

**THE SUPREME COURT OF THE  
FEDERATED STATES OF MICRONESIA**  
Cite as *Robert v. Mori* ,  
6 FSM Intrm. 394 (App. 1994)

[6 FSM Intrm. 394]

**ROMAN ROBERT,  
Plaintiff-Appellant,**

**vs.**

**BOB MORI, in his official capacity as  
the FSM National Election Commissioner,  
Defendant-Appellee.**

**APPEAL CASE NO. C1-1994**

**OPINION**

Hearing: January 27, 1994  
Order Issued: January 28, 1994  
Opinion Entered: April 15, 1994

**BEFORE:**

Hon. Andon L. Amaraich, Associate Justice, FSM Supreme Court  
Hon. Richard H. Benson, Associate Justice, FSM Supreme Court  
Hon. Martin Yinug, Associate Justice, FSM Supreme Court

**APPEARANCES:**

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**HEADNOTES**

**Administrative Law – Judicial Review; Appeal and Certiorari**

When an appeal from an administrative agency decision involves an issue of extreme time sensitivity and of national importance that ultimately would have to be decided by the appellate division the court may allow a direct

appeal to the appellate division. Robert v. Mori, 6 FSM Intrm. 394, 397 (App. 1994).

### **Constitutional Law – Interpretation**

Where the constitutional language is inconclusive or does not provide an unmistakable answer courts may look to the journal of the Constitutional Convention for assistance in determining the meaning of constitutional words. Robert v. Mori, 6 FSM Intrm. 394, 397 (App. 1994).

### **Constitutional Law – Legislative Powers; Elections**

While the Constitution makes ineligible for election to Congress persons convicted of felonies in FSM courts, the Constitution gives to Congress the power to modify that ineligibility by statute. Robert v. Mori, 6 FSM Intrm. 394, 398 (App. 1994).

### **Constitutional Law – Interpretation**

Some weight may be given as well to the early Congresses' understanding of constitutional provisions given the continuity of elected representation in the early Congresses. Robert v. Mori, 6 FSM Intrm. 394, 399 (App. 1994).

### **Constitutional Law – Legislative Powers; Elections**

Congress has the Constitutional power to prescribe, by statute, additional qualifications for eligibility for election to Congress beyond those found in the Constitution. Such additional qualifications must be consistent with the rest of the Constitution. Knowledge of English may not be a qualification. Robert v. Mori, 6 FSM Intrm. 394, 399 (App. 1994).

### **Constitutional Law – Ex Post Facto Laws**

The concept of ex post facto laws 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).

### **Constitutional Law – Ex Post Facto Laws**

The mark of an ex post facto law is the imposition of punishment for past acts. The question is whether the legislative aim was to punish that individual for past activity, or whether the

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restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession. Robert v. Mori, 6 FSM Intrm. 394, 401 (App. 1994).

### **Constitutional Law – Ex Post Facto Laws**

Since the legislative aim of a statute making ineligible for election to Congress those persons convicted of a felony in a Trust Territory court was not to punish persons for their past conduct it is a regulation of a present situation concerned solely with the proper qualifications for members of Congress. As such it is a reasonable means for achieving a legitimate governmental purpose. It is therefore not unconstitutional as an ex post facto law. Robert v. Mori, 6 FSM Intrm. 394, 401 (App. 1994).

### **Constitutional Law – Bill of Attainder**

A bill of attainder is any legislative act that applies to either named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial by substitution of a legislative for a judicial determination of guilt. Robert v. Mori, 6 FSM Intrm. 394, 401 (App. 1994).

### **Constitutional Law – Bill of Attainder**

A statute making all persons convicted of a felony in the Trust Territory courts ineligible for election to the FSM Congress does not constitute criminal punishment and does not substitute a legislative for a judicial determination of guilt and thus is not an unconstitutional bill of attainder. Robert v. Mori, 6 FSM Intrm. 394, 401 (App. 1994).

**Constitutional Law – Bill of Attainder; Constitutional Law – Due Process; Constitutional Law – Ex Post Facto Laws**

The statutory ineligibility of persons convicted of Trust Territory felonies is a valid exercise of Congress's constitutional power to prescribe additional qualifications for election to Congress, and is not unconstitutional as a deprivation of a liberty interest without due process of law, or as an ex post facto law, or as a bill of attainder.

Robert v. Mori, 6 FSM Intrm. 394, 401 (App. 1994).

**Constitutional Law – Legislative Powers; Elections; Separation of Powers**

Congress, not the FSM Supreme Court, has the constitutional power to make persons granted a pardon of a felony conviction eligible for election to Congress. The court cannot exercise a power reserved to Congress.

Robert v. Mori, 6 FSM Intrm. 394, 401 (App. 1994).

