

Micronesia's constitution - 1975

The Constitution of the Federated States of Micronesia was drafted by the Micronesian Constitutional Convention in 1975 in Saipan. The Convention was convened by the Congress of Micronesia, which at that time included representation from the Ponape, Kusaie, Truk, and Yap Districts of the Trust Territory of the Pacific Islands (TTPI), and which also included the Marshall Islands, Palau, and the Northern Mariana Islands Districts. An Acrobat "pdf" copy of the two volumes of the **Micronesia Constitutional Convention Journal of 1975** is available on the University of South Pacific Emalus Campus Library website on the page for FSM Legislation and Law Reports.

The FSM Constitution was ratified in 1978, with the voters of the Ponape, Kusaie, Truk, and Yap Districts approving the Constitution. The ratification of the Constitution by these four districts recognized their sovereign right to form the Federated States of Micronesia and make the FSM Constitution the supreme law of the land.

In 1990, a Second Constitutional Convention was convened in Palikir, Pohnpei that resulted in four Constitutional Convention proposals that were ratified by the voters. These constitutional amendments are listed below and have been incorporated into the version of the Constitution available here.

In 2001, a Third FSM Constitutional Convention was convened in Palikir, Pohnpei. Fourteen proposals passed the Constitutional Convention, but none were approved by the citizens of the FSM in a referendum. To view the fourteen proposals, committee reports, analysis, journal discussions, and other reference material dealing with the Third FSM Constitutional Convention, visit the web site of the **Public Information Office** of the Office of the President, and see copies of the fourteen proposals from the PIO web site below. For additional reference, see an article on the **FSM Constitution and the 2001 Constitutional Convention** by Regent Professor of the College of Micronesia-FSM, President of the Third FSM Constitutional Convention, and former President of the Federated States of Micronesia, the Honorable John H. Haglelgam.

CONSTITUTIONAL AMENDMENT BULLETIN: The three constitutional amendments proposed by the FSM Congress and voted upon in the March, 2005 national elections for FSM Congress two year seats were not approved by the electorate. The proposed constitutional amendments in Acrobat "pdf" format can be viewed by clicking the following links:

- (1) A constitutional amendment dealing with FSM citizenship, proposing an **amendment to Art. III, Sec. 3 of the Constitution** .
- (2) A constitutional **amendment adding a new Sec. 8 to Art. XIII of the Constitution** to add a full faith and credit clause to the Constitution.
- (3) A constitutional **amendment affecting the FSM Supreme Court's jurisdiction in cases in which the ownership of land and water is at issue in Art. XI, Sec. 6** .

PREAMBLE

WE, THE PEOPLE OF MICRONESIA, exercising our inherent sovereignty, do hereby establish this Constitution of the Federated States of Micronesia.

With this Constitution, we affirm our common wish to live together in peace and harmony, to preserve the heritage of the past, and to protect the promise of the future.

To make one nation of many islands, we respect the diversity of our cultures. Our differences enrich us. The seas bring us together, they do not separate us. Our islands sustain us, our island nation enlarges us and makes us stronger.

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

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

ARTICLE I

Territory of Micronesia

Section 1. The territory of the Federated States of Micronesia is comprised of the Districts of the Micronesian archipelago that ratify this Constitution. Unless limited by international treaty obligations assumed by the Federated States of Micronesia, or by its own act, the waters connecting the islands of the archipelago are internal waters regardless of dimensions, and jurisdiction extends to a marine space of 200 miles measured outward from appropriate baselines, the seabed, subsoil, water column, insular or continental shelves, airspace over land and water, and any other territory or waters belonging to Micronesia by historic right, custom, or legal title.

Section 2. Each state is comprised of the islands of each District as defined by laws in effect immediately prior to the effective date of this Constitution. A marine boundary between adjacent states is determined by law, applying the principle of equidistance. State boundaries may be changed by Congress with the consent of the state legislatures involved.

Section 3. Territory may be added to the Federated States of Micronesia upon approval of Congress, and by vote of the inhabitants of the area, if any, and by vote of the people of the Federated States of Micronesia. If the territory is to become part of an existing state, approval of the state legislature is required.

Section 4. New states may be formed and admitted by law, subject to the same rights, duties, and obligations as provided for in this Constitution.

ARTICLE II

Supremacy

Section 1. This Constitution is the expression of the sovereignty of the people and is the supreme law of the Federated States of Micronesia. An act of the Government in conflict with this Constitution is invalid to the extent of conflict.

Case annotations: The Constitution of the Federated States of Micronesia is the supreme law and the decisions of the FSM Supreme Court must be consistent with it. *Truk v. Hartman*, 1 FSM Intrm. 174, 176-77 (Truk 1982).

While FSM Constitution is supreme law of the land and FSM Supreme Court may under no circumstances acquiesce in unconstitutional governmental action, states should be given full opportunity to exercise their legitimate powers in manner consistent with commands of Constitution without unnecessary intervention by nat'l courts. *Etpison v. Perman*, 1 FSM Intrm. 405, 428 (Pon. 1984).

