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IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

CIVIL APPEAL NO. 02-25
(Civil Action No. 01-140)

CINDERELLA ADACHI and FRANCISCO NGIRAKESIIL, Appellants, -vs- ELIAS CAMSEK CHIN, Appellee.	**MOTION FOR LEAVE TO FILE CROSS-APPELLANT CHIN'S BRIEF IN EXCESS OF 40 PAGES**

Cross-Appellant Chin, by counsel, and pursuant to Rule 28(a)(11) of the Appellate Procedure Rules, respectfully moves this Honorable Court for leave to file his brief in excess of 40 pages. As grounds for this motion, counsel asserts that Chin has a cross appeal brief to file, as well as to respond to the many issues raised in appellees' appeal. All of these will be addressed in one brief. Accordingly, Chin respectfully requests that he be permitted to file a brief of 45 to 50 pages in length.

Dated 10/22/02

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Appellants,

-vs-

ELIAS CAMSEK CHIN,

Appellee.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that sufficient copies of MOTION FOR LEAVE TO FILE CROSS-APPELLANT CHIN'S BRIEF IN EXCESS OF 40 PAGES have been provided to Johnson Toribiong and Jon Van Dyke, counsels for Cinderella Adachi and Francisco Ngirakesiil, by leaving said copies in Johnson Toribiong's court mailbox on the date indicated below.

Date 10/22/02

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SUPREME COURT OF PALAU

APPELLATE DIVISION

NNGIRAKESIIL FRANCISCO and CINDERELLA ADACHI, Appellants, vs. CAMSEK ELIAS CHIN, Appellee/Cross Appellant.	Civil Appeal No. 02-25 Civil Action No. 01-140 (On Appeal from the Supreme Court of Palau, Trial Division: the Honorable Associate Justice R. Barrie Michelson Presiding)

APPELLEE CHIN'S OPENING BRIEF

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nothing on sole judge any?

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QUESTIONS PRESENTED ON APPEAL

1. Whether the Trial Division erred in dismissing the Senate as a Defendant.

2. Whether the Trial Division erred in declining to declare that the Senate lacked jurisdiction to consider Mr. Chin's qualifications unless and until he became a member of the Senate with an equal right to vote on the qualifications of all Senators.

3. Whether the Trial Division erred in declining to declare whether or not Mr. Chin meets the Constitutional requirements to serve as a Senator of the OEK.

4. Whether the Trial Division erred in not granting summary judgment that Resolution No. 6-55 added an unconstitutional fifth qualification.

5. Whether the Trial Division erred in denying the requested injunctive relief.

6. Whether the Trial Division erred in holding that the Judicial Branch cannot review the constitutionality of the Senate's exercise of the "sole judge" power.

STATEMENT OF THE CASE

Camsek Elias Chin was resoundingly elected by the voters of Palau to serve as a Senator of the *Olbiil era Kelulau* , finishing fifth out of twenty-five candidates.

Mr. Chin was then sued by Theophilus Ngerul, who sought a ruling that Chin was not qualified to serve as a Senator as an alleged non-citizen of Palau present

in Palau only four of the five years preceding his election. The Trial Division initially dismissed Ngerul's complaint on the ground that the Court lacked jurisdiction, the Senate being the sole judge of the qualifications of its members. The Appellate Division reversed and remanded, citing the Constitution's allocation, to the Judicial Branch, of the power and duty to "say what the law is."[1] Ngerul then dropped his citizenship claim as factually baseless, and Mr. Chin, who had counterclaimed, won a declaration that he met the constitutional residency requirement, which requires only residency and not continuous physical presence.

During the pendency of the Ngerul case, five of the nine Senators-elect purported to exclude or expel Mr. Chin from the Senate on the premise that he was not a Senator unless and until "seated" by a majority of his fellow Senators-elect. This anti-Chin faction's first step was to erroneously state, in a Credentials Committee Special Committee Report No. 6-1,[2] that 10 USC § 532 required each "commissioned officer in the Regular Army of the United States to be a United States Citizen," which it does not require. When it became clear that Mr. Chin was never a U.S. citizen, the two anti-Chin members of the Credentials Committee responded with a Special Committee Report No. 6-3, in which they acknowledged their mistake in assuming Mr. Chin to be a U.S. citizen, but stated their disagreement with the Ngerul Court's ruling that Mr. Chin was a resident under Palauan law, and recommending his

1 Ngerul v. Chin & ROP, Civ. App. No. 00-44, *slip. op.* (January 17, 2001), at 3.

2 The Credentials Committee was composed of three Senators-elect, two of whom, Senator Koshiba and Senator Fritz, are opposed to recognition of Mr. Chin's membership in the Senate. The third member, Senator Dengokl, refused to sign Report No. 6-1.

exclusion on that ground. Throughout this process, the Committee operated without first adopting rules of procedure, as it was required to do by 3 PNCA § 304.

On February 21, 2001, four Senators voted in favor of Senate Resolution No. 6-19, resolving to "seat" Mr. Chin as a Senator based on the Ngerul Court's finding that he was both a citizen and a resident of Palau pursuant to the Constitution and the Voting Rights Act. Had Mr. Chin been allowed to vote on Resolution No. 6-19, as the other Senators-elect voted on their own qualifications, it would have passed by a majority vote of 5 to 4, and he would have been "seated" at that time.

On April 4, 2001, in response to the failed Resolution No. 6-19 and an Appellate ruling in the Ngerul case that Mr. Chin met the residency requirement, the two anti-Chin members of the Credentials Committee issued Special Committee Report No. 6-4, acknowledging that Mr. Chin met the residence requirement of Article IX, § 6, but, in spite of their prior acknowledgment of his citizenship, and in spite of conclusive evidence he had always been a citizen, recommending he not be seated due to professed doubts *as to his citizenship*. Report No. 6-4 acknowledged the several U.S. assurances that Chin was not a U.S. citizen and receipt of his Palauan citizenship documents, yet recommended a 30-day ultimatum to Mr. Chin to provide further "proof" he was not a U.S. Citizen, under pain of expulsion.

On May 1, 2001, the Senate Committee of the Whole (the whole Senate except Chin) issued Special Committee Report No. 6-5 stating that "your committee agrees that Senator-elect Chin's election and qualifications for membership in the Senate of the Sixth Olbiil Era Kelulau appear to be in order." Immediately thereafter,

in acknowledgement of that finding, the anti-Chin majority voted down Resolution 6-41 to "seat" Mr. Chin, and passed Resolution No. 6-42, to "seat" Mr. Chin only on the pre-condition that he first sign a consent authorizing release of information "that is responsive to the question whether or not I [Mr. Chin] have been a U.S. citizen at any time."

On May 25, 2001, Mr. Chin having declined to accede to the addition of his unconstitutional pre-condition to his exercise of the powers he was decisively elected to exercise, the anti-Chin majority passed Senate Resolution No. 6-47, resolving that if Senator-elect Chin did not sign the consent by 4:30 p.m. May 31, 2001, "the Senate finally and conclusively judges him not qualified pursuant to the Constitution for membership in the Sixth Olbiil Era Kelulau." Concerned to not establish unconstitutional impediments to the assumption of office by duly-elected minority members of the Senate, Mr. Chin did not sign.

In response, on June 11, 2001, the anti-Chin majority passed Senate Resolution No. 6-49, resolving that the "seat" Senator Chin had been elected to occupy "became finally and conclusively vacant on May 31, 2001 at 4:30 p.m." and that a special election be held on July 16, 2001 to fill it.

On June 18, 2001, Mr. Chin brought the appealed-from action to stop that election and to require the relevant Senate staff to give him the same access and compensation being provided to the other eight persons elected to serve in the Senate. He also sought declarations that his exclusion was unconstitutional and that he was qualified to serve as a Senator; and injunctive relief requiring.

On July 12, 2001, the Trial Division enjoined the election, ruling that the constitutionality of the Senate's actions was justiciable and that Mr. Chin was likely to prevail on his claim that exclusion or expulsion for failure to sign a consent violated the constitution. ("Thus, the Senate Resolutions fall well outside the boundaries of proper legislative action – boundaries firmly in place at the time the framers of the Palau Constitution adopted the Sole Judge Clause.").[3]

On August 27, 2001, Mr. Chin brought a motion for partial summary judgment seeking a declaration that he was qualified to serve as a Senator but had been unconstitutionally prevented from doing so. The undisputed facts before the Court in that motion overwhelmingly tended to prove that Mr. Chin met all the qualifications to serve as a Senator. The facts included all of the following: Mr. Chin was born in Peleliu on October 10, 1949 and grew up in Koror; his parents were Palauan; he attended and graduated from Koror Elementary School; at age eleven he enrolled in school in Guam, then Hawaii; during and after his education, his parents remained in Koror and he maintained contact with them; he joined the ROTC in high school and continued with it at the University of Hawaii; he registered with the United States as a resident alien (i.e. as a citizen of the Trust Territory) in order to obtain employment as an officer in the U.S. Army Reserves; he obtained his original commission as an officer in the U.S. Army Reserves in 1975; he never applied for citizenship in the United States or in any other foreign country; he has held Trust Territory and Palau passports, and no others; since May 1994, though still in the military, he continuously maintained his household in Palau; for the rest of his career

3 Chin v. Andres, et al., Civil Action No. 01-140, slip op., at 6.

after May 1994, being stationed in Kwajelin, he was able to be with his family at his home in Palau almost every holiday; since 1997, when his service ended, he stayed at home all the time; he registered to vote, and did vote, as a resident of Koror, in Palau elections beginning 1985; while pursuing his career abroad he never intended to terminate his residence in Koror, as his return to Palau confirms; he was certified by the Palau Election Commission as qualified to run for the office of Senator; and certified as one of the nine victors in the November 2000 general election; on December 14, 2000, he executed a Consent to Release Information, and a Freedom of Information Act request, to obtain confirmation from the United States to his fellow Senators-elect that he had never become a U.S. citizen; on December 21, 2000, the United States did confirm in writing that he was *not* a citizen of the United States of America; he provided that document to his fellow Senators-elect; on December 29, 2000, the United States again confirmed, in an official writing, that he had never been naturalized as a U.S. Citizen; he also provided that document to the other Senators-elect; his name was then deleted by a majority of the other Senators elect from Senate Resolution No. 6-1, by which, without further investigation, they "seated" themselves; that "seating" was based on Special Committee Report No. 6-1 of the Credentials Committee, which reasoned from the erroneous[4] proposition that 10

