 (App. 1993).

The Court has issued decisions dealing with the due process clause under the Constitution.⁹⁹

Constitutional Law; Due Process. The fundamental concept of procedural due process is that the government may not be permitted to strip citizens of "life, liberty or property" in an unfair, arbitrary manner. Before such important individual interests are exposed to possible governmental taking or deprivation, the Constitution requires that the government follow procedures calculated to assure a fair and rational decision making process. Panuelo v. Amayo, 12 FSM Intrm. 365, 374 (App. 2004).

Extradition; Constitutional Law; Due Process. A person for whom extradition is

⁹⁹ FSM CONST. art. IV, § 3.

sought must be brought before a justice that evidence of his criminality may be heard and considered so that he may be certified as extraditable. Such a person is entitled to notice of the hearing and an opportunity to be heard and to effective assistance of counsel. In re Extradition of Jano, 6 FSM Intrm. 93, 99 (App. 1993).

Constitutional Law; Due Process. Only in extraordinary circumstances where immediate action is essential to protect crucially important public interests, may private property be seized without a prior hearing of some kind. Semes v. FSM, 4 FSM Intrm. 66, 74 (App. 1989).

Constitutional Law; Due Process; Public Officers and Employees. The National Public Service System Act¹⁰⁰ and the FSM Public Service System Regulations establish an expectation of continued employment for nonprobationary national government employees by limiting the permissible grounds and specifying necessary procedures for their dismissal; this is sufficient protection of the right to continued national government employment to establish a property interest for nonprobationary employees which may not be taken without fair proceedings, or "due process." Semes v. FSM, 4 FSM Intrm. 66, 73 (App. 1989).

Attorney, Trial Counselor and Client; Attorney Discipline and Sanctions; Constitutional Law; Due Process. A hearing cannot qualify as the full evidentiary hearing contemplated by Disciplinary Rule 5(b) when the decision finding the allegations of misconduct proven had been made and announced before the hearing was held. Such a hearing must take place before the decision is made. Otherwise it is a denial of due process. In re Attorney Disciplinary Proceeding, 9 FSM Intrm. 165, 174 (App. 1999).

Constitutional Law; Due Process; Notice and Hearing; Judgments. The basic tenets of due process of law are notice and an opportunity to be heard. As applied to judgments, this means that a judgment may not be rendered in violation of these constitutional limitations and guaranties. An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated to apprise interested parties of the pendency of the action, which is itself a corollary to another requisite of due process, the right to be heard. Hartman v. Bank of Guam, 10 FSM Intrm. 89, 96-97 (App. 2001).

Civil Procedure; Constitutional Law; Due Process; Judgments. When someone is accorded none of these due process guarantees with respect to a "judgment" against it, the judgment and ensuing order in aid of judgment and writ of execution are void as a matter of law, and these procedural infirmities inherent in the judgment are subject to attack at any

¹⁰⁰ 52 F.S.M.C. chap 1 (1997).

time, and thus are outside the adjudicative framework established by the rules of procedure. Hartman v. Bank of Guam, 10 FSM Intrm. 89, 97 (App. 2001).

The Court has issued decisions interpreting the Constitution's equal protection clause.¹⁰¹

Constitutional Law; Equal Protection. The constitutional guarantees of equal protection apply if the discrimination is based on the individual's membership in one of the classes enumerated in FSM Const., art. IV, § 4, or if the discrimination affects a "fundamental right." The law is then subject to a strict scrutiny review, under which it will be upheld only if the government can demonstrate that the classification upon which that law is based bears a close rational relationship to some compelling governmental interest. But if the law does not concern an enumerated class or a fundamental right, the question becomes whether the classification is rationally related to a legitimate governmental purpose. FSM Social Sec. Admin. v. Weilbacher, 7 FSM Intrm. 137, 146 (Pon. 1995).

Constitutional Law; Equal Protection. The equal protection analysis and standards that apply to a discriminatory law also apply to a neutral and non-discriminatory law when it is being applied in a discriminatory fashion. FSM Social Sec. Admin. v. Weilbacher, 7 FSM Intrm. 137, 146 (Pon. 1995).