Failure to apply constitutional holding retroactively does not violate supremacy clause of Constitution, FSM Const. art. II, § 1. To the contrary, courts may choose between prospective and retroactive application in order to avert injustice or hardship. *Innocenti v. Wainit*, 2 FSM Intrm. 173, 184-5 (App. 1986).

A state law provision attempting to place "original and exclusive jurisdiction" in Yap State Court cannot divest a nat'l court of responsibilities placed upon it by the nat'l constitution, which is "supreme law of the Federated States of Micronesia." *Gimnang v. Yap*, 5 FSM Intrm. 13, 23 (App. 1991).

It is duty of FSM Supreme Court to review any nat'l law, including a treaty such as the Compact of Free Association, in response to a claim that the law or treaty violates constitutional rights, and if any provision of the Compact is contrary to the constitution, which is the supreme law of the land, then that provision must be set aside as without effect. *Samuel v. Pryor*, 5 FSM Intrm. 91, 98 (Pon. 1991).

ARTICLE III

Citizenship

Section 1. A person who is a citizen of the Trust Territory immediately prior to the effective date of this Constitution and a domiciliary of a District ratifying this Constitution is a citizen and national of the Federated States of Micronesia.

Cross reference: The statutory provisions on TT citizenship are found in chapter 1 of title 7 of the FSM Code.

Case annotations: Citizenship may affect, among other legal interests, rights to own land, to engage in business or be employed, and even to reside within the FSM. *In re Sproat*, 2 FSM Intrm. 1, 6 (Pon. 1985).

Art. III, §§ 1 and 2, of FSM Constitution are self-executing and do not contemplate, or imply the need for, court action to confirm citizenship where no challenge exists. *In re Sproat*, 2 FSM Intrm. 1, 7 (Pon. 1985).

Where there exists an actual controversy involving a concrete threat to citizenship rights and interests, FSM Supreme Court could be constitutionally required to determine whether a person is or is not a citizen. *In re Sproat*, 2 FSM Intrm. 1, 7 (Pon. 1985).

Section 2. A person born of parents one or both of whom are citizens of the Federated States of Micronesia is a citizen and national of the Federated States by birth.

Cross reference: The statutory provisions on FSM citizenship are found in chapter 2 of title 7 of this code.

Case annotations: Art. III, §§ 1 and 2, of FSM Constitution are self-executing and do not contemplate, or imply need for, court action to confirm citizenship where no challenge exists. *In re Sproat*, 2 FSM Intrm. 1, 7 (Pon. 1985).

Section 3. A citizen of the Federated States of Micronesia who is recognized as a citizen of another nation shall, within 3 years of his 18th birthday, or within 3 years of the effective date of this Constitution, whichever is later, register his intent to remain a citizen of the Federated States and renounce his citizenship of another nation. If he fails to comply with this Section, he becomes a national of the Federated States of Micronesia.

Section 4. A citizen of the Trust Territory who becomes a national of the United States of America under the terms of the Covenant to Establish a Commonwealth of the Northern Mariana Islands may become a citizen and national of the Federated States of Micronesia by applying to a court of competent jurisdiction in the Federated States within 6 months of the date he became a United States national.

Section 5. A domiciliary of a District not ratifying this Constitution who was a citizen of the Trust Territory immediately prior to the effective date of this Constitution, may become a citizen and national of the Federated States of Micronesia by applying to a court of competent jurisdiction in the Federated States within 6 months after the effective date of this Constitution or within 6 months after his 18th birthday, whichever is later.

Section 6. This Article may be applied retroactively.

ARTICLE IV

Declaration of Rights

Case annotations: Statutory provisions which carried over from Trust Territory Code and were reproduced and referred to as "Bill of Rights" in 1 FSMC 101-114, may retain some residual vitality in the unlikely event that they furnish protection beyond those available under Constitution's Declaration of Rights. *FSM v. George*, 1 FSM Intrm. 449, 454-55 (Kos. 1984).

Provisions in Declaration of Rights in FSM Constitution concerning due process and right to be informed are traceable to Bill of Rights of U.S. Constitution. *Engichy v. FSM*, 1 FSM Intrm. 532, 541 (App. 1984).

Because Declaration of Rights is patterned after provisions of U.S. Constitution, and U.S. cases were relied on to guide the constitutional convention, U.S. authority may be consulted to understand the meaning. *Afituk v. FSM*, 2 FSM Intrm. 260, 263 (Truk 1986).

In adopting Declaration of Rights as part of FSM Constitution and therefore the supreme law of the land, the people of Micronesia subscribed to various principles which place upon the judiciary the obligation, among others, to assure that arrests are based upon probable cause, that determinations of guilt are arrived at fairly, and that punishments for wrongdoing are proportionate to the crime and meet prescribed standards. *Tammed v. FSM*, 4 FSM Intrm. 266, 281-82 (App. 1990).

When a trial court is asked to give special mitigative effect to customary punishment during its sentencing proceedings, the court must first consider whether these customary activities have become so imbued with official state action so that actions of assailants are seen as actions of the state itself; if so punishments must be tested by same standards that would be applied if state officials carried out these punishments directly. *Tammed v. FSM*, 4 FSM Intrm. 266, 283 (App. 1990).