4 Mr. Chin received his original commission in the Army Reserves, rather than the Regular Army, and was thus completely outside the scope of 10 U.S.C.A. § 532 (an *original* appointment as a commissioned officer. . . in the Regular Army. . . may be given only to a person who . . (1) is a citizen of the United States. . .") [emphasis added]. Thus an officer who receives his original appointment as an officer in the Reserves can later receive an appointment to serve in the Regular Army *without* being a U.S. citizen. After that, at least during the time of Mr. Chin's service, it was the statutorily-recognized practice to assign officers who had received their commission as reserve officers to

U.S.C. § 532 "requires every commissioned officer in the Regular Army of the United States to be a United States citizen;" on May 1, 2001, the members of the Senate Committee of the Whole all signed Special Committee Report No. 6-5 stating that "Senator-elect Chin's election and qualifications for membership in the Senate of the Sixth Olbiil Era Kelulau appear to be in order;" on that same date, the Senate passed Senate Resolution No. 6-42, requiring Mr. Chin, as a prerequisite to being "seated," to execute a consent giving all other Senators access to any records of the United States that pertained in any way to Mr. Chin's citizenship status; on May 7, 2001, the United States, via diplomatic note, through Palau's Ministry of State, directly informed the Senate that Mr. Chin had never been a citizen of the United States; on May 25, 2001, the Senate, on a vote of 5 to 3, passed Senate Resolution No. 6-47, providing that if Mr. Chin failed to execute the consent described in Resolution 6-42 by 4:30 p.m. May 31, 2001, then, by virtue of that failure, "the Senate finally and conclusively judges him not qualified pursuant to the Constitution for membership in the Senate of the Sixth Olbiil Era Kelulau;" on June 11, 2001, the Senate, on a vote of 5 to 3, passed Resolution No. 6-49, providing that Mr. Chin had been conclusively judged not qualified by virtue of Resolution No. 6-47, and declaring: (1) that Mr. Chin's seat had been vacant since the inauguration of the Sixth OEK; and (2) that it "became

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positions in the Regular services without the formality of any further commissions or appointments. *See, e.g.* 10 U.S.C. §§262, 265, 591, 593, & 595, all repealed December 1, 1994. Further, even if § 532 *did* require reserve officers to be U.S. citizens when they received their commissions, which it does not, it was not enacted until 1980, and there was no similar prior law of any kind. Mr. Chin received his original commission, in the Reserves, in 1975, as a Trust Territory citizen.

finally and conclusively vacant on May 31, 2001," and a special election to fill it was therefore required.

Then, just days before the September 24, 2001 hearing of Mr. Chin's motion for partial summary judgment,[5] the Senate moved to pre-empt the Court's consideration of that motion by passing Senate Resolution No. 6-55. That resolution purported to exclude or expel Mr. Chin from the Senate on a finding that he failed the 5-year residency qualification. That finding was based on the Senate's "interpretation" of the constitutional residence requirement to implicitly include an actual "continuous presence," rather than merely legal residence, in the Republic. It applied that novel interpretation to the same facts by which the Senate had previously found Mr. Chin to be qualified. Because of Resolution No. 6-55, the Trial Division denied Mr. Chin's motion without prejudice.

Accordingly, on December 7, 2001, Mr. Chin filed a second motion for partial summary judgment. He sought a declaration that both Senate Resolutions 6-42[6] and 6-55 added new, unconstitutional requirements to the Constitutional qualifications for service in the Senate. In January 21, 2002, the Court ruled that the first attempt to exclude or expel Mr. Chin (Resolutions 6-42, 6-47, 6-49, and 6-52)

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5 The Senate's Third Regular Session of 2001 commenced on July 10, 2001, and ended no later than August 4, 2001. Senate Procedures Rule 1.B. As a standing committee, the Credentials Committee was allowed after August 4, 2001 to continue to hold meetings to consider matters remaining in that committee. Senate Procedures Rule 9.0. The findings and recommendations of that committee, however, may not, under the Rules, be considered until the next Regular Session, which did not begin until October 9, 2001. *Id.* The Credentials Committee, working between sessions, recorded SCR No. 6-7 on September 18, 2001. Pursuant to Rule 9.0, it was not eligible for consideration until October 9, 2001, at the next regular session. Despite that Rule, the Senate purported to consider and adopted September 18, 2001 at a Special Session called for that purpose.

6 In conjunction with Resolutions 6-47, 6-49, and 6-52.

added an unconstitutional fifth qualification. With respect to the second exclusion, however, the Court declined to rule on Mr. Chin's motion for a declaration that it, too, added an unconstitutional fifth qualification-continuous presence. Rather, the Court ruled only that it was not adopted by the constitutionally-mandated 2/3 majority, and had no effect for that reason. The Court also ruled that Mr. Chin, for that reason, remained a member of the Senate.

On July 10, 2002, Mr. Chin filed a motion for summary judgment on all remaining issues, seeking, among other things, a declaration that Mr. Chin became a Senator by virtue of being elected to that office, regardless of the acts of his fellow Senators-elect in his absence, and an order enjoining Appellants from excluding Mr. Chin from the Senate chambers or withholding the resources and compensation due him as a Senator. That same day, the Court denied the declaratory relief as based on a misstatement of the law, and declined the injunctive relief as overly intrusive into the affairs of the Senate.

Appellants Adachi and Francisco appeal on the ground that the Trial Division's rulings violate the "sole judge" clause and the political question doctrine, and that it erred in construing the foregoing Senate Resolutions. Mr. Chin cross-appeals on the Court erred in dismissing the Senate, in finding Mr. Chin's untenable in light of the Speech and Debate clause, and declining to enjoin the Appellants to accord Mr. Chin the rights due him as a Senator, in accordance with the Court's ruling he has been "seated" as such.

ARGUMENT

Resolving this appeal is not simply a matter of deciding where the line should be drawn between the Senate's power to be the sole judge of the qualifications of its members and the Court's sole power to interpret and protect the Constitution. Although Appellants and the Senate urge that the case is that simple, it is not. The third, most important, factor is the Court's duty to protect the right of the Electorate to elect a person to the office of Senator who meets all the qualifications to hold that office. When a person is decisively chosen by the Electorate, and he meets those qualifications as established by the Constitution, as confirmed by statute enacted by the Legislative Branch in response to the Constitution, as established by the statements of the founding fathers regarding their intentions, and as repeatedly construed by both Houses of the Legislative Branch until last year, it is the Court's duty to aid the Electorate when its choice is denied.

agrees/ concedes that there is a line to be drawn

The right of the Electorate to elect one who meets the qualifications of the Constitution, so established, is of more fundamental importance to the rule of law in Palau than fine distinctions that can be made in debating the issue of where to draw the line between the powers of the Legislative and Judicial branches with respect to these issues. As noted by the United States Supreme Court when considering issues similar to those in this case, the founding fathers of that country, whose work largely inspired and informed the work of Palau's founding fathers, emphasized that the will of the Electorate should be given greater weight than the views of the Legislative and Judicial Branches regarding the intersection of their powers with respect to the "sole judge" clause.

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> Had the intent of the Framers emerged from these materials with less clarity, we would nevertheless have been compelled to resolve any ambiguity in favor of a narrow construction of the scope of Congress' power to exclude members-elect. A fundamental principle of our representative democracy is, in Hamilton's words, "that the people should choose whom they please to govern them." [citation] As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself. In apparent agreement with this basic philosophy, the Convention adopted his suggestion limiting the power to expel. To allow essentially that same power to be exercised under the guise of judging qualifications, would be to ignore Madison's warning . . .

Powell v. McCormack, 395 U.S. 486, 547, 89 S. Ct. at 1977 (1969).

The Court should consider the following arguments with that fundamental principle, and its paramount nature, in mind.

I. THE COURT ERRED IN DISMISSING THE SENATE.

It was clear error for the Court to dismiss the Senate on the ground that its unconstitutional override of Mr. Chin's election was protected from Court review by the Speech and Debate Clause. That clause, by its unambiguous terms, provides speech and debate immunity only to individual Senators. ROP Const. Art IX § 9 ("No *member* of either house of the Olbiil era Kelulau shall be held to answer in any other place for any speech or debate in the Olbiil era Kelulau." [emphasis added]). The word "member" in that clause is clear and unambiguous. Further, this Court has taken pains to recognize that the Constitution provides no immunity to the Senate as a body when it violates the Constitution. It has done so in the following words:

> We approve, however, the dicta in Powell v. McCormack, 395 U.S. at 503, that "[L]egislative immunity does not . . . bar all judicial review of legislative acts[.], and that "a claim alleging that a legislature has abridged an individual's constitutional

> rights by refusing to seat an elected representative constitutes a "case and controversy" over which federal courts have jurisdiction." Powell v. McCormack, 395 U.S. at 513, n. 35. It is not a question of whether courts have jurisdiction over such matters. They do. Id. . . .
>
> This Court is the ultimate interpreter of the constitution, and has the responsibility of deciding whether the action of any (other) branch of government has exceeded whatever authority has been committed to it (by the Constitution). Remeliik, et al. v. The Senate, 1 ROP Intrm. 1, 4, 5, (High Ct. Aug 1981) (citing United States v. Nixon, 418 U.S. 683, 704 (1974), and Marbury v. Madison, 1 Cranch. 137, 177 (1803); The Senate v. Remeliik, President of the Republic, 1 ROP Intrm. 90, 91 (Tr. Div. Nov. 1983). See also Powell v. McCormack, 395 U.S. at 519, 521, 548-549 (citing Baker v. Carr, 369 U.S. 186, 211 (1962). The "Speech of Debate Clause" (of the Constitution) may not shield members of Congress in all conceivable circumstances. See Powell v. McCormack, 395 U.S. at 506, n. 25. See also Ngiralois v. Trust Territory, 4 T.T.R. 517, 522 (Pal. App. 1969).

all dicta?