Constitutional Law; Equal Protection; Criminal Law and Procedure; Sentencing. Under the equal protection clause of the declaration of rights in the FSM Constitution, indigency alone should not disadvantage an accused in our system of criminal justice. Gilmete v. FSM, 4 FSM Intrm. 165, 169 (App. 1989).

The Court has determined it has the constitutional power and responsibility to review challenged statutes and to set them aside if they are found to be in violation of the Constitution. The Court has ruled a number of national statutes unconstitutional.

Courts; Judicial Powers. The FSM Supreme Court has the constitutional power and obligation to review legislative enactments of Congress and to set aside national statutes to the extent they violate the Constitution. Constitutional Convention 1990 v. President, 4 FSM Intrm. 320, 324 (App. 1990).

Courts Judges; Separation of Powers Legislative Powers. Congress may not remove at its discretion a justice temporarily assigned to a case any time after that justice has served 90 days because any such resolution and the statute upon which it is based, 4

¹⁰¹ FSM CONST. art. IV, § 4 states: "Equal protection of the laws may not be denied or impaired on account of sex, race, ancestry, national origin, language, or social status."

F.S.M.C. 104(2) violate FSM Const. art. IX, § 7.¹⁰² Urusemal v. Capelle, 12 FSM Intrm. 577, 587 (App. 2004).

Criminal Law and Procedure; Major Crimes; Criminal Law and Procedure National Crimes. The 1991 constitutional amendment that changed the word "major" to the word "national" narrowed Congress's power by allowing it to define national crimes instead of major crimes and prescribe penalties, having due regard for local custom and tradition. Jano v. FSM, 12 FSM Intrm. 569, 573 (App. 2004).

Weapons. National government jurisdiction over possession of firearms and ammunition under the Weapons Control Act¹⁰³ was not removed by the 1991 constitutional amendment that removed national government jurisdiction over major crimes, because there was an independent national government jurisdictional basis for it under the Constitution's foreign and interstate commerce and national defense clauses. Jano v. FSM, 12 FSM Intrm. 569, 574 (App. 2004).

Criminal Law and Procedure; National Crimes; Weapons. The regulation of possession of firearms and ammunition involves a national activity or function because of the international commerce aspects of its manufacture and movement, together with the national government interest in protecting the national security under the national defense clause. In combination, these provide the national government with a jurisdictional basis to regulate the possession of firearms and ammunition. Jano v. FSM, 12 FSM Intrm. 569, 576 (App. 2004).

Power to Interpret Treaties. Conduct of foreign affairs and the implementation of international agreements are properly left to the non-judicial branches of government. The judicial branch has the power to interpret treaties. In re Extradition of Jano, 6 FSM Intrm. 93, 103 (App. 1993).

The Court has dealt with of the doctrine of separation of powers and established the test for when the system of checks and balances under the Constitution has been encroached upon.

¹⁰² FSM CONST. art. IX, § 7 states: "The President, Vice-President, or a justice of the Supreme Court may be removed from office for treason, bribery, or conduct involving corruption in office by a 2/3 vote of the members of Congress. When the President or Vice-President is removed, the Supreme Court shall review the decision. When a justice of the Supreme Court is removed, the decision shall be reviewed by a special tribunal composed of one state court judge from each state appointed by the state chief executive. The special tribunal shall meet at the call of the President.

¹⁰³ 11 F.S.M.C. chap. 10 (1997).

Separation of Powers; Between Branches. The doctrine of separation of powers among the three branches of the national government is built into the Constitution by its very structure and the explicit language of FSM Const., art. IX (Legislative), X (Executive), and XI (Judicial). These articles provide each branch its own specific powers and this structure provides for the independence of each branch in a system of checks and balances wherein no branch may encroach upon another's domain. FSM v. Udot Municipality, 12 FSM Intrm. 29, 48 (App. 2003).