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**COURT'S OPINION**

RICHARD H. BENSON, Associate Justice:

**I. ISSUE PRESENTED**

The question before the court is whether someone convicted of a felony by a Trust Territory court and then pardoned prior to the institution of our Constitutional government is ineligible to be a member of the FSM Congress. We conclude that as a matter of law such a person is ineligible and affirm the National Election Commissioner's decision to deny Roman Robert a place on the ballot for the Special Election for the Second Chuuk Congressional District scheduled for February 11, 1994.

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**II. PROCEDURAL HISTORY**

On January 21, 1994, Roman Robert, the plaintiff in this matter, appealing an adverse administrative agency decision of the National Election Commissioner for Chuuk, filed his complaint in the trial division. The parties filed an agreed motion for a Temporary Restraining Order, which was granted. On January 22, 1994, the plaintiff filed a notice of appeal from the Commissioner's decision. On January 24, 1994, with the agreement of the defendant, he filed a petition for a direct appellate review of the decision of the National Election Commissioner.

The issue involved was one of extreme time sensitivity and of national importance that ultimately would have to be decided by the appellate division. Furthermore, the parties stipulated as to the appeal and agreed to the record. Consistent with our past practice, we granted the petition. See *Moroni v. Secretary of Resources & Development*, 6 FSM Intrm. 137, 139 (App. 1993) (discussion of past direct appeals).

After hearing the parties at oral argument on January 27, and carefully reviewing their briefs, we issued our order on January 28, 1994, affirming the National Election Commissioner's decision and dismissing the appeal. We now set forth our reasons for doing so.

**III. FACTS**

On January 3, 1994, the appellant, Roman Robert, filed a petition to be a candidate for the Special Election to fill a vacancy in the Second Chuuk Congressional District. By letter dated January 19, 1994, the National Election Commissioner, Bob Mori, denied Roman Robert a place on the ballot because he had previously been convicted of a felony. The denial was accompanied by a legal opinion of the FSM Attorney General.

Sometime in 1971 Roman Robert was convicted in the Trial Division of the Trust Territory High Court, Truk District, of the felony of assault and battery with a dangerous weapon. He was sentenced to one year's probation. On August 30, 1978, the Deputy High Commissioner of the Trust Territory granted Roman Robert "a full and complete pardon . . . restoring to him full and complete civil rights."

#### IV. LEGAL ANALYSIS

##### Constitutional History

The Constitutional language pertinent to our inquiry is as follows: "A person convicted of a felony by a state or national government court is ineligible to be a member of Congress. The Congress may modify this provision or prescribe additional qualifications; knowledge of the English language may not be a qualification." FSM Const. art. IX, § 9.

We cannot positively conclude from the language itself that "[a] person convicted of a felony" includes those who are later pardoned. "If the [Constitutional] language is inconclusive our tentative conclusion may be tested against the journals of the Micronesian Constitutional Convention and the historical background against which the clause was adopted." *Tammow v. FSM*, 2 FSM Intrm. 53, 57 (App. 1985). See also *FSM v. Jonathan*, 2 FSM Intrm. 189, 193 (Kos. 1986) (where the constitutional language "does not provide an unmistakable answer" courts may look to the journal of the Constitutional Convention for assistance in determining the meaning of constitutional words).

The Constitutional Convention committee report states that the constitutional language

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"prohibits any person convicted of a felony by any court in Micronesia from election or appointment to the Congress, but allows room for the Congress by law to change this absolute prohibition." SCREP No. 36, II J. of Micro. Con. Con. 823, 845. The committee stated that the reason even pardoned persons were included in this absolute prohibition was because "[t]he Committee was wary of the executive pardon power, feeling that it might be abused by the executive branch for political purposes." 1 *Id.* It is thus clear that the framers chose this language because they intended to bar from membership in Congress even those receiving pardons.

The phrase "Congress may modify this provision" was included in section 9 of article IX because "the Committee felt that it should be left to the Congress itself to define circumstances under which a convicted felon might be eligible to become a member of Congress." *Id.* The intent was "to make convicted felons ineligible for the time being, but to allow flexibility for Congress by law to provide future exceptions to such ineligibility." *Id.* Congress thus has the power to modify "this absolute prohibition" by statute.