Salii v. House of Delegates, 1 ROP Intrm. 708, 712-713 (1989) [emphasis added]; *accord* Palau Chamber of Commerce v. Ucherbelau, 5 ROP Intrm. 300, 301, 302 (Tr. Div. 1995, Ngiraklsong, C.J.) (declaring act by Senators and Delegates of raising their "official expense allowance" to be unconstitutional.); Remeliik v. the Senate, 1 ROP Intrm. 1 (T.T. H. Ct. 1981) (Issuing declaratory judgment binding the President and the Senate after denying Senate's motion to dismiss).[7]

Because the Constitution contains no language extending speech and debate immunity to the Senate, none should be inserted by this Court. Prigg v. Pennsylvania, 10 L. Ed. 1060, 1088 (Storey, J.) (where there is no qualification or restriction in the clause being interpreted "we have no right to insert any which is not

7 Mr. Chin only sought declaratory relief with respect to the Senate to stay within the rules established by this Court with respect to this sort of an action. He only sought injunctive relief from Appellants, as authorized by Powell v. McCormack.

expressed and cannot be fairly implied."); Ross v. City of Long Beach, 48 P. 2d 649, 650 (Cal. 1944) (Courts cannot add provisions to what the Constitution declares in definite language.); United States ex. rel. Hoover v. Elsea, 501 F. Supp. 83, 88 (N.D. Ill. 1980) ("The constitution should be read according to the plain meaning of the language and subtle construction for the purpose of limiting its operation must be avoided.").

In sum, because the Speech and Debate Clause only applies to speech or debate by "members" of the Senate,"[8] it cannot be properly invoked to excuse the Court from its duty to examine the constitutionality of the acts of the Senate. It was therefore an error for the Trial Division to dismiss the Senate as a defendant because "the Senate as a legislative body [is] protected by the Speech and Debate Clause."[9]

II. THE COURT ERRED IN DISMISSING MR. CHIN'S EQUAL PROTECTION AND DUE PROCESS CLAIMS.

A. Mr. Chin Was Entitled to Declaratory Relief on his Equal Protection Claims.

1. Mr. Chin's Exclusion and Expulsion Have Violated, and Continue to Violate, His Constitutional Right to Equal Protection of the Law.

Mr. Chin was denied equal protection in two major ways. First, he was the only Senator-elect required to sign a consent form as a precondition for being seated. Because no other Senator was required to sign a waiver of the type demanded of Mr. Chin as a prerequisite to being "seated" as Senators, Mr. Chin was denied the equal protection of the law, as prohibited by Article IV, § 5 of the Constitution.

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8 ROP Const. Art. IX, § 9.

9 Chin v. Andres, *et al.*, Civ. Action No. 01-140, *slip op.* October 18, 2001), at 1, see also *id.* at 8-9.

("Every person shall be equal under the law and shall be entitled to equal protection. . . No person shall be treated unfairly in a legislative or executive investigation.").

Although the anti-Chin majority later passed Resolution No. 6-48, requiring all Senators to sign a consent form requiring them to sign a release of any information by the U.S. of "past or present U.S. citizenship," that did nothing to remedy the unequal treatment of Mr. Chin because *no other Senator had to sign such a consent as a precondition to being allowed to function as a Senator.*[10]

Second, Mr. Chin was denied equal protection because he was the only Senator-elect not allowed to vote on the qualifications of all the Senators-elect, including himself. As discussed below, this initial bootstrap appears to violate several provisions of the Constitution (See § III, *infra*).

Accordingly, Mr. Chin was entitled to a declaration that he was deprived of the same opportunity to serve as a Senator that the other Senators-elect assumed unto themselves.

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10 Further, the evidence below was that Senators Dengokl and Whipps refused to comply with Resolution No. 6-48, yet *were not expelled for that refusal!* Yet further, Senator Andres was *not* required to sign a consent with respect to a very real concern regarding his eligibility to serve on the Senate – his functional rule in the Melekeok State Government in violation of ROP Const. Art. IX, § 10. Just as Mr. Chin produced three letters from the U.S. stating that he was not a citizen, Senator Andres produced one letter from the Speaker of the Melekeok Legislature stating that Senator Andres promptly withdrew from his state government position after the Court ruled it illegal for a Senator to hold such a position.. The Senate simply accepted that letter. It did not require Senator Andres, as a precondition to being seated, to sign a document requesting the Melekeok government to produce the records of his compensation by the government, his letter of resignation, the attendance records of the Melekeok council of chiefs, or the Legislature, or any other such things that might indicate that the Speaker was mistaken.

2. The Trial Division, Presented with Those Facts, Should Have Granted the Requested Declaration That Chin's Equal Protection Rights Had Been Infringed.

The Constitution requires that "Every person shall be equal under the law and shall be entitled to equal protection." ROP Const. Art. IV, § 5. When a coordinate branch of the government violates this or any other provision of the Constitution, it is the province and *duty* of the Judicial Branch to so declare. Salii v. House of Delegates, 1 ROP Intrm. 708, 712-713 (1989) (Court has jurisdiction to decide "a claim alleging that a legislature has abridged an individual's constitutional rights by refusing to seat an elected representative"); Kazuo v. ROP, 1 ROP Intrm. 154, 160 (1984) ("'It is emphatically the province and duty of the judicial department to say what the law is' "); Melaitau, *et al.*, v. Lakobong, *et al.*, Civ. App. No. 01-62, *slip op.* (July 24, 2002), at 1 ("Courts have an almost unflagging obligation to hear every case over which they have jurisdiction.").[11] The Trial Division failed to fulfill that obligation when it erroneously dismissed Mr. Chin's equal protection claims on the theory that "they also fall within the protections afforded by the Speech and Debate Clause."[12]

B. Mr. Chin Should Have Prevailed on His Due Process Claims.

First, the Credentials Committee violated Mr. Chin's right to due process because its two-member anti-Chin majority simply issued findings without first adopting rules of procedure its minority member could insist upon. 3 PNCA §

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11 *See also* 14 PNCA § 1001 ("In a case of actual controversy within its jurisdiction," the Court is empowered to render declaration of the legal rights of any interested party seeking same); ROP Const. Art. X (the judicial power extends to matters in which the national government is a party).

12 Chin v. Andres, *et al.*, Civ. Action No. 01-140, *slip op.* October 18, 2001), at 9.

304 ("Each investigating committee [of the OEK] *shall* adopt rules, not inconsistent with any law or any applicable rules of the Olbiil era Kelulau, governing its *procedures*, including the conduct of hearings." [emphasis added]).

Second, Mr. Chin's exclusion from participating, as a member, in votes, debates, and committee assignments relevant to the issue of his "seating" also violated his right to due process of law.[13] An impartial tribunal would have to include all the persons elected to be members of the Senate, as the Constitution requires. To exclude Chin from voting on that issue stacked the cards against him. To exclude him from speaking and debating these issues, as a Senator, violated the due principle right to be heard in the manner set forth in Article IX, § 10. Had his "seating" not been adjudicated by his foes in his absence, he would have been seated on February 21, 2001 with the passage of Resolution No. 6-19, which failed on a vote of 4 to 4.

It was error for the Trial Division to hold itself unable, because of the Speech and Debate clause, to declare that the Senate, and its Credentials Committee, violated Mr. Chin's right to due process of law.

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13 *See* Goldberg v. Kelly, 397 U.S. 254, 267-71, 90 S. Ct. 1011, 1020-1022 (1970). (Rudimentary elements of due process of the law include: (1) opportunity to be heard "at a meaningful time and in a meaningful manner"; (2) timely and adequate notice; and (3) a tribunal whose conclusion will be based "solely on the legal rules and evidence adduced at the hearing [and which is] of course . . . impartial.").

III. THE COURT ERRED IN DECLINING TO DECLARE THAT MR. CHIN HAD A CONSTITUTIONAL RIGHT TO VOTE ON HIS OWN QUALIFICATIONS.

At least four sections of the Constitution apply to the procedures for initiating each Senate of the OEK. All four must be read together in a manner that will make sense of, and give effect to, all of them.[14]

Those four sections provide as follows:

> Article IX, § 2: "Senators and Delegates *shall be elected* for a term of four (4) years." [emphasis added].
>
> Article IX, § 10: "Each house of the Olbiil era Kelulau shall be the sole judge of the election and qualification of its *members*, may discipline a *member*, and, by a vote not less than two-thirds (2/3) of its *members* may suspend or expel a *member*." [emphasis added].
>
> Article IX, § 11: "Each house of the Olbiil era Kelulau *shall* convene on the second Tuesday in January following the regular general election and may meet regularly for four (4) years." [emphasis added].
>
> Article IV, § 5: "Every person shall be equal under the law and shall be entitled to equal protection ... No person shall be treated unfairly in legislative ... investigations."

what happens on 1/1?

no precedents cited

research needed

Viewed together, these provisions cannot be properly interpreted to allow a cadre of the Senators-elect to place a bar, whether for disqualification, non-election, or otherwise, on the initial opportunity of one of their fellow Senators-elect to become a Senator in the same manner they do. These sections are best interpreted

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14 Otsuka v. Hite, 414 P.2d 412, 421 (Cal. 1966) (if reasonably possible, every provision of the Constitution should be given meaning and effect, and related provisions should be harmonized."); Serrano v. Priest, 487 P. 2d 1241, 1249 (Cal. 1971) ("Elementary principles of construction dictate that where constitutional provisions can reasonably be construed to avoid a conflict, such interpretation should be adopted"); People v. Anderson, 493 P.2d 880 886 (Cal. 1972) ("The same rules of construction require that wherever possible we construe constitutional provisions in such a way as to reconcile potential conflict among provisions and to give effect to each.").