Separation of Powers; System of Checks and Balances. The constitutional demarcation of powers to the three branches of the national government was established with deliberate design and purpose. The intended effect was to create a system of checks and balances between the branches such that no one branch could encroach upon another and thereby dominate the others. FSM v. Udot Municipality, 12 FSM Intrm. 29, 51 (App. 2003).

Separation of Powers; Standard for Determining Encroachment. The standard for determining whether there is an improper interference with the independent power of a branch of government is whether the action of one branch substantially impairs another branch's performance of its essential role in the constitutional system. FSM v. Udot Municipality, 12 FSM Intrm. 29, 51 (App. 2003).

The Court has addressed federalism issues and ruled on issues of national and state powers and abstention and certification.

Federalism. The Constitution's broadly stated express grants of power to the national government contain within them innumerable incidental or implied powers, as well as certain inherent powers. Chuuk v. Secretary of Finance, 9 FSM Intrm. 424, 431 n.2 (App. 2000).

Federalism National/State Power; Fishing. Because regulating the ownership, exploration, and exploitation of the exclusive economic zone's natural resources is a power expressly and exclusively delegated to the national government and because the incidental power to collect assessments levied pursuant to that delegated power is indisputably a national power, the power to disburse those funds is also a national power, except where the Constitution provides otherwise (such as in art. IX, § 6¹⁰⁴). Thus even were the states the underlying owners of the exclusive economic zone's resources, such a conclusion would not entitle the states to the exclusive economic zone's revenues except where the

¹⁰⁴ FSM CONST. art. IX, § 6 states: "Net revenue derived from ocean floor mineral resources exploited under Section 2(m) shall be divided equally between the National government and the appropriate state government."

Constitution so provides. Chuuk v. Secretary of Finance, 9 FSM Intrm. 424, 431-32 (App. 2000).

Fishing; International Law. Under the U.N. Convention on the Law of the Sea, an international treaty to which the FSM has acceded and which is now in effect, coastal nations do not have sovereign ownership of the resources in their exclusive economic zones. Coastal nations only have sovereign rights for the purpose of exploring and exploiting, conserving and managing natural resources, whether living or non-living. These rights are subject to numerous duties, including the duty to allow other nations access to the living resources of its exclusive economic zone if the coastal nation does not have the domestic capacity to harvest the entire allowable catch in its exclusive economic zone. Chuuk v. Secretary of Finance, 9 FSM Intrm. 424, 432 (App. 2000).

Taxation; Constitutionality. A state use tax that is a tax on imports in violation of FSM Const., art. IX, § 2(d)¹⁰⁵; and that regulates and restricts interstate commerce in violation of art. IX, § 2(g),¹⁰⁶ and art. VIII, § 3,¹⁰⁷ respectively of the FSM Constitution contravenes the Constitution. Department of Treasury v. FSM Telecomm. Corp., 9 FSM Intrm. 575, 583 (App. 2000).

Constitutional Law; Certification of Issues; Federalism; Abstention and Certification. FSM Const., art. XI, § 8,¹⁰⁸ providing for state court certification of issues of national law, gives the FSM Supreme Court appellate division another tool to oversee the development

¹⁰⁵ FSM CONST. art. IX, § 2(d) states:

“Section 2. The following powers are expressly delegated to Congress:

...

(d) to impose taxes, duties, and tariffs based on imports;”

¹⁰⁶ FSM CONST. art. IX, § 2(g) states:

“Section 2. The following powers are expressly delegated to Congress:

...

(g) to regulate banking, foreign and interstate commerce, insurance, the issuance and use of commercial paper and securities, bankruptcy and insolvency, and patents and copyrights.”

¹⁰⁷ FSM CONST. art. VIII, § 3 states: “State and local governments are prohibited from imposing taxes which restrict interstate commerce.”

¹⁰⁸ FSM CONST. art. XI, § 8 states: “When a case in a state or local court involves a substantial question requiring the interpretation of the Constitution, national law, or a treaty, on application of a party or on its own motion the court shall certify the question to the appellate division of the Supreme Court. The appellate division of the Supreme Court may decide the case or remand it for further proceedings.”

of national law jurisprudence, but also provides the option of remand so that the state court may address issues of national law. Bernard's Retail Store & Wholesale v. Johnny, 4 FSM Intrm. 33, 35 (App. 1989).