##### Legislative History

Some weight may be given as well to the early Congresses' understanding of this provision given the continuity of elected representation in the early Congresses. See *Mackenzie v. Tuuth*, 5 FSM Intrm. 78, 82 (Pon. 1991). The Interim Congress enacted the first election law for the new FSM Congress. It included an absolute prohibition on the election of persons convicted of a felony. Pub. L. No. IC-1, § 8(5) (Intrm. Cong., 1st Sess. 1978). The Interim Congress found that "[i]t is clear from the language of the Constitution that a convicted felon's ineligibility to serve as a member of Congress is left for the Congress to determine." SCREP No. IC-16, House J. of Intrm. Cong. 278 (1979). House Bill IC-23 was proposed to make

those who had been pardoned by the Trust Territory government or by a later state or national FSM government eligible to serve in the FSM Congress. *Id.* at 279. The bill passed, but was disapproved by the Trust Territory High Commissioner, who noted in his veto message that the power to modify the qualifications for election to the FSM Congress was reserved for the future FSM Congress and should not be exercised by the Interim Congress. Senate J. of Intrm. Cong. 231 (1979); House J. of Intrm. Cong. 392 (1979).

The Second Congress reenacted much of the earlier election law including the absolute prohibition on the eligibility of convicted felons. Pub. L. No. 2-73, § 201(5) (2nd Cong., 4th Reg. Sess. 1982) (codified at 9 F.S.M.C. 201(5)). It also considered a separate bill to make eligible for election to Congress individuals who receive pardons or who do not engage in criminal activity for at least seven years after the date of the end of their felony sentence. See SCREP No. 210, J. of 2nd Cong., 4th Reg. Sess. 245 (1982). This bill failed to pass on First Reading. J. of 2nd Cong., 4th Reg. Sess. 123 (1982).

#### Constitutionality of Statutory Prohibition

The appellant correctly points out that the prohibition in the constitutional language only covers "person[s] convicted of a felony by a state or national government court," and that the appellant was convicted by a Trust Territory court. However, statutory law makes ineligible for election to Congress those persons who "have been convicted of a felony by a State or National

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Court of the Federated States of Micronesia or its predecessor Government of the Trust Territory of the Pacific Islands." 9 F.S.M.C. 201(5). This provision was originally enacted by the Interim Congress as Public Law No. IC-1, § 8(5) (Intrm. Cong., 1st Sess. 1978) and later reenacted by the Second Congress as Public Law No. 2-73, § 201(5) (2nd Cong., 4th Reg. Sess. 1982).

Appellant argues that while Congress may have the constitutional power to modify the provision barring convicted felons or to prescribe additional qualifications, Congress can only do so if it is done constitutionally – consistent with the rest of the Constitution. Appellant therefore implicitly contends either that the phrase "or its predecessor Government of the Trust Territory of the Pacific Islands" in section 201(5) is unconstitutional, or that it is unconstitutional as applied to the appellant and anyone similarly situated.

Congress does undoubtedly have the power to prescribe additional qualifications for membership in Congress by statute. FSM Const. art. IX, § 9.2 The appellant contends that these additional statutory qualifications must not be inconsistent with the rest of the Constitution. We agree.

One impermissible additional statutory qualification is found in the text itself – "knowledge of the English language may not be a qualification." *Id.* The appellant cites the following as another example of an additional qualification Congress could not prescribe: a statutory provision saying all Chuukese are ineligible for Congress. We agree that this example would be a constitutionally impermissible additional qualification. See FSM Const. art. IV, § 4. This case poses no such impermissible additional qualification.

#### 1. Liberty Interest

The appellant further contends that the right to run for Congress is a "liberty interest"

protected by section 3 of the Declaration of Rights.<sup>3</sup> He offers no authority for this proposition other than to state that the right to pursue the calling of one's choice is included under the broad umbrella of liberty interests. While this may be true, the appellant has not offered any authority that the right to pursue elective office is one such interest. And assuming that it is one such interest, he offers nothing to show that he was deprived of this "liberty interest" other than by the due process of law.

## 2. Ex post facto law

The appellant contends that the part of section 201(5) at issue here is either an ex post facto law or a bill of attainder. Ex post facto laws and bills of attainder are prohibited by the Declaration of Rights. FSM Const. art. IV, § 11. Both of these terms have well developed historical

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meanings.<sup>4</sup> The committee report explained an ex post facto law as follows:

The concept of ex post facto laws 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. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, [390, 1 L. Ed. 648, 650] (1798).

....

The ban on ex post facto law applies, however, to criminal acts only. This means retroactive noncriminal laws may be valid. . . .

SCREP No. 23, II J. of Micro. Con. Con. 793, 801. The committee report relied exclusively on the landmark decision of *Calder v. Bull* in its discussion of the concept of ex post facto law. *Tosie v. Tosie*, 1 FSM Intrm. 149, 154 (Pon. 1982). The *Calder v. Bull* definition remains the standard. See, e.g., *Robert v. Chuuk State House of Representatives*, 6 FSM Intrm. 260, 270-71 (Chk. S. Ct. Tr. 1993); *Collins v. Youngblood*, 497 U.S. 37, 42, 110 S. Ct. 2715, 2719, 111 L. Ed. 2d 30, 38-39 (1990).