to require that the members of the Senate are initially chosen by the Electorate, that all such members must initially convene on the following second Tuesday of January, and that then, *after* all elected Senators have become "members" of the Senate, the *entire membership* may then proceed to examine the election and qualifications of its "members," as provided by Art. IX, § 10. The Constitution is clear that when the Senate commences to judge the qualifications of a "member," all "members" may participate in that exercise. *Id.* Not one word of the Constitution supports the notion that the initial membership of the OEK may be decided by any means other than election. It simply says "shall be elected." That, and only that, is what initially makes elected persons "members" on the second Tuesday of the January following their election. Then, once they all are "members," and only then, can these "members" judge each other's qualifications. And the only qualifications they are authorized to judge are those of "members." There is no provision anywhere in the Constitution to allow the adjudication by the Senate of an elected person *unless* that person is a "member." Such an activity is not authorized by the Constitution, and is not a power of the Senate. To the contrary, it is prohibited by Article IV, § 5 because it does not give "equal" prerogatives to Senators-elect as members and because it "unfairly" treats a Senator-elect as a non "member." It was thus error for the Trial Division to rule, without explanation, that Mr. Chin's request for a declaration that he was entitled to participate in the adjudication of all Senators' qualifications "is premised upon an incorrect statement of law."[15]

15 Chin v. Francisco, *et al.*, Civil Action No. 01-140, *slip op.* (July 10, 2002).

To construe the Constitution otherwise, as this case so thoroughly demonstrates, is to court constitutional disaster. Giving some Senators-elect greater power over "seating" than that enjoyed by other Senators-elect thwarts the elective process simply provided by Art. IX, § 2. No body other than the Electorate can decide the initial membership of the Senate of Palau.[16]

Any doubt at all about the meaning that this Court must now give these four sections of the Constitution must be resolved in the manner that, as much as possible, limits the power of Senators-elect to exclude a Senator-elect chosen to be a "member" of the Senate by the Electorate. As the Powell Court ruled,

> Had the intent of the Framers emerged from these materials with less clarity, we would nevertheless have been compelled to resolve any ambiguity in favor of a narrow construction of the scope of Congress' power to exclude members-elect. A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them.'

Powell v. McCormack, 395 U.S. at 547, 89 S. Ct. at 1977.

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16 U.S Courts have sometimes found that members of that country's *large* legislative bodies have a "seating" power, but *only* where two persons claim membership in an extremely close election and the results are therefore subject to final adjudication by the body. That is not this case, Mr. Chin being the fifth-highest vote-getter out of twenty-five candidates for nine at-large seats. Barry v. U.S. and Roudebush v. Hartke are such cases, and inapplicable to the non-seating of a Senator pending an investigation into his qualifications. It is only when the people's choice is in question that exclusion is or should be permitted. When qualifications, rather than election, have been the issue, U.S. courts have taken pains to decisively intervene on behalf of the Electorate. Powell v. McCormack, *supra*. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 808, 115 S.Ct. 1842, 1856 ("*No qualification [not found in Constitution] . . . is permitted to fetter the judgment of disappoint the inclination of the people.*")[quoting Madison, emphasis supplied by U.S. Supreme Court]; Bond v. Floyd, 385 U.S. 116, 128 (1966) ("Since Bond satisfied all the stated qualifications in the State Constitution, Chief Judge Tuttle concluded that his disqualification was beyond the power of the House as a matter of state constitutional law").

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Even if the Constitution *did* allow some Senators-elect to anoint themselves as Senators, then proceed to judge the qualifications of others not privy to that mutual self-approval ceremony, *excluding* the un-anointed from "member"ship while they did so, that initial exclusion, though not nominally an expulsion, would still have to be approved by a vote of two-thirds of the self-anointed ones. Powell v. McCormack, 395 U.S. at 548, 89 S. Ct. at 1978 ("In short, both the intention of the Framers, to the extent it can be determined, and an examination of the basic principles of our democratic system persuade us that the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote." A two-thirds vote is required).

IV. THE COURT ERRED IN NOT GRANTING SUMMARY JUDGMENT THAT RESOLUTION NO. 6-55 ADDED A FIFTH "CONTINUOUS RESIDENCE" QUALIFICATION.

Mr. Chin requested a ruling that Resolution No. 6-55, though a little more subtly contrived then Resolution No. 6-42, also adds an unconstitutional fifth request – "continuous presence." The Court should have so ruled.

A. Resolution No. 6-55 Violates Article IX by Adding a New Qualification – "Continuous Presence."

In Resolution No. 6-54, in explicit response to the Court's July 24, 2001 ruling that Mr. Chin was likely to succeed on the merits of his claim that Resolution 6-42 was unconstitutional, the Senate invented its own interpretation of the Section 6(3) residency requirement, shunning and contradicting the tests repeatedly used by the Court, the tests established by law, and numerous precedents

of both Houses of the OEK. It did so to make any person a "non-resident" who was absent in the five-year period any more than Mr. Chin's opponents were.

To be a resident under Resolution 6-55, one would, during the five year pre-election period, have to have "maintained actual residence in the Republic of Palau for not less than five (5) years immediately preceding the election, except for short, temporary, and intermittent absences." Resolution No. 6-55, at 5. This "interpretation" overturns all previous interpretations of Section 6(3) by this Court. *See, e.g.*, ROP v. Pedro, 6 ROP Intrm. 185, 190 (1997) (Once residency is established, no physical presence is required to maintain it); Elbelau v. Election Commission, 3 ROP Intrm. 426, 434 (Tr. Div. 1993) (One may retain residency "even if absent for an extended period of time."); Ngerul v. Chin, Civ. Action No. 00-233, slip op. (February 15, 2001), at 9-10 (Mr. Chin intended to return to Palau and therefore "never gave up residency in Palau."); Ngerul v. Chin, Civ. App. No. 01-06 *slip op.* (April 2, 2001) at 5 ("In this instance, the intent of the framers not to equate 'residence' with 'continuous presence' could not be clearer."). Thus, Appellants are point-blank wrong to argue that Resolution No. 6-54, by which the Senate says it changed what "residency" means, "is not inconsistent with" the Constitution.[17]

The Senate cannot create a novel interpretation of "residency" for application to Chin that would have excluded several prior Senators if applied to them. The constitutional meaning of the word "resident" is "not occasional but fixed." U.S. Term Limits, 89 S.Ct., at 1848, quoting Powell v. McCormack, 89 S.Ct., at 1967, quoting 16 Parl Hist Eng. 589, 590 (1769). Resolution No. 6-55

17 Appellant's Brief, filed August 26,2002, at 24.

violates the Constitution by creating a novel interpretation for the purpose excluding Mr. Chin – an interpretation that would have disqualified numerous members of the first OEK,[18] and thus violated the principle of "uniformity" discussed in U.S. Term Limits.[19]

It is this Court's province and duty to re-establish the uniformity in the meaning of Section 6(3) that has been destroyed by Resolution No. 6-55. *see, e.g.*, Ngerul v. Chin, Civ. App. No. 0-44, *slip. op.* (Jan. 17, 2001), at 3. ("Resolution of this dispute, which here requires construction of the term 'resident' in Article IX, Section 6(3), falls squarely within the Court's statutory authority to 'say what the law is.'"); *accord* U.S. Term Limits, 115 S.Ct. at 1856 ("No qualification [not found in the Constitution] . . . is permitted to better the judgment or disappoint the inclination of the people"); Melairau v. Lakobong, *supra*, at 4-6.

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18 *See, e.g.*, Ngerul v. Chin, Civ. Action No. 00-233, *slip op.* (February 15, 2001), at 4 ("Elections for the First Olbiil Era Kelulau were held in 1980. At the time of his election to the House of Delegates in 1980, Delegate Hideo Termeteet had not lived continuously in Palau for the five years immediately preceding the election . . . Delegate Ignacio Anastacio had not lived continuously in Palau for the five years immediately preceding the election . . . Delegate Mariano Carlos had not lived continuously in Palau for the five years immediately preceding the election . . . ."). The same was true of at least two Senators of the First OEK, John S. Tarkong and Kaleb Udiu. *Id.* at 5.

19 The founding fathers of the United States rejected provisions that might be used by Congress to alter the qualifications requirements of its members because "such a power would vest '"an improper & dangerous power in the Legislature"' by which the Legislature '"can by degrees subvert [the qualifications set by] the Constitution."'" U.S. Term Limits, 118 S.Ct., at 1849, quoting Powell v. McCormack, 89 S.Ct., at 1970, quoting 2 Records of the Federal Convention of 1787, pages 249-250 (M. Farrand. Ed. 1911). For all of these reasons, it is clear that Palau must not allow its Congress to wield the "sole judge" power in a way that sets different qualifications for different Senators, past or present. Like the Congress of the United States, Palau's Congress must be constrained, as much as possible, to apply the "fixed" rule of the Constitution itself.

B. Resolution No. 6-55 Violates the Voting Rights Act.

The Voting Rights Act enumerates the factors that *must* be considered by the Senate or the House when adjudicating the question of whether or not a Palauan who has established residency in Palau has changed his residency by living in another jurisdiction for more than thirty days with the intent to permanently reside there. The Act requires that ten (10) factors be considered. 23 PNCA § 107(c)(4)(A through J). Senate Resolution No. 6-55 violated this Act by picking out *just two* of those ten factors and *ignoring all the others*.[20] Considering the eight (8) ignored criteria would, on the facts before the Senate, have led to an inescapable conclusion that Mr. Chin never gave up his Koror residency. While all the members of the Senate may judge the issue of whether one of them is not a five-year resident, they cannot do so in violation of the law enacted to govern its judgment.

C. Resolution No. 6-55 Was Also Unconstitutional Because Resolution No. 6-42 Contained a Full and Final Judgment that Mr. Chin Met the Constitutional Residency Requirement.