Constitutional Law; Certification of Issues. Under normal circumstances, the decision as to whether to decide or remand a question certified under FSM Const., art. XI, § 8 will be made only by the constitutionally appointed justices of the FSM Supreme Court, without convening a third judge and without oral argument. Bernard's Retail Store & Wholesale v. Johnny, 4 FSM Intrm. 33, 35 (App. 1989).

Legislative Powers; Custom and Tradition; Constitutional Convention. Congress has no power to specify voting requirements for the Constitutional Convention and therefore any attempt to exercise this power so as to uphold tradition is also outside the powers of Congress under FSM Const., art. V, § 2, which is not an independent source of congressional power but which merely confirms the power of Congress, in exercising national legislative powers, to make special provisions for Micronesian tradition. Constitutional Convention 1990 v. President, 4 FSM Intrm. 320, 328 (App. 1990).

The Court has ruled on a number of cases interpreting other provisions of the Constitution's Declaration of Rights.

Constitutional Law; Involuntary Servitude. While the Constitution's prohibition of slavery and involuntary servitude¹⁰⁹ may have had its source in the TT Bill of Rights and the U.S. Constitution, it has particular meaning within the FSM's historical context of forced labor by former foreign administering authorities. Some still-living citizens of this nation have experienced firsthand the evils of slavery and involuntary servitude, and the constitutional provision was meant to ban those types of atrocities forever. Rodriguez v. Bank of the FSM, 11 FSM Intrm. 367, 384 (App. 2003).

Constitutional Law; Imprisonment for Debt. The constitutional prohibition prohibiting imprisonment for debt¹¹⁰ is a restriction on the courts against the enforcement of judgments of a certain character, but does not restrict a court's power to enforce its lawful orders by imprisonment for contempt. Even when the violation of the order is for failure to make payments for the recovery of a judgment enforceable by an order in aid of judgment, if the order is one which the court could lawfully make, the imprisonment is not for failure to pay the debt, but failure to obey a lawful court order. Rodriguez v. Bank of the FSM, 11 FSM

¹⁰⁹ FSM CONST. art. IV, § 10 states: "Slavery and involuntary servitude are prohibited except to punish crime."

¹¹⁰ FSM CONST. art. IV, § 13 states: "Imprisonment for debt is prohibited."

Intrm. 367, 382 (App. 2003).

Constitutional Law; Fundamental Rights; Criminal Law and Procedure. In adopting the Declaration of Rights as part of the FSM Constitution and therefore the supreme law of the land, the people of Micronesia subscribed to various principles which place upon the judiciary the obligation, among others, to assure that arrests are based upon probable cause, that determinations of guilt are arrived at fairly, and that punishments for wrongdoing are proportionate to the crime and meet prescribed standards. Tammed v. FSM, 4 FSM Intrm. 266, 281-282 (App. 1990).

The Court has ruled on a number of civil rights¹¹¹ cases alleging excessive action by law enforcement officers and cruel and unusual punishment because of the conditions of prison facilities in Chuuk State.

Protection of Civil Rights; Due Process; Excessive Behavior by Law Enforcement. The right to due process of law is violated when a police officer batters a person instead of protecting him or her from harm because persons who are not in police custody have a due process interest in personal security that may be violated by the acts of police officers. Davis v. Kutta, 7 FSM Intrm. 536, 547-548 (Chk. 1996).

Protection of Civil Rights; Cruel and Unusual Punishment. Confining a prisoner in dangerously unsanitary conditions, which represent a broader government-wide policy of deliberate indifference to the dignity and well-being of prisoners, is a failure to provide civilized treatment or punishment, in violation of prisoners' protection against cruel and unusual punishment, and renders state liable under 11 F.S.M.C. 701(3). Plais v. Panuelo,

¹¹¹ 11 F.S.M.C. § 701 states:

§ 701. Deprivation of rights.