Compact of Free Association's immunization provisions, which limit a plaintiff's right to sue a physician for malpractice, do not affect a fundamental right, and therefore, provisions need not be subjected to strict scrutiny, but instead should be tested under less stringent rational relationship test. *Samuel v. Pryor*, 5 FSM Intrm. 91, 104 (Pon. 1991).

There is no fundamental interest in unbounded wrongful death recovery requiring strict scrutiny of state law imposing a recovery cap. *Tosie v. Healy-Tibbets Builders, Inc.*, 5 FSM Intrm. 358, 362 (Kos. 1992).

Section 1. No law may deny or impair freedom of expression, peaceable assembly, association, or petition.

Case annotations: Right of citizens to express their views, including views critical of public officials, is fundamental to development of a healthy political system. Therefore, courts are generally reluctant to find that expression of opinions asserted outside of the court itself, however intemperate or misguided, constitute contempt of court. *In re Iriarte (I)*, 1 FSM Intrm. 239, 247-48 (Pon. 1983).

Section 2. No law may be passed respecting an establishment of religion or impairing the free exercise of religion, except that assistance may be provided to parochial schools for non-religious purposes.

Section 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.

Case annotation: Due Process

Due process may well require that, in a Nat'l Public Service System employment dispute, the ultimate decision-maker reviews the record of the *ad hoc* committee hearing, at least insofar as either party to personnel dispute may rely upon some portion of record. *Suldan v. FSM (I)*, 1 FSM Intrm. 201, 206 (Pon. 1982).

Words "due process of law" shall be viewed in light of history and accepted meaning of those words prior to and at the time Constitution was written. *Alaphonso v. FSM*, 1 FSM Intrm. 209, 216-17 (App. 1982).

Due Process Clause of Constitution requires proof beyond a reasonable doubt as a condition for criminal conviction in FSM. *Alaphonso v. FSM*, 1 FSM Intrm. 209, 217-23 (App. 1982).

As a matter of constitutional due process, trial court presented with alibi defense should consider evidence concerning the alibi along with all other evidence and shall not find defendant guilty if after considering all of that evidence, the judge feels there is reasonable doubt of defendant's guilt. *Alaphonso v. FSM*, 1 FSM Intrm. 209, 223-25 (App. 1982).

Art. XI, § 6(b) of FSM Constitution requires that FSM Supreme Court consider a petition for writ of *habeas corpus* alleging imprisonment of a petitioner in violation of his rights of due process. *In re Iriarte (I)*, 1 FSM Intrm. 239, 243-44 (Pon. 1983).

Preservation of a fair decision-making process, and even the maintenance of a democratic system of gov't, requires that courts and individual judges be protected against unnecessary external pressures. *In re Iriarte (I)*, 1 FSM Intrm. 239, 247 (Pon. 1983).

Strict judicial observance of due process is necessary to insure respect for the law. *In re Iriarte (I)*, 1 FSM Intrm. 239, 248 (Pon. 1983).

In *habeas corpus* proceeding, court must apply due process standards to actions of courts which have issued orders of commitment. *In re Iriarte (I)*, 1 FSM Intrm. 239, 249 (Pon. 1983).

FSM Constitution does not contemplate that citizens of FSM should be required to travel to Saipan or to petition anyone outside of FSM to realize rights guaranteed to them under the Constitution. *In re Iriarte (I)*, 1 FSM Intrm. 239, 253 (Pon. 1983).

Defendant of a criminal contempt charge is entitled to those procedural rights normally accorded other criminal defendants. *In re Iriarte (II)*, 1 FSM Intrm. 255, 260 (Pon. 1983).

FSM Supreme Court is entitled and required to assure that TT High Court, exercising governmental powers within FSM, does not violate constitutional rights of its citizens. *In re Iriarte (II)*, 1 FSM Intrm. 255, 268 (Pon. 1983).

A *nahniken*, just as any ordinary citizen, is entitled to bail and due process. *In re Iriarte (II)*, 1 FSM Intrm. 255, 272 (Pon. 1983).

A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *FSM v. Nota*, 1 FSM Intrm. 299, 304 (Truk 1983).

Gov't employment that is "property" within meaning of Due Process Clause cannot be taken without due process. To be property protected under the Constitution, there must be a claim of entitlement based upon governmental assurance of continual employment or dismissal for only specified reasons. *Suldan v. FSM (II)*, 1 FSM Intrm. 339, 351-52 (Pon. 1983).

Fundamental concept of procedural due process is that gov't may not be permitted to strip citizens of life, liberty or property in an unfair, arbitrary manner. Where such important

individual interests are exposed to possible governmental taking or deprivation, the Constitution requires that the gov. t follow procedures calculated to assure a fair and rational decision-making process. *Suldan v. FSM (II)*, 1 FSM Intrm. 339, 354-55 (Pon. 1983).