Resolution No. 6-42, as the culmination of the Senate's investigation into Mr. Chin's qualifications, resolved that Mr. Chin appears to meet his

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20 Senate Resolution No. 6-55, at page 5, ¶ 2, applying *only 2* of the required 10 criteria to Mr. Chin's Palau residency, and declining to apply any of the other 8 criteria to evaluate whether Mr. Chin established an intentionally-permanent residency elsewhere. ("The Senate . . . notes that the statute lists ten (10) factors as indicating a person's 'intent,' including '[t]he amount of time the individual is physically present within the jurisdiction.' And '[w]hether the individual maintains a home' in the jurisdiction. The Senate concludes that if this standard were properly applied to Senator-Elect Chin it would have to be concluded that Senator-Elect Chin had not been a resident of Palau between 1960 and 199?, because Senator-Elect Chin's physical presence in Palau has been quite limited during that period, and no evidence exists that he maintained a home in Palau during those years."). If the other 8 criteria had been applied, the inescapable result would have been a lack of evidence to support an intent to establish permanent residence in any place outside Palau.

qualifications, and that he was entitled to take his seat as a Senator if he executed the unconstitutionally-required consent. It is crystal clear from the text of Resolution No. 6-42 that the seat resolved to be given Mr. Chin was conditioned *only* on further investigation of his *citizenship*, and that his *residence* had therefore been fully and finally determined. Specifically, the consent prepared by the Senate specifically states that "information covered by this consent is limited to my citizenship status only ...." The Resolution goes on to say that "be it further resolved that if the information received from the U.S. Government [pursuant to the consent] shows that Camsek Elias Chin is a U.S. citizen, he shall voluntarily reason from his seat as a Senator in the Sixth Olbiil Era Kelulau." There is no provision whatever for removal on new evidence of *residency*. The Trial Division was thus correct to conclude that, upon removal of the unconstitutional consent requirement, Resolution No. 6-42 resolved to "seat" Mr. Chin.

D. Resolution No. 6-55 Was Not Based on Evidence of New *Facts*.

The evidence cited by Resolution No. 6-55 provides no support for reversing the Senate's prior determination that Mr. Chin should be seated despite his working in Kwajelin in 1995.

The Senate specifically discussed Mr. Chin's resident alien status, his "Green Card," before adopting Resolution No. 6-42, but knew that holding a Green Card does not, as a matter of U.S. law, constitute any evidence whatever that one is a resident of the United States.[21] Nonetheless, without citing any

wrong

21 Again, the resident alien status evidenced by the Green Card is nothing more than an *entitlement* to *become* a permanent resident. It is not evidence that the holder has ever

wrong

authority (because none could be cited) to support its statement, Resolution No. 6-55 simply rests its expulsion of Mr. Chin on the untrue statement that "Senator-elect Chin was a 'Permanent Resident Alien' of the United States of America from 1974 up to and including at the earliest December 28, 2000 and [therefore] could not have been a resident of the Republic of Palau during that period." Resolution No. 6-55, at 6. While the Senate did obtain, fax in April 2001, the U.S. Cable dated December 28, 2000 stating that U.S. records show that Mr. Chin retains his Green Card status, that was just additional evidence of the same fact established by the Green Card, and was *known about and discussed prior to the adoption of Resolution No. 6-42*.

V. THE COURT ERRED IN DECLINING TO DECLARE WHETHER OR NOT MR. CHIN IS QUALIFIED.

A. The Trial Court Had the Jurisdiction and the Duty to Rule on Mr. Chin's Qualifications.

The Trial Division, though willing to find that the Senate had found Mr. Chin is qualified, declined to make its own finding to that effect, as Mr. Chin had requested of it. It had the power and duty to so declare. Salii v. House of Delegates, 1 ROP Intrm. 708, 712-713 (1989) (Court has jurisdiction to decide "a claim alleging that a legislature has abridged an individual's constitutional rights by refusing to seat

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become a resident of the United States, or has given up a prior residence. 8 U.S.C.A. § 1101(a)(20). ("The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed."). The same is true of all other "evidence" upon which Resolution No. 6-55 purports to base its conclusion. *See* Chin v. Francisco, *et al.*, Civ. Action No. 01-140 Opposition to Francisco and Adachi Motion for Summary Judgment (December 7, 2002), at 10-11.

an elected representative"); Kazuo v. ROP, 1 ROP Intrm. 154, 160 (1984) ("'It is emphatically the province and duty of the judicial department to say what the law is.'"); Melaitau v. Lakobong, Civ. App. No. 01-62, *slip op.* (July 24, 2002) ("Courts have an almost unflagging obligation to hear every case over which they have jurisdiction.").

B. On the Undisputed Facts and Law, Mr. Chin Is a Citizen.

The Trial Division had before it the following conclusive evidence of Mr. Chin's citizenship.

Parentage. It is undisputed that Mr. Chin's parents are Palauan. ROP Const. Art. III, § 2 provides that "A person born of parents, one or both of whom are citizens of Palau is a citizen of Palau by birth, and shall remain a citizen of Palau so long as the person is not or does not become a citizen of any other nation." The United States has clearly shown that Mr. Chin has never become a citizen of that country. There is no hint that Mr. Chin ever became a citizen of any other nation. He is thus a citizen under the Constitution as a matter of his constitutional birthright. *id.*

Citizenship upon Establishment of the Republic. Mr. Chin was undisputedly a Trust Territory citizen on January 1, 1981. ROP Const. Art. III, § 1 provides "A person who is a citizen of the Trust Territory of the Pacific Islands immediately prior to the effective date of this Constitution and who has at least one parent of recognized Palauan ancestry is a citizen of Palau." His 1981 Trust Territory Citizenship conclusively required a finding that he became a Palauan citizen in January 1, 1981. *id.*

Passport. The fact that Mr. Chin holds a Palauan passport is also conclusive evidence of his citizenship. Palau's Ministry of State, the entity legally charged with issuing such documents, should be the sole point of inquiry on that issue. It is noteworthy that, many years ago, a passport was substantial, but not conclusive, evidence of citizenship in the United States. Magnuson v. Baker, 911 F. 2d 330, 333 (9th Cir. 1989). It is equally noteworthy that, to conform to modern realities, the United States changed the law to provide that a passport is *conclusive* evidence of citizenship. *id.* As a modern state, this is the rule Palau should adopt.

Residency. The Legislative Branch makes the laws, the Executive Branch enforces them, and the Judicial Branch resolves disputes regarding how they are enforced. The Executive Branch, since 1994, continued to allow Mr. Chin to enter and reside in Palau without an entry permit. The determination of the Immigration department of Palau's Executive Branch in that regard should be considered particularly strong evidence of his Palauan citizenship, if not to have disposed of have conclusively disposed of that issue as a matter of law. 6 P.N.C.A. § 101, *et seq.*; *accord*, Magnuson v. Baker, 911 F. 2d at 333-335.

Suffrage. It was an undisputed fact Mr. Chin has voted in Palau, and in no other place. The act of voting is normally considered to be conclusive evidence of citizenship in the jurisdiction where the right to vote is exercised. *See, e.g.*, Baker v. Keck, 13 F. Supp. 486, 487 (E.D. Ill. 1936) ("Accordingly it is commonly held that the exercise of suffrage by a citizen of the United States is conclusive evidence of his citizenship."). In a young nation such as Palau, especially one with a small

population and whose founding fathers have expressed their desire for an inclusive approach to residency and citizenship, such a rule is particularly appropriate.

U.S. Communiqués. The formal communications of the United States Department of State should have been treated as conclusive evidence that Mr. Chin is *not* a citizen of the United States.[22] In contrast to the great weight of the evidence of his Palauan citizenship that Mr. Chin has supplied to this Court and to the Senate, no Defendant was able to point to one *scintilla* of evidence that Mr. Chin ever ceased to be a citizen of Palau.

In sum, the evidence of Mr. Chin's Palauan citizenship was, and is overwhelming and uncontradicted.[23] The Court should therefore have declared him to meet the citizenship requirement of Art. XI § 6, as he asked it to do. Salii v. House of Delegates, 1 ROP Intrm. 708, 712-713 (1989) (Court has jurisdiction to decide "a claim alleging that a legislature has abridged an individual's constitutional rights by refusing to seat an elected representative"); Melaitau v. Lakobong, *supra*, at 1 ("Courts have an almost unflagging obligation to hear every case over which they have jurisdiction."). He asks the Appellate Division to do so now.

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22 Mr. Chin notes the apparent irrelevance of the entire inquiry as to the unfounded and erroneous suppositions that he had to be a citizen of the United States in order to be an officer in the U.S. military. The Constitution does not forbid a dual citizen (which Chin emphasizes he is not) from being a Senator. The only constitutional requirement is Palauan citizenship. ROP Const. Art III, § 2 simply states that a Palauan citizen cannot be deprived of Palauan citizenship unless he or she becomes a citizen of another nation. It does not state that becoming a citizen of another nation terminates one's Palauan citizenship.

23 *See* footnote 4, *supra*.

C. Under Palauan Law, Mr. Chin Became a Resident of Koror as an Infant, and Remained Such Throughout His Life.

The Voting Rights Act provides that "Once residence is established it is maintained unless the individual is physically present in another political jurisdiction on a reasonably continuous basis within a minimum 30 day period *with the intent to establish his permanent home therein.*" 23 P.N.C.A. § 107(c)(1) [emphasis added].

The evidence before the Trial Division was that Mr. Chin never intended to establish a "permanent home" in any of the other jurisdictions in which he was temporarily physically present. While engaged in his career abroad, he regularly spent his free time in Palau. He exercised his right to vote in Palau, and only there. He purchased acquired and retained real estate in Palau in anticipation of his ultimate return. He acquired none in any other jurisdiction. While in the military, he always lived in military housing, except in one circumstance where that was not possible. He kept bank accounts in Palau. He continued, while abroad, to observe his customary duties as a Palauan, and to perform exemplary civic duties as an active member of the Palauan community. The godparents of his children resided in Palau, not in any of the places he was stationed. When his wife and children could not be with him due to the nature of his duties, they returned home to Palau. He eschewed the opportunity to take up permanent residence in the United States, an opportunity that was his, as an alien lawfully admitted to the U.S., for many years. That choice, along with his continued involvement with his family, his observance of his obligations as a Palauan, and his contributions to the Palauan community, presented the Trial Court extremely persuasive evidence that he did *not* intend to permanently reside in the U.S.