(1) A person commits a crime if he or she willfully, whether or not acting under the color of law, deprives another of, or injures, oppresses, threatens, or intimidates another in the free exercise or enjoyment of, or because of his or her having so exercised any right, privilege, or immunity secured to him by the Constitution or laws of the Federated States of Micronesia, the laws of the Trust Territory of the Pacific Islands, or the Constitution or laws of the United States of America which are applicable to the Federated States of Micronesia.

(2) A person convicted under this section shall be imprisoned for not more than ten years.

(3) A person who deprives another of any right or privilege protected under this section shall be civilly liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, without regard to whether a criminal case has been brought or conviction obtained. In an action brought under this section, the court may award costs and reasonable attorney's fees to the prevailing party.

5 FSM Intrm. 179, 208 (Pon. 1991).

Protection of Civil Rights. A municipality which employs untrained persons as police officers, then fails to train them and authorizes their use of excessive force and summary punishment, will be held responsible for their unlawful acts, including abuse of a prisoner arrested without being advised of the charges or given an opportunity for bail, whose handcuffs were repeatedly tightened during his 14 hour detention in such a way that he was injured and unable to work for one month. Moses v. Municipality of Polle, 2 FSM Intrm. 270, 271 (Truk 1986).

Protection of Civil Rights. A municipality which employs untrained persons as police officers, fails to train them and authorizes their use of excessive force and summary punishment, will be held responsible for their actions in stripping a prisoner, handcuffing his leg to a table and his arms behind his back, then kicking and abusing him. Alaphen v. Municipality of Moen, 2 FSM Intrm. 279, 280 (Truk 1986).

The Court has issued rulings on administrative law, the status of rules and regulations, and the application of the Administrative Procedures Act.¹¹²

Regulations; Force of Law. Regulations prescribed by the registrar of corporations have the “force and effect of law.” KCCA v. FSM, 5 FSM Intrm. 375, 377 (App. 1992).

Regulations Cannot Extend Reach of Statute. Regulations do not come into effect when they have not been filed with the Registrar of Corporations. Regulations cannot extend or limit the reach of the statute that authorized it. Braiel v. National Election Dir., 9 FSM Intrm. 133, 138 (App. 1999).

Administrative Procedure Act (APA). Where there is conflict between a statute of general application to numerous agencies or situations, such as the APA, and a statute specifically aimed at a particular agency or procedure, such as the National Election Code, the more particularized provision will prevail. This rule is based upon recognition that the legislative body, in enacting the law of specific application, is better focused and speaks more directly to the affected agency and procedure. Olter v. National Election Comm’r., 3 FSM Intrm. 123, 129 (App. 1987).

Administrative Procedure. The Court need not dwell on the apparent conflicts between two lines of U.S. cases concerning the scope of judicial review of administrative actions, but should search for reconciling principles which will serve as a guide to the Court within FSM when reviewing agency decisions of the law. Olter v. National Election

¹¹² 17 F.S.M.C. §§ 101-113.

Comm'r., 3 FSM Intrm. 123, 132 (App. 1987).

IV. FUTURE CHALLENGES

While a stable national judiciary has been developed for the nation, there are numerous future challenges to be met for the FSM Supreme Court to remain a strong and independent co-equal branch of the national government. The Court must strive to improve upon its efficiency in delivering judicial services and provide a national judicial system more responsive to the needs and expectations of the people. The Court must also remain aware and sensitive to uniquely Micronesian customs and traditions that must be taken into account in rendering its decisions.

At a basic level, the Court must continue to remain vigilant to threats to its independence and to the rule of law. Threats to judicial independence must be dealt with on both an individual capacity and at an institutional level. In small island settings where family relationships are important and extensive, threats to the individual independence of the justices are common and should be particularly guarded against. Judicial conferences within the FSM and in a regional setting must continue to bring up and discuss potential threats to judicial independence and issues of judicial ethics as part of their programs. The impartiality of the judiciary is vital and has far reaching effects to all parts of the community. A fair and impartial judiciary also has an effect on economic development, as foreign investors must have confidence in the stability of the national Court when business or other disputes arise that might necessitate court action.