If, pursuant to § 156 of Nat. l Public Service System Act, the highest management official declines to accept a finding of fact of the *ad hoc* committee, the official will be required by statutory as well as constitutional requirements to review those portions of the record bearing on the factual issues and to submit a reasoned statement demonstrating why the *ad hoc* committee's factual conclusion should be rejected. *Suldan v. FSM (II)*, 1 FSM Intrm. 339, 360-61 (Pon. 1983).

Due process demands impartiality on part of adjudicators. *Suldan v. FSM (II)*, 1 FSM Intrm. 339, 362 (Pon. 1983).

There is a presumption that a judicial or quasi-judicial official is unbiased. The burden is placed on the party asserting unconstitutional bias. The presumption of neutrality can be rebutted by a showing of conflict of interest or some other specific reason for disqualification. Where disqualification occurs, it is usually because the adjudicator has a pecuniary interest in the outcome or has been the target of personal abuse or criticism from the party before him. *Suldan v. FSM (II)*, 1 FSM Intrm. 339, 362-63 (Pon. 1983).

The highest management officials cannot be said to be biased as a class and they cannot be disqualified, by virtue of their positions, from final decision-making as to a nat'l gov't employee's termination under § 156 of the Nat'l Public Service System Act, without individual consideration. *Suldan v. FSM (II)*, 1 FSM Intrm. 339, 363 (Pon. 1983).

Where there is reason to believe that provisions of a public land lease may have been violated by lessee, and where another person has notified the Public Lands Authority of his claim of a right to have the land leased to him, the Public Lands Authority may not consider itself bound by lease's renewal provision but is required to consider whether it has a right to cancel the lease and, if so, whether the right should be exercised. These are decisions to be made after a rational decision-making process in compliance with procedural due process requirements of art. IV, § 3 of FSM Constitution. *Etpison v. Perman*, 1 FSM Intrm. 405, 421 (Pon. 1984).

Adjudicatory decisions of governmental bodies affecting property rights are subject to procedural due process requirements of art. IV, § 3 of Constitution. *Etpison v. Perman*, 1 FSM Intrm. 405, 422 (Pon. 1984).

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

Right to be informed of nature of accusation requires that a statute be sufficiently explicit to prescribe offense with reasonable certainty and not be so vague that persons of common intelligence must necessarily guess at its meaning. *Laion v. FSM*, 1 FSM Intrm. 503, 507 (App. 1984).

Required degree of precision under the right to be informed of the nature of the accusation may be affected by considerations such as limits upon capacity for human expression and

difficulties inherent in attempts to employ alternative methods of stating the concept. *Laion v. FSM*, 1 FSM Intrm. 503, 508 (App. 1984).

Some generality may be inescapable in proscribing conduct but standard of precision required under the right to be informed of the nature of the accusation is greater in criminal statutes than in civil statutes. *Laion v. FSM*, 1 FSM Intrm. 503, 508 (App. 1984).

Courts are far more inclined to set aside as unconstitutionally vague statutes or ordinances reaching into marginal areas of human conduct such as prohibitions against loitering or vagrancy aimed at conduct often thought of as offensive or undesirable, but not directly dangerous to others. *Laion v. FSM*, 1 FSM Intrm. 503, 509 (App. 1984).

Prohibitions against assaults with dangerous weapons fall within the more traditional realm of criminal law and therefore are entitled to greater deference by courts in determining whether they are unconstitutionally vague. *Laion v. FSM*, 1 FSM Intrm. 503, 509 (App. 1984).

Commonly accepted meanings arising out of prior court interpretations in jurisdictions from which statutes are borrowed may be considered in testing a claim that the statute is unconstitutionally vague. *Laion v. FSM*, 1 FSM Intrm. 503, 509-10 (App. 1984).

There is no suggestion in the Con Con Journal that the framers of the FSM Constitution wanted to depart from or expand upon U.S. constitutional principles concerning particularity and definitions in criminal statutes. Reliance in the Report of the Committee on Civil Liberties upon U.S. court decisions in explaining the words confirms that the intent was to adopt the American approach concerning the statutory specificity needed so as not to be unconstitutionally vague. *Laion v. FSM*, 1 FSM Intrm. 503, 513 (App. 1984).

In considering whether term "dangerous weapon" is so vague as to render 11 FSMC 919 unconstitutional, it is relevant that a court in the U.S. has held that term sufficiently definite to meet U.S. constitutional standards. *Laion v. FSM*, 1 FSM Intrm. 503, 513 (App. 1984).

Suspicion of guilt can justify the extreme action of an arrest only when based upon reasonable grounds known to the arresting officer at the time of arrest so strong that a cautious man would "believe," that is, consider it more likely than not that the accused is guilty of the offense. *Ludwig v. FSM*, 2 FSM Intrm. 27, 33 (App. 1985).

Due Process Clause, art. IV, § 3 of FSM Constitution, is based upon Due Process Clause of U.S. Constitution and courts can look to interpretations under U.S. Constitution for guidance. *Ludwig v. FSM*, 2 FSM Intrm. 27,35 (App. 1985).