Neither Appellants nor the Senate were able to come forward with any "specific facts" showing that Mr. Chin ever intended "to establish a permanent home" in any of the other jurisdictions in which he was temporarily present in pursuit of his education and career. In fact, the only evidence relevant to this issue that was not presented in the Ngeru case, where the Appellate Division upheld Justice Michelson's ruling that Mr. Chin *met* the residency requirement, was the U.S. Cable dated December 28, 2000 stating that U.S. records show that Mr. Chin retains his Green Card status.[24] There was *no evidence* that Mr. Chin ever intended to "establish his permanent home" in Hawaii, in North America, in Germany, in Korea, or in the Marshall Islands. The fact that Mr. Chin moved on from each of these places, and settled in Palau, where he always retained close ties, showed otherwise.

Consequently, as a matter of law, Mr. Chin never abandoned his status as a resident of Palau. 23 P.N.C.A. § 107(c). The Senate recognized this in Special Committee Report No. 6-5, at 2 ("Senator-elect Chin's election and qualifications for membership in the Senate of the Sixth Olbiil Era Kelulau appear to be in order.") and in Resolution No. 6-43 (seating Mr. Chin unless he is found to be a U.S. citizen.)

true?

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24 Again, the need for Mr. Chin to register as a resident alien in the U.S., an act required by his chosen career, did not, as a matter of U.S. law, provide any evidence of an intent to "establish [a] permanent home" in the United States. Even assuming that U.S. law properly provides any guidance to the decision this Court must make, the term "permanent resident alien," as used in the U.S. Immigration and Nationality Act, does not, as a matter of U.S. statute, imply any intent on the part of a permanent resident alien to reside permanently in the United States. 8 U.S.C.A. § 1101(33) ("The term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.") [emphasis added]; 8 U.S.C.A. §1101(31) ("The term 'permanent' means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance of either the United States or of the individual . . .").

there support opposition

The Trial Court should have declared Mr. Chin to meet the residency requirement of Article XI, § 6, as he asked it to do. Ngerul v. Chin, Civ. App. No. 0-44, slip. op. (Jan. 17, 2001), at 3. ("Resolution of this dispute, which here requires construction of the term 'resident' in Article IX, Section 6(3), falls squarely within the Court's statutory authority to 'say what the law is.'"); Melaitau v. Lakobong, *supra*, at 1.

VI. THE COURT ERRED IN DENYING THE REQUESTED INJUNCTIVE RELIEF.

The Speech and Debate Clause provides no protection to Senate employees. Powell v. McCormack, 395 U.S. 486, 504 (1969) ("In Kilbourn and Dombrowski we thus dismissed the action against members of Congress but did not regard the Speech or Debate Clause as a bar to reviewing the merits of the challenged congressional action since congressional employees were also sued. Similarly, though this action may be dismissed against the Congressmen petitioners are entitled to maintain their action against House employees and to judicial review of the propriety of the decision to exclude petitioner Powell."). Because there is no constitutional provision exempting Senate employees from the Court's power to enjoin persons to perform their duties as the law requires, none should be have been implied by the Trial Court.[25] It was thus error for the Trial Court, having found that Mr. Chin was a

25 Prigg v. Pennsylvania, 10 L. Ed. 1060, 1088 (Storey, J.) (where there is no qualification or restriction in the clause being interpreted "we have no right to insert any which is not expressed and cannot be fairly implied."); Ross v. City of Long Beach, 48 P. 2d 649, 650 (Cal. 1944) (Courts cannot add provisions to what the Constitution declares in definite language.).

Senator, to refuse to enjoin the Senate's employees to treat him as such on the ground that to do so would unduly intrude into the Senate's affairs.

VII. MR. CHIN WAS ENTITLED TO HIS ATTORNEYS' FEES.

Mr. Chin successfully sued to uphold the constitutional provisions governing the election of Senators, obtaining a ruling that the consent required of Mr. Chin by Resolutions 4-42, 6-47, and 6-49 was unconstitutional and a ruling that Resolution No. 6-55 was not effective, under the Constitution, to expel him. Re-establishing the constitutional process for seating senators, and vindicating the rights of the Electorate, benefit the public. Those resisting the Constitution have used public funds to pay their attorneys to do so. Mr. Chin had to personally fund the re-establishment of the Constitution. That is not fair or equitable. Mr. Chin requested attorneys' fees to address that unfairness and inequity. The Court denied that request as contrary to 14 PNCA § 703, which disallows the taxing of specified "costs" of suit from the Republic. That statute is inapplicable because attorneys' fees are not "costs."[26] The attorney fee issue should thus have been decided pursuant to the common law of the United States, which uses the so called "American Rule" that each party pays its own counsel absent contrary statute or contract . 1 PNCA § 303. The "American Rule" has a well-established exception that empowers Courts "to award attorneys' fees to a party whose litigation efforts directly benefits others." Chambers v. NASCO, Inc., 111 S.Ct. 2123, 2133 (1991). This is such a case, and Mr.

26 *See, e.g.*, Haroco v. American Nat. Bank, 38 F. 3d 1429, 1441 (7th Cir. 1994) ("attorney's fees may not be recovered as 'costs'" under statute allowing recovery of costs); Commonwealth v. Sherer, 126 A 2d 483, 484 (Pa. Super. 1956) ("attorney fess are not costs.). Further, it is not clear that the Senate qualifies as "the Republic" under the statute, and Appellants certainly do not.

Chin most respectfully requests this Court to reverse the Trial Division's denial of his motion for attorneys' fees and order that the Senate and Appellants pay for the attorneys fees Mr. Chin reasonably incurred in vindicating the Constitution.

VIII. NONE OF APPELLANTS' ASSERTED GROUNDS FOR APPEAL HAVE MERIT.

A. Appellants Wrongly Assert that Resolution No. 6-55 Was Adopted by Two-Thirds of the Members of the Senate.

Appellants and the Senate concede that only five Senators voted in favor of Resolution No. 6-55. Instead, they urge this Court to find that Senator Tmetuchl's silence during voting should be counted as a "yes" vote for purposes of expelling Mr. Chin under ROP Const. Art. IX, § 10. Article IX, Section 10 states that "[e]ach house of the Olbiil Era Kelulau . . . by a vote of not less than two-thirds (2/3) of its members may suspend or expel a member" (emphasis added). Six actual, affirmative votes would therefore be needed even to expel Mr. Chin on proper grounds. ROP Const. Art. IX, § 10. Case law from other jurisdictions, such as that copiously supplied by Appellants, should not be viewed as a ground for diluting what the Palau Constitution provides in clear terms.

Even if foreign case law should be so viewed, it is just as easy to find copious cases upon which to urge a conclusion opposite that urged by Appellants. A vote of 3-1 with one abstention, for example, fails to satisfy a two-thirds vote requirement. See State ex rel. Rea v. Etheridge, 32 S.W.2d 828, 831 (Tex.Com.App. 1930) ("it should be affirmatively shown that two-thirds of the council had voted in favor of the proposition"). Where the absence of one member deprived a board of the requisite three-fourths majority, an ordinance was void. See Bonney v. Smith, 147

has nothing to do w/ abstention

P.2d 771, 773 (Okla. 1944). Similarly, an abstention may violate a simple majority vote requirement. See Braddy v. Zych, 702 S.W.2d 491, 495 (Mo.App. 1985) ("an abstention is not a favorable vote"); Mann v. Key, 345 So.2d 293, 295 (Ala. 1977) ("the vote must be by a 'majority of the total membership'"); Rockland Woods Inc. v. Incorporated Village of Suffern, 340 N.Y.S.2d 513, 514 (Sup. 1973) ("the absence or abstention of a member does not dispense with or lessen that requirement"); State ex rel. Roberts v. Gruber, 373 P.2d 657, 660 (Or. 1962) ("The words 'the entire membership of the council' mean all its members"); Streep v. Sample, 84 So.2d 586, 588 (Fla. 1956) ("a majority of all members, three or more, shall constitute a quorum, but three votes are necessary to adopt an ordinance"); Caffey v. Veale, 145 P.2d 961, 964 (Okla. 1944) ("No presumption should be indulged that a voter who does not vote yea or nay is thereby to be counted among those who vote yea"); Van Cleve v. Wallace, 13 N.W.2d 457, 470 (Minn. 1944) ("the council can act only through the affirmative vote of the majority of all its members"); Van Hovenberg v. Holeman, 144 S.W.2d 718, 721 (Ark. 1940) ("requirement that the permit be granted by a majority of all members"); State ex rel. Deal v. Alexander, 77 N.W. 841, 842 (Iowa 1899) ("majority of the whole number of members"). And there is no unanimous consent where there is an abstention. See Burns v. Stenholm, 17 N.W.2d 781, 784 (Mich. 1945).[27]

distinguish these

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27 None of Francisco and Adachi's authorities apply to the present case. All of them involve municipal and corporate rather than legislative bodies, and none of them were decided under rules such as Rule 8(H), which requires the President to order the Clerk to record an abstaining vote in the affirmative. A number of them involved "passed" votes as opposed to abstentions. See A & H Services Inc. v. Wahpeton, 514 N.W.2d 855, 859 (N.D. 1994); Northwestern Bell Telephone Co., v. Board of Commissioners, 211 N.W.2d