The Court must continue to develop a national judiciary that is sensitive and responsive to Micronesian customs and traditions and the Constitution's judicial guidance clause.¹¹³ This is not an easy task as the application of customs and traditions can conflict with various constitutional rights, some of which are guaranteed under the constitution's Declaration of Rights.¹¹⁴ Further discussions should be done with traditional leaders on the ways to address these issues and strike an appropriate balance between the two.

The Court should continue to take actions that will move the judicial system away

¹¹³ Tamanaha, *A Proposal for the Development of a System of Indigenous Jurisprudence in the Federated States of Micronesia*, *supra* note 77 at 71, 79-94.

¹¹⁴ For a detailed discussion of these issues, *see*, Edward C. King, *Custom and Constitutionalism in the Federated States of Micronesia*, 3 ASIAN-PACIFIC L. & POLICY J. 249 (2002); Brian Z. Tamanaha, *The Role of Custom and Traditional Leaders Under the Yap Constitution*, 10 U. HAW. L. REV. 81 (1988); and Edward C. King, Book Review, 3 ISLA: J. MICRONESIAN STUD. 376 (1995). The latter reviewing TAMANAHA, UNDERSTANDING LAW IN MICRONESIA: AN INTERPRETIVE APPROACH TO TRANSPLANTED LAW (1993).

from the confrontational adversarial system of the U.S. and toward a more conciliatory and consensus based dispute resolution system. This would be more consistent with traditions, customs, and values in a small island setting. Court proceedings should encourage settlement and decision making through alternative dispute resolution methods such as mediation. A court annexed system of optional alternative dispute resolution involving mediation should be considered for implementation and mediators should be trained to implement this system.

The national court must continue to provide assistance for the development of the other court systems in the FSM in order to strengthen the rule of law at all levels of government. This is especially important for the municipal or local courts in the FSM. Training of judicial officers, especially municipal and local court judges and judicial staff are critical. In the FSM states, there are about 79 municipal and local courts. To assist with the operations in many of these courts, language barriers, geographical isolation, lack of infrastructure, and long distances between the islands, are but a few of the problems that need to be overcome. Court bench book projects for each level of court in the FSM would be valuable.

The Court must continue to assist in the training of legal practitioners and seek to increase the number of legal practitioners certified to practice before it. This can be done through further coordination with the COM–FSM’s Trial Counselor Certificate Program. This is most important in Chuuk where there is a critical shortage of legal practitioners that may appear before the Court. The Court should also offer legal internships for FSM citizen graduates of law schools outside of the U.S. and clerkships for law school graduates.

The Court must be prepared to integrate new technologies into the Court’s filing, record keeping, and administrative systems to improve the efficiency of Court operations. Currently, the Court disseminates court decisions, court calendars, and other information to legal practitioners via e-mail attachments. Further use of computer and telecommunications technology will help to alleviate the disadvantages created by the great distances between the islands and states. Electronic filing which is being implemented in other courts in the region should be considered for filing documents before the Court. Electronic archiving of old and new filings should be looked at to address limitations of space and for easy ability to recall documents through the creation of databases. The significant resources available over the internet should be further utilized for legal research. Use of other technologies such as video conferencing should also be examined.

The Court must do more to continue to educate the general public on the role of the FSM Supreme Court within the national constitutional government, in relationship to the states and municipalities and their courts, and its important role in enforcing the rule of law. The Court can do this by producing more educational material about the Court and its work, by conducting seminars and panel discussions for the general public, and by opening its

doors to visits by students and other community groups.

V. CONCLUSION

In its first 25 years of existence, the FSM Supreme Court has established a stable and capable national court. The Court must remain vigilant in keeping the judiciary strong and independent, and the stalwart for the enforcement of the rule of law, guardian of human rights and good governance in the nation. While doing so it must remain cognizant and sensitive to Micronesian customs and traditions, and the expectations and interests of the people of the Federated States of Micronesia in the fair and efficient implementation of justice.