The gov't in any criminal case is required, as a matter of due process, to prove all elements of the offense beyond a reasonable doubt. *Ludwig v. FSM* 2 FSM Intrm. 27,35 (App. 1985).

A temporary seizure is itself a significant taking of property, depriving the owner of possession, an important attribute of property. *Ishizawa v. Pohnpei*, 2 FSM Intrm. 67,75 (Pon. 1985).

Constitution's Due Process Clause is drawn from U.S. Constitution and FSM courts may look to decisions under that Constitution for guidance in determining the meaning of this Due Process Clause. *Ishizawa v. Pohnpei*, 2 FSM Intrm. 67,76 (Pon. 1985).

Where a seizure is for forfeiture rather than evidentiary purposes, constitutional prohibitions against taking property without due process come into play. *Ishizawa v. Pohnpei*, 2 FSM Intrm. 67,76 (Pon. 1985).

Any attempt to grant statutory authority to permit seizure of a fishing vessel upon a lesser standard than probable cause would raise serious questions of compatibility with art. IV, §§ 3 and 4 of the Constitution. Such an interpretation should be avoided unless clearly mandated by statute. *Ishizawa v. Pohnpei*, 2 FSM Intrm. 67,77 (Pon. 1985).

Due process does not require that a second judge decide motions for recusal where the trial judge accepts as true all factual allegations in the affidavit of the party seeking recusal, and must rule only on matters of law in making decision to recuse or not recuse himself. *Skilling v. FSM*, 2 FSM Intrm. 209, 213 (App. 1986).

Procedure for recusal provided in FSM Code, whereby a party may file a motion for recusal with an affidavit, and judge must rule on the motion, stating his reasons for granting or denying the motion, before any further proceeding is taken, allows the moving party due process. *Skilling v. FSM*, 2 FSM Intrm. 209, 214 (App. 1986).

Actions of a police officer in stripping a prisoner to punish and humiliate him, then beating him and damaging his pickup truck, constituted violation of the prisoner's constitutional rights to be free from cruel and unusual punishment and his due process rights. *Tolenoa v. Alokoa*, 2 FSM Intrm. 247, 250 (Kos. 1986).

A claim that decision-makers in a land adjudication were biased raises serious statutory and constitutional due process issues and is entitled to careful consideration. *Heirs of Mongkeya v. Heirs of Mackwelung*, 3 FSM Intrm. 92, 99 (Kos. S. Ct. Tr. 1987).

There is no deprivation of due process in a case in which the gov. t at trial elicited testimony revealing that it had custody of certain physical evidence but did not attempt to introduce it, and in which defendant made no request that it be produced. *Loney v. FSM*, 3 FSM Intrm. 151, 155 (App. 1987).

An expectation of being paid for work already performed is a property interest qualifying for protection under Due Process Clause of FSM Constitution. *Falcam v. FSM (II)*, 3 FSM Intrm. 194, 200 (Pon. 1987).

An expectation of continued gov. t employment, subject only to removal by a supervisor, is a property interest qualifying for protection under Due Process Clause of FSM Constitution. *Falcam v. FSM (II)*, 3 FSM Intrm. 194, 200 (Pon. 1987).

Due Process Clause of art. VI, § 3 of FSM Constitution requires proof beyond a reasonable doubt as a condition for criminal convictions in the FSM. *Runmar v. FSM*, 3 FSM Intrm. 308, 311 (App. 1988).

Where purchasers at a judicial sale are not served by summons and complaint pursuant to FSM Civil Rule 3 but receive notice of a motion seeking confirmation of the sale and made by a creditor of the party whose property was sold, and where purchasers do not object to the

motion, confirmation of sale is effective and binding on purchasers and is not violative of their rights of due process. *Sets v. Island Hardware*, 3 FSM Intrm. 365, 368 (Pon. 1988).

The Nat'l Public Service System Act and FSM Public Service System Regulations establish an expectation of continued employment for nonprobationary nat. l gov. t employees by limiting the permissible grounds and specifying procedures necessary for their dismissal; this is sufficient protection of the right to continued nat. l gov. t employment to establish a property interest for nonprobationary employees which may not be taken without fair proceedings, or "due process." *Semes v. FSM*, 4 FSM Intrm. 66, 73 (App. 1989).

Once it is determined that a statute establishes a property right subject to protection under Due Process Clause of FSM Constitution, constitutional principles determine what process is due as a minimum. *Semes v. FSM*, 4 FSM Intrm. 66, 74 (App. 1989).

In absence of statutory language to the contrary, the Nat. l Public Service System Act's mandate may be interpreted as assuming compliance with constitutional requirements, because if it purported to preclude constitutionally required procedures, it must be set aside as unconstitutional. *Semes v. FSM*, 4 FSM Intrm. 66, 74 (App. 1989).

In assessing the government's shorter term, preliminary deprivations of private property to determine what, if any procedures are constitutionally necessary in advance of the deprivation, the FSM Supreme Court will balance the degree of hardship to the person affected against the gov. t interests at stake. *Semes v. FSM*, 4 FSM Intrm. 66, 75 (App. 1989).