Vote requirements refer to the full authorized membership of a board, not the actual membership when the vote is taken. Braddy, 702 S.W.2d at 493-94 ("referring to the entire Board as defined in the Charter creates a predictability and definiteness in the requirements for the enaction of laws"); Opinion of the Justices, 230 A.2d 802, 803 (Me. 1967) (two-thirds vote requirement means two-thirds of entire membership, not two-thirds of members elected and qualified to serve at time vote is taken); Steiner Inc. v. Town Plan and Zoning Commission, 175 A.2d 559, 561 (Conn. 1961) (declining "[t]o construe the statute as the plaintiff claims, that is, to require only two-thirds of the incumbents instead of two-thirds of the authorized membership"); Dombal v. Garfield, 30 A.2d 579, 580 (N.J. 1943) ("'a majority of all members' of the councilmanic body means 'the full membership commanded by the act, and not a reduced body, however occurring'"); Hammer v. Commonwealth ex rel Hoover, 193 S.E. 496, 500 (Va. 1937) (where number of councilmen is nine, "Legislature intended that there should be no valid election unless five councilmen voted in favor"); Smiley v. Commonwealth ex rel. Kerr, 83 S.E. 406, 408 (Va. 1914) ("the candidate for the office to be filled must be appointed by the vote of a majority of the entire body vested with the legislative power to make the appointment"); Reese

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399, 400 (N.D. 1973) (specifically distinguishing between members present but not voting and members dead or absent); Payne v. Petrie, 419 S.W.2d 761, 762 (Ky.App. 1967); State ex rel. Miller v. Marshall, 184 So. 870, 872 (Fla. 1938), reh'g denied, 185 So. 428 (Fla. 1938). In A & H Services Inc., the vote was unanimous and resolution of the factual dispute would not have affected the outcome of the case. In Equity Investors Inc. v. Ammest Group Inc., 563 P.2d 531, 533-34 (Kan.App. 1977), no one at the vote objected to the announcement that the motion had carried, and all of the members of the board, including the dissenting and abstaining directors, indicated that the proposal had been accepted. In Alamo Heights v. Gerety, 264 S.W.2d 778, 779 (Tex.Civ.App. 1954), the abstaining alderman disqualified himself for interest.

v. State, 62 So. 847, 850 (Ala. 1913) ("If it had intended that a majority of a quorum or of the members constituting the council after a vacancy occurred should suffice, the Legislature would have said so"); McLean v. City of East St. Louis, 78 N.E. 815, 816 (Ill. 1906) ("we see no ground whatever for sustaining the claim that such an ordinance could be passed by a majority of a quorum"); Wood v. Gordon, 52 S.E. 261, 262 (W.Va. 1905) ("If a majority of a quorum, or of the number then constituting the council after one or more had died or resigned, had been intended, the Legislature would have so provided"); Pollasky v. Schmid, 87 N.W. 1030, 1031 (Mich. 1901) (where two places were vacant, two-thirds vote of remaining aldermen was not sufficient to pass an ordinance).

B. The Trial Division Correctly Held that Resolution No. 6-42 Added an Unconstitutional Fifth Qualification that Mr. Chin Had to Meet in Order to be Seated.

Section 6 of Article IX sets forth *all* the Constitutional qualifications for the office of Senator.[28] To be qualified, a Senator must be "1) a citizen; 2) not less than twenty-five years of age; 3) a resident of Palau for not less than five (5) years immediately preceding the election; and 4) a resident of the district in which he wishes to run for office for not less than one (1) year immediately preceding the election." ROP Const. Art. IX, § 6(3). This provision must be read with Article IX, § 10 to provide that the Senate's power to adjudge that one of its members is not qualified to serve as a Senator *must* be on one of these grounds and *cannot* be on any other ground. This is so because Section 6(3) clearly states that one having all four of

28 If there is another qualification, it could only be a qualification based on Article IX, § 10 that a Senator not hold any other office. There has been and could be no suggestion that Senator Chin holds any other government office.

these traits *is* qualified, and thus *cannot* be constitutionally *disqualified* under § 10 if he or she meets all these requirements.

Nonetheless, after excluding Senator Chin from the Senate for six months on the purported ground that the Senate was investigating his qualifications, the Senate, on a pair of 5 to 3 votes, passed Resolution Nos. 6-47 and 6-49.

Resolution No. 6-47 resolved that if Senator Chin did not sign and return the consent form drafted by his Senatorial opponents by May 31, 2001 at 4:30 p.m., that the Senate "finally and conclusively judges him not qualified pursuant to the Constitution for membership in the Senate of the Sixth Olbiil Era Kelulau." When read along with the May 1, 2001 Resolution No. 6-42 imposing the execution of that consent as a precondition to being seated, and the May 1, 2001 Special Committee Report 6-5 acknowledging that Chin is otherwise qualified, it is clear that this final and conclusive judgment was for a constitutionally-impermissible fifth qualification imposed solely on Senator Chin.

Resolution 6-49 resolved that, because Senator Chin had not signed that consent by that time, "the Senate hereby declares that the seat in the Senate of the Sixth Olbiil Era Kelulau that has remained unoccupied since the commencement of the term of the Sixth Olbiil Era Kelulau became finally and conclusively vacant on May 31, 2001 at 4:30 p.m." The combined effect of these two resolutions was to permanently deny Senator Chin his right to function as a Senator of the Sixth OEK, as he has been elected to do, not because he lacked any of the four constitutional qualifications to hold that office, but because he refused to sign the consent demanded by his opponents. That violated the Constitution. Exclusion on the ground that a

citizen elected to serve as Senator would not sign a consent in order to be "seated" adds a fifth requirement for a citizen to so serve – a requirement that is not in the Constitution.

To conform to the Palau Constitution, a resolution finding that a duly-elected Senator is not qualified to serve as such can neither add to, nor diminish, the qualifications set forth in Article IX § 6(3) of the Constitution. This basic principle of constitutional democratic republicanism has been twice examined by the United States Supreme Court, first in Powell v. McCormack, 395 U.S. 486 (1969), and second in U.S. Term Limits, Inc. v. Thornton, 115 S.Ct. 1842 (1995). Both cases were explicitly founded on the "'fundamental principle of our representative democracy,' embodied in the Constitution, that 'the people should choose whom they please to govern them.'" U.S. Term Limits v. Thornton, 118 S.Ct., at 1845, quoting Powell v. McCormack, 89 S.Ct., at 1977. In the U.S. Term Limits case, the Court upheld the holding of the Arkansas Supreme Court that states have no authority " 'to change, add to, or diminish' the requirements for congressional service enumerated in the qualifications clauses." 118 S.Ct., at 1846.

Resolution No. 6-42 fails this test and destroys uniformity. It clearly and unequivocally sets a fifth qualification for Mr. Chin, that no present Senator, and no past Senator, has ever had to meet – a requirement that he sign a consent allowing investigation into his private affairs as a precondition to taking the seat the Electorate has directed that he take.

C. The Trial Court Properly Found that the Part Of Resolution No. 6-42 that Did Not Violate the Constitution Was a Valid and Binding Legislative Resolution.

1. The Court Properly Construed Resolution No. 6-42.

Appellants argue that the Trial Division erred in giving effect to the portion of Resolution No. 6-42 that did not violate the Constitution. To the contrary, the portions of these resolutions that violated the Constitution had to be excised, and the remaining portion that did not violate the Constitution had to be given effect. Yalap & Maidesil v. ROP, 3 ROP Intrm. 61, 66 (1992); ROP Const. Art. II, § 2 ("Any law [or] act of government . . . shall not conflict with this Constitution and shall be invalid *to the extent of such conflict.*") [emphasis added].

Application of this constitutional mandate to the facts of this case was appropriate and required. Despite the general rule that a deliberative body may reconsider its proceedings as it sees fit, the Senate could not have contradicted its fact finding in SCR 6-5 and SR-42 that Senator Chin is qualified to serve as a Senator. That general rule *does not apply* after the original decision has altered the vested rights of a third party. 59 Am. Jur. Parliamentary Law, § 15; McConoughy v. Jackson, 35 P. 863 (Cal. 1894). Mr. Chin's fundamental constitutional right to serve as a Senator vested in him upon the adoption of SCR 6-5 and SR-42.[29] In reliance on that investiture, he initiated this expensive and time-consuming litigation. There was no reason for the Trial Division not to do as Article II, § 2 clearly requires – give

29 Mr. Chin notes that Appellants and the Senate were completely content with the provisions of SCR 6-5 and SR-42, as seen from their initial vigorous defense of the constitutionality and effectiveness of those acts, until this Court ruled that one part of the latter would likely be found unconstitutional.

effect to the portion of Resolution Nos. 6-42, 6-47, and 6-49 that state that Mr. Chin's qualifications appear to be in order, which do not violate the constitution, and excise those portions that add a fifth requirement to qualify for service in the Senate, which do violate the Constitution.

2. The Effect of Special Committee Report No. 6-5 and Senate Resolution No. 6-42 Must Be Considered in Their Historical Context.

The Trial Court's holding that Resolution No. 6-42 functioned to "seat" Mr. Chin as a member of the Senate was made after extensive presentations by both sides regarding the history and context of those acts. To fully understand what the Senate's Committee of the Whole did on May 1, 2001 by unanimously resolving that "for the present . . . Senator-elect Chin's election and qualifications for membership in the Senate of the Sixth Olbiil era Kelulau appear to be in order,"[30] to understand the immediately subsequent resolution that upon executing the unconstitutionally-required consent, "Senator Chin "shall be entitled to take his seat as a Senator of the Sixth Olbiil era Kelulau,"[31] one must, as the Trial Court did, consider the following contemporaneous facts informing those two formal rulings.

- On January 1, 2001, Senator Chin provided the Senate with two letters from the U.S. Chargé stating that Chin was not, and never had been, a U.S. citizen. (Exhibit 19 to June 25, 2001 Affidavit of Camsek Chin).

- On January 29, 2001, Senator Chin provided the Senate with a copy of his U.S. Alien registration card, conclusively proving that he had not been required

30 SCR No 6-5.
31 Resolution No. 6-42.

to become a U.S. citizen to obtain his commission as an officer of the U.S. Army Reserves. *See* SCR No. 6-3, at 3 (Exhibit 21 to June 25, 2001 Affidavit of Camsek Chin).

- On April 3, 2001, the Credentials Committee acknowledged that the Appellate Division had determined that Senator Chin met the constitutional residency requirement, but had "left the question of Chin's citizenship unresolved." *See* SCR No. 6-4, at 3 (Exhibit 1 to September 21, 2001 Declaration of Counsel).