Appellant here argues that the statutory ineligibility of those persons convicted of felonies in Trust Territory courts constitutes an increase in punishment for the crime after it was committed.<sup>5</sup> Such an increase in punishment would be barred by the prohibition of ex post facto laws. *Tosie*, 1 FSM Intrm. at 154-56 (if FSM Congress deprived prisoners convicted of crimes committed before enactment of National Criminal Code of their previous right to be considered for parole by the President this could be an increase in punishment violative of the ban on ex post facto laws).

Thus, if the ineligibility of persons convicted of felonies by the Trust Territory courts is an increase in that person's criminal punishment it would be void as an ex post facto law. If, however, it is merely a noncriminal law with some retroactive aspects it is not an ex post facto law.

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In determining whether the statute in question is a noncriminal law and not violative of the ex post facto law prohibition we find instructive the following comment:

The mark of an ex post facto law is the imposition of what can fairly be designated punishment for past acts. The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession.

De Veau v. Braisted, 363 U.S. 144, 160, 80 S. Ct. 1146, 1155, 4 L. Ed. 2d 1109, 1120 (1960) (convicted felons ineligible to be officer or agent of waterfront labor organization). See also Robert, 6 FSM Intrm. at 267-70. We find nothing that would lead us to believe that the legislative aim of section 201(5) was to punish persons for their past conduct. We believe that it is a regulation of a present situation concerned solely with the proper qualifications for members of Congress. As such it is a reasonable means for achieving a legitimate governmental purpose. We therefore conclude that section 201(5) is not an ex post facto law.

### 3. Bill of Attainder

Nor is it a bill of attainder. The constitutional prohibition of bills of attainder bars "all legislative acts that apply to either named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial. Such punishments without a judicial trial are prohibited." SCREP No. 23, II J. of Micro. Con. Con. 793, 801. "The distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt." De Veau, 363 U.S. at 160, 80 S. Ct. at 1155, 4 L. Ed. 2d at 1120. Any criminal punishment here stems from the judicial trial in 1971, not from Congressional legislation. Furthermore, the appellant is not a named individual or an easily ascertainable member of a group in the legislation in question nor was a legislative determination of guilt substituted for a judicial one.

### 4. Summary

Thus the statutory ineligibility of persons convicted of Trust Territory felonies is a valid exercise of Congress's constitutional power to prescribe additional qualifications for election to Congress, and is not unconstitutional as a deprivation of a liberty interest without due process of law, or as an ex post facto law, or as a bill of attainder.

## V. CONCLUSION

The Constitution grants to Congress, not to the Court, the power to make persons granted a pardon of a felony conviction eligible for election to Congress. Congress has chosen not to exercise that power. We cannot exercise a power reserved to Congress.

It may seem unfair that someone who has become a law-abiding and respected member of the community and who has received a full pardon for one felony conviction early in life is ineligible for election to Congress. If it is unfair, it is an unfairness that Congress may remedy with appropriate legislation.

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### Footnotes:

1. See Norman Meller, *Constitutionalism in Micronesia* 195 (1985) for an account of the incident that caused the

Constitutional Convention's wariness of the executive power in this regard.

2. The appellee has pointed to a second potential source of Constitutional authority, the Transition Clause, for Congress's ability to exclude those convicted of a felony by its predecessor government. "The Congress may provide for a smooth and orderly transition to government under this Constitution." FSM Const. art. XV, § 5. While we do not decide whether this clause is such a source we do note that the policy behind it would argue in favor of Congress's ability to bar those convicted of a felony by its predecessor government as well.
3. "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." FSM Const. art. IV, § 3.
4. One commentator stated that while many of the rights included in the Declaration of Rights were worded differently from the U.S. Constitution and the Trust Territory Bill of Rights chapter of the Trust Territory Code (1 TTC §§ 1-14) so they would more aptly express the additional meanings that had accreted to those phrases (e.g. "freedom of expression" in the place of freedom of the press and freedom of speech) no substitute could be found for "ex post facto law" or "bill of attainder" that could adequately express their meaning including their historical overtones. Meller, *supra* note 1, at 245, 257 n.30.
5. Appellant makes much of his contention that the door was opened for a convicted Trust Territory felon to run for the FSM Congress by the FSM Constitution because it only applied to felony convictions by a national or state court, but that the door was later closed by the statute, 9 F.S.M.C. 201(5), adding Trust Territory felony convictions. This is factually inaccurate. No one was eligible to run for the FSM Congress until the first election law was passed by the Interim Congress, and that law barred those with Trust Territory convictions as well. Thus the door was never open.