Under the equal protection clause of the Declaration of Rights in the FSM Constitution, indigency alone should not disadvantage an accused in our system of criminal justice. *Gilmete v. FSM*, 4 FSM Intrm. 165, 169 (App. 1989).

Due Process Clause of FSM Constitution's Declaration of Rights is based on Due Process Clause of U.S. Constitution. *Paul v. Celestine*, 4 FSM Intrm. 205, 208 (App. 1990).

In determining whether constitutional line of due process has been crossed, a court must look to such factors as need for application of force, relationship between need and amount of force that was used, extent of injury inflicted, and whether force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm. *Paul v. Celestine*, 4 FSM Intrm. 205, 208-09 (App. 1990).

To be property protected under the FSM and Kosrae State Constitutions, the employment right must be based on governmental assurance of continual employment or dismissal for only specified reasons as stated in statute, regulation, formal contract or actions of a supervisory person with authority to establish terms of employment. *Edwin v. Kosrae*, 4 FSM Intrm. 292, 302 (Kos. S. Ct. Tr. 1990).

Although neither the Environmental Protection Act nor the earthmoving regulations contain any absolute requirement that a public hearing be held before an earthmoving permit may be issued, issuance by nat. l gov. t officials of a permit authorizing earthmoving by a state agency without holding a hearing and based simply upon the application filed by the state agency and the minutes prepared by state officials, is arbitrary and capricious where dredging activities have been long continued in the absence of a nat. l earthmoving permit and where the parties

directly affected by those activities have for several months been vigorously opposing continuation of earthmoving activities at the dredging site. *Damarlane v. Pohnpei Transp. Auth.*, 5 FSM Intrm. 1, 8 (Pon. 1991).

If a judge has participated as an advocate in related litigation touching upon the same parties, and in the course of that previous activity has taken a position concerning the issue now before him as a judge, the appearance of justice, as guaranteed by Due Process Clause, requires recusal. *Etscheit v. Santos*, 5 FSM Intrm. 35, 43 (App. 1991).

There are certain circumstances or relationships which, as a per se matter of due process, require almost automatic disqualification, and, if a judge has a direct, personal, substantial, pecuniary interest in the outcome of the case, recusal is constitutionally mandated. *Etscheit v. Santos*, 5 FSM Intrm. 35, 43 (App. 1991).

To prevent the "probability of unfairness," a former trial counselor or attorney must refrain from presiding as a trial judge over litigation involving his former client, and many of the same issues, and same interests and same land, with which the trial judge has been intimately involved as a trial counselor or attorney. *Etscheit v. Santos*, 5 FSM Intrm. 35, 45 (App. 1991).

Because there is a rational basis, linked to legitimate gov't purposes of increasing availability of health care services, for providing immunity from patient suits to U.S. Public Health Service physicians, the Federal Programs and Services Agreement's immunity provisions are not in violation of a plaintiff's due process rights. *Samuel v. Pryor*, 5 FSM Intrm. 91, 106 (Pon. 1991).

A person's constitutional right to due process of law, and his right to be free from cruel and unusual punishment is violated when an officer instead of protecting the person from attack, threw him to the ground, and beat the person in the jail. *Meitou v. Uwera*, 5 FSM Intrm. 139, 144 (Chk. S. Ct. Tr. 1991).

Plaintiff's due process rights were not violated where gov't did not use condemnation procedures specified in 67 TTC 451, but followed land registration procedures to obtain title and treated plaintiff fairly and in same way it treated other landowners. *Palik v. Kosrae*, 5 FSM Intrm. 147, 152-54 (Kos. S. Ct. Tr. 1991).

Constitutional provisions applicable to a prisoner may vary depending on his status. A pre-trial detainee has a stronger right to liberty, which right is protected by the Due Process Clause, FSM Const. art. IV, § 3. A convicted prisoner's claims upon liberty have been diminished through due process so that person must rely primarily on art. IV, § 8 which protects him from cruel and unusual punishment. *Plais v. Panuelo*, 5 FSM Intrm. 179, 190 (Pon. 1991).

When a panel hearing in a summary dismissal was closed to the public and the injured party and counsel were present to attend and participate in the hearing and the panel accepted and considered all testimony and evidence offered by the parties, due process was not violated. *Palsis v. Kosrae State Court*, 5 FSM Intrm. 214, 217 (Kos. S. Ct. Tr. 1991).

Variance between charge of striking police car windshield with fists and evidence adduced at trial of damaging headlights with a beer can is not so misleading and prejudicial that

defendant was denied a fair trial or suffered from a lack of notice as to the evidence to be offered at trial on a charge of damaging the property of another. *Otto v. Kosrae*, 5 FSM Intrm. 218, 222 (App. 1991).

The actions of a private corporation partly owned by a gov. t should not be considered "state action" for purposes of due process analysis. *Alik v. Kosrae Hotel Corp.*, 5 FSM Intrm. 294, 298 (Kos. 1992).

Under FSM law there is no property right to particular levels of tort compensation triggering due process protections. *Tosie v. Healy-Tibbets Builders, Inc.*, 5 FSM Intrm. 358, 362-63 (Kos. 1992).