- On May 1, 2001, Senator Kanai explained to the Senate Committee of the Whole that he and Senator Whipps had taken the two letters from the U.S. Chargé to the U.S. Embassy and verified that they were correct and genuine. (Exhibit 2 to September 21, 2001 Declaration, at 9). Immediately thereafter, the Committee of the Whole adopted SCR No. 6-5, on a vote of 6 to 0, resolving that "Senator-elect Chin's election and qualifications for membership in the Senate of the Sixth Olbiil era Kelulau appear to be in order." That same day, the Senate adopted SR 6-42, resolving that as soon as Senator Chin executed the consent, he would "be entitled to take his seat as a Senator of the Sixth Olbiil era Kelulau."

In this context, SCR 6-5 and SR 6-42 show that the Senate had completely considered all doubt that Chin's qualifications were in order, and had, for that specific reason, formally resolved to seat him as a Senator, but only if he acceded to the unconstitutional demand that he sign the consent. From all the acts of the Senate and its two relevant committees during the April-May 2001 period, it was clear that the only remaining issue was citizenship. Thus, when the Court ruled that the consent was unconstitutional, the Senate lacked jurisdiction to find Mr. Chin was

not a resident, having already ruled that he was qualified unless a citizen. Thus, Mr. Chin's expulsion by Resolution No. 6-55 on the ground he was not a five-year resident, even if had been adopted by two-thirds vote, which it was not, and even if it judged Senator Chin's residency in conformity with the established meaning of the Constitution, which it did not, was void under the doctrines of *res judicata* and collateral estoppel. Without new evidence of *new facts*, the Senate, when acting in a judicial capacity, cannot reverse its own prior judgments, especially when those affected by them have taken action in reliance upon them.

D. The Trial Court Properly Declined to Dismiss this Case as a "Political Question" Despite the Textual Commitment of Power in the "Sole Judge" Clause.

Even if this case presented a non-justiciable political question under the U.S. Constitution, which it does not, it does not do so under the Palau Constitution, as this Court has had the opportunity to rule and discuss at length in remarkable similar circumstances. Elbela v. Election Commission, 3 ROP Intrm. 426, 427-428 (Tr. Div. 1993); *accord*, Powell v. McCormack, 395 U.S., at 518 & 548, 89 S. Ct. at 1962 & 1978 (because the "textually demonstrable commitment" to Congress is limited to judging only those qualifications expressly set forth in the Constitution, the political question doctrine does not bar courts from adjudicating claims arising from the exclusion of a member on other grounds). Further, because this is a case to defend and protect the Mr. Chin's constitutional rights as a citizen of Palau, it simply cannot be viewed as a foray into the political realm outside the scope of the Court's constitutional function. The Senate v. Remeliik, 1 ROP Intrm. 90, 91 (1983) (Court's province and duty to uphold the Constitution).

The only protection the "sole judge" clause would have offered the Senate would have been from Court review of a judgment on qualifications that was: (1) directed at one already a member of the Senate; and (2) not in conflict with the requirements of the Constitution itself.[32] As discussed below, the "sole judge" language should not provide any bar at all to Court review of a vote to exclude one who never became a Senator because he did not sign a consent five other Senators demanded he sign. Neither should the "sole judge" protection extend to a suit seeking a declaration that he was excluded by means of a novel and unconstitutional definition of "resident" that would overturn nearly twenty years of precedents in the Senate, the House of Delegates, and the Court.

E. The Trial Division Did Not Err in Taking Judicial Notice of Senate Records.

A Court may take judicial notice of readily-verifiable facts *sua sponte*. ROP Evid. Rule 201(c) ("A court may take judicial notice, whether requested or not."). Despite this broad grant of power, Appellants argue that the Trial Division erred in doing just that They are wrong.

First, judicial inquiry outside the record in the course of taking judicial notice is not an independent investigation within the meaning of the commentary to Canon 3(B)(7). Minor v. State, 2001 Tenn. Crim. App. LEXIS 932 (December 5, 2001) (Where trial judge conducted its own sua sponte investigation into the court

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32 Powell v. McCormack, 395 U.S., at 518 & 548, 89 S. Ct. at 1962 & 1978 (because the "textually demonstrable commitment" to Congress is limited to judging only those qualifications expressly set forth in the Constitution, the political question doctrine does not bar courts from adjudicating claims arising from the exclusion of a member on other grounds).

records of a related case, and took judicial notice thereof, it did not violate the rule stated in the commentary to Canon 3(B)(7)(e) that "A judge must not independently investigate facts in a case," and such an investigation provided inadequate ground to support recusal). To the contrary, Courts are *specifically authorized* to make an independent investigation outside the record in order to determine whether they have been the victim of fraud, such as with respect to the statements in the Andres affidavit concerning what happened at the vote on Resolution No. 6-55.[33] Chambers v. NASCO, Inc., 111 S. Ct. 2123, 2132 (1991) ("Moreover, a court has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud.").

Second, an "independent investigation," is not, strictly speaking, prohibited by Canon 3(B)(7). As stated in the A.B.A. Code of Judicial Conduct.

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33 The Constitution requires an affirmative vote of two-thirds (2/3) of all members. Senator Andres and his attorneys apparently determined that they had a colorable legal argument that the vote that did take place could be construed as a 6 to 2 vote. Mr. Van Dyke and Mr. Toribiong are allowed to make such an argument under Rule 11. This is not, however, what they and Senator Andres did. They instead failed to inform the Court what really happened, and submitted an affidavit signed by Senator Andres, and a statement of facts prepared by his attorneys, simply asserting that six members voted for the resolution, *without explaining to the Court or opposing counsel that this is so only if the Senate Rules are construed to relax the Constitutional six-vote requirement.* Senator Andres and counsel *did not disclose* to the Court or opposing counsel that the sworn statement was only true if one accepts their rather questionable legal theory. These omissions make the statements of Senator Andres and his attorneys to the Court, and to opposing counsel, materially, if not critically, misleading. As recognized by the Supreme Court of the United States, the Court's duty to uphold the Constitution requires it to do something to address that situation, and a judicial investigation outside the record is the completely appropriate way for the Court to do that. It is disturbing that the Senate's response to its own wrong was to accuse the Court of wrongdoing because the Court exposed its critically material omissions in stating the facts. This was especially inappropriate when to do that interfered with the integrity of the Court while it was considering Senate arguments urging minimal interference between coordinate branches.

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ignores their view that it was a vote to exclude needing only a simple majority

Preamble, "The text of the Canons and the Sections, including the Terminology and Application Sections, is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections." It is important to note that this particular commentary was not added until the most recent revision of the Code in 1990, that it is little tested, and that well respected jurists have historically gone outside the record to decide cases when justice so required. For example, in Ballew v. Georgia, 98 S.Ct. 1029, 1034 n. 10 (1978), Justice Blackman, writing for the *majority* of the Supreme Court, cites numerous studies on how jury size affects verdicts. These were apparently *not* part of the record before the Court. *Id.*, 98 S.Ct. at 1042 (Powell concurring) (noting Justice Blackman's "heavy reliance" on studies that had not been "subjected to the traditional testing mechanisms of the judicial process.").

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Third, if Court staff did seek to confirm Justice Michelsen's understanding of the nature of Senator Trnetuchl's asserted "aye" vote, and if that was a judicial error, the Court promptly took the appropriate course of action to remedy any such error by promptly holding a hearing at which counsel for both sides were informed of exactly what took place and given the opportunity to comment upon it and upon the judicially noticed matter. This was sufficient to cure any error. Shaman, Judicial Conduct and Ethics, 2d Ed., Ex Parte Communications, § 5.08 ("prompt disclosure of the *ex parte* communication to all affected parties may avoid the need for other corrective action."); McElhannon v. Hing, 728 P.2d 273 (Ariz. 1986) (effect of *ex parte* communication was cured by prompt notice and opportunity to comment.) Thus, even if the event at issue here constituted an *ex parte*

communication, and it simply wasn't,[34] the effect of any judicial error was cured by the Court's prompt hearing where he gave all parties an opportunity to comment. This is especially true in this instance because Appellants' counsel *conceded* at that hearing that the resulting judicially-noticed fact *is true*; thereby confirming to Justice Michelsen that Appellants were not prejudiced in any way, and that Senator Andres' affidavit was not, shall we say, "completely correct." Appellants should not have wrongly complained of prejudice, at the expense of the dignity of the Court, and in a manner constituting judicial intimidation by a co-ordinate branch, just because the truth of the vote came out despite Senator Andres's ill-advised efforts to gloss it over.

Fourth, even if the Court had not taken prompt action to rectify its alleged error, if any, such an error would not support a motion to recuse because the error did not result "manifest injustice." Seid v. Seid, 36 P. 3d 1167, 1176-1177 (Wy. 2001) (Even where a party clearly had an improper *ex parte* communication with the judge, that provided no ground for recusing the judge absent manifest injustice arising from the communication.). To the contrary, the taking of judicial notice, even if it did result from such an ex parte communication (which is not at all clear), *prevented* the injustice that would otherwise have arisen from the incorrect assertions of Defense counsel and Senator Andres that the Resolution was adopted by a 6 to 2 vote. Here, judicial notice of a readily-verifiable public fact *prevented* the injustice that would

34 Under Minor, this inquiry into an extrinsic official record with respect to the taking of judicial notice is outside the meaning of "independent [ ] investigation of facts" as used by the Commentary. Under Chambers, it was a completely-proper, necessary, and specifically-authorized judicial investigation.

otherwise have resulted from Senator Andres's and Defense counsel's presumably unintentional misleading statements to the Court.

CONCLUSION

Appellants and the Senate have unconstitutionally infringed the Electorate's right to choose Mr. Chin as a Senator. This Court is empowered by the Constitution to remedy that infringement, and is the only body so empowered. It should not shrink from its duty to do so.

Respectfully submitted this 28th day of October 2002.

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Chin