Among the rational bases supporting the constitutionality of a state statute capping wrongful death recovery are a desire to create foreseeable limits on gov. t liability; to promote insurance; to encourage settlement of claims; and to ease the burden on courts and families of valuing losses incurred through death of family member. *Tosie v. Healy-Tibbets Builders, Inc.*, 5 FSM Intrm. 358, 363 (Kos. 1992).

Aliens are persons protected by the due process and equal protection clause of the Constitution. *Berman v. FSM Supreme Court (I)*, 5 FSM Intrm. 364, 366 (Pon. 1992).

Employment opportunity is a liberty interest protected by due process. *Berman v. FSM Supreme Court (I)*, 5 FSM Intrm. 364, 366 (Pon. 1992).

When a landowner voluntarily signs a statement of intent for an easement for a road even though the state failed in its duty of care to inform him that he could refuse to sign, the state has not violated landowner's due process rights. *Nena v. Kosrae*, 5 FSM Intrm. 417, 424 (Kos. S. Ct. Tr. 1990).

When counsel is allowed such a short preparation time that counsel's effectiveness is impaired then the accused is deprived of due process and effective assistance of counsel. *In re Extradition of Jano*, 6 FSM Intrm. 93, 101 (App. 1993).

Something more than a state merely misinterpreting its own law, such as that the state's interpretation was arbitrary, grossly incorrect, or motivated by improper purposes, is needed to raise a legitimate due process issue. *Simon v. Pohnpei*, 6 FSM Intrm. 314, 316 (Pon. 1994).

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).

Due Process; Notice and Hearing

It is normally required that a hearing be held prior to seizure of a property. In extraordinary situations a seizure may take place prior to hearing, but the owner must be afforded a prompt post-seizure hearing at which the person seizing the property must at least make a showing of

probable cause. Unreasonable delay in providing a post-seizure hearing may require that an otherwise valid seizure be set aside. *Ishizawa v. Pohnpei*, 2 FSM Intrm. 67, 76 (Pon. 1985).

Due Process Clause prevents governmental authorities from depriving an individual of property interests, without first according an opportunity to be heard as to whether the proposed deprivation is permissible. *Falcam v. FSM (II)*, 3 FSM Intrm. 194, 200 (Pon. 1987).

Only in extraordinary circumstances, where immediate action is essential to protect crucially important public interests, may private property be seized without a hearing. *Falcam v. FSM (II)*, 3 FSM Intrm. 194, 200 (Pon. 1987).

Any withholding of private property, such as a gov. t employee's paycheck, without a hearing can be justified only so long as it takes the authorized payor to obtain a judicial determination as to the legality of the payment being withheld. *Falcam v. FSM (II)*, 3 FSM Intrm. 194, 200 (Pon. 1987).

A party is not deprived of due process of law in a case in which a judgment is entered against it on a cause of action raised by the trial court, where the party had notice and an opportunity to be heard, even though the cause of action does not appear in the pleadings and no amendment of the pleadings was made. *United Church of Christ v. Hamo*, 3 FSM Intrm. 445, 453 (Truk 1988).

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

Constitutional due process requires that a nonprobationary employee of the nat. l gov. t be given some opportunity to respond to charges against him before his dismissal may be implemented; including oral or written notice of charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. *Semes v. FSM*, 4 FSM Intrm. 66, 76 (App. 1989).

Implementation of constitutional requirement that a gov. t employee be given an opportunity to respond before dismissal is consistent with statutory scheme of Nat. l Public Service System Act, therefore Act need not be set aside as contrary to due process. *Semes v. FSM*, 4 FSM Intrm. 66, 77 (App. 1989).

A prisoner's rights to procedural due process have been violated when he received neither notice of charges against him nor an opportunity to respond to those charges before or during confinement. *Plais v. Panuelo*, 5 FSM Intrm. 179, 212 (Pon. 1991).

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

Where a party attended the meeting at which the common boundary was set and thus had actual notice, and filed no adverse claim to the boundary location that would trigger the statutory right to notice, but claimed he was not aware of the adverse boundary until eight years later, and waited another four years before filing suit, the claimant's repeated failure to

timely assert his rights does not demonstrate a due process violation. *Setik v. Sana*, 6 FSM Intrm. 549, 553 (Chk. S. Ct. App. 1994).

One who receives actual notice cannot assert a constitutional claim that the method of notice was not calculated to reach him. *Setik v. Sana*, 6 FSM Intrm. 549, 553 (Chk. S. Ct. App. 1994).

Where parties had no claims to the land at the time the title was determined they were not entitled to notice. Lack of notice to them does not raise a genuine issue of material fact as to validity of a Certificate of Title. Where a court proceeding determined title, lack of a record of notice in the Land Commission files does not raise a genuine issue of material fact as to the validity of the Certificate of Title because the Land Commission did not conduct the hearing on title and so would not have any record of notice. *Luzama v. Pohnpei Enterprises Co.*, 7 FSM Intrm. 40, 49 (App. 1995).

Constructive notice is a concept through which actual notice is imputed to a party regardless of whether that party has actual knowledge of the imputed facts. A party has constructive notice when from all facts and circumstances known to him at the relevant time, he has such information as would prompt a person exercising a reasonable care to acquire knowledge of the fact in question or to infer its existence. *Nahnken of Nett v. Pohnpei*, 7 FSM Intrm. 171, 177 n. 11 (Pon. 1995).

Where a vessel has been arrested pursuant to a warrant a post-seizure hearing is required by the constitutional guarantee of due process. *FSM v. M.T. HL Achiever (II)*, 7 FSM Intrm. 256, 257 (Chk. 1995).

An owner of seized property cannot challenge the statute it was seized under as unconstitutional because the statute fails to provide for notice and a hearing, if procedural due process, notice and a right to a hearing, are provided. *FSM v. M.T. HL Achiever (II)*, 7 FSM Intrm. 256, 258 (Chk. 1995).

Due Process; Vagueness

"Dangerous device" as defined under the Weapons Control Act is not unconstitutionally vague. The language, properly interpreted, affords sufficient notice so that conscientious citizens may avoid inadvertent violations, and constructs sufficiently definite standards to prevent arbitrary law enforcement. *Joker v. FSM*, 2 FSM Intrm. 38, 45 (App. 1985).

Taking of Property

Gov't employment that is "property" within meaning of Due Process Clause cannot be taken without due process. To be property protected under Constitution, there must be claim of entitlement based upon governmental assurance of continual employment or dismissal for only specified reasons. *Suldan v. FSM (II)*, 1 FSM Intrm. 339, 351-52 (Pon. 1983).

Fundamental concept of procedural due process is that gov. t may not strip citizens of life, liberty or property in an unfair, arbitrary manner. Where such important individual interests are exposed to possible governmental taking or deprivation, Constitution requires that gov. t follow procedures calculated to assure a fair and rational decision-making process. *Suldan v. FSM (II)*, 1 FSM Intrm. 339, 354-55 (Pon. 1983).

When a landowner voluntarily enters into a statement of intent to grant state an easement the state has not violated landowner's constitutional rights by "taking" his property without just compensation, and is not liable for trespass. *Nena v. Kosrae*, 5 FSM Intrm. 417, 425 (Kos. S. Ct. Tr. 1990).

Constitutional guarantee of due process only protects persons from governments, and those acting under them, established or recognized by the Constitution. *Semwen v. Seaward Holdings, Micronesia*, 7 FSM Intrm. 111, 113 (Chk. 1995).

A plaintiff's firing by a private employer does not state a cause of action for unconstitutional deprivation of due process because no governmental entity or official is a defendant; the defendant is not alleged to be performing an essential governmental function; and a gov. t action is not at issue. *Semwen v. Seaward Holdings, Micronesia*, 7 FSM Intrm. 111, 113 (Chk. 1995).

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

The mere act of United States' funding the FSM and Pohnpei does not subject it to liability for a taking because its involvement was insufficiently direct and substantial to warrant such liability and because one gov. t is not liable for a taking by officials of another gov. t for merely advocating measures that other gov. t should take. *Damarlane v. United States*, 7 FSM Intrm. 167, 169-70 (Pon. 1995).

An unconstitutional taking occurs whenever a public entity substantially deprives a private party of the beneficial use of his property for a public purpose. Therefore where neither the Trust Territory nor a U.S. gov't agency could be considered a public entity in the FSM after the effective date of the Compact they are legally incapable of committing a taking after that date. *Damarlane v. United States*, 7 FSM Intrm. 167, 170 (Pon. 1995).

Section 4. Equal protection of the laws may not be denied or impaired on account of sex, race, ancestry, national origin, language, or social status.

Case annotation: A patient's equal protection rights were not violated when there was no showing that the patient was treated differently from any other patient on the basis of her sex, ancestry, nat. l origin, or social status. *Samuel v. Pryor*, 5 FSM Intrm. 91, 106 (Pon. 1991).

Families of wrongful death victims do not constitute a suspect class for purposes of equal protection analysis. *Tosie v. Healy-Tibbets Builders, Inc.*, 5 FSM Intrm. 358, 362 (Kos. 1992).

Aliens are persons protected by due process and equal protection clauses of Constitution. *Berman v. FSM Supreme Court (I)*, 5 FSM Intrm. 364, 366 (Pon. 1992).

Congress and President respectively have power to regulate immigration and conduct foreign affairs while Chief Justice may make rules governing admission of attorneys. Therefore a rule of admission that treats aliens unequally, promulgated by the Chief Justice, implicates powers expressly delegated to other branches. *Berman v. FSM Supreme Court (I)*, 5 FSM Intrm. 364, 366 (Pon. 1992).

Without a rational valid basis for rule limiting the number of times an alien may take the bar exam it will be held unconstitutional even if it would be constitutional if the regulation were made by Congress or the President. *Berman v. FSM Supreme Court (I)*, 5 FSM Intrm. 364, 367 (Pon. 1992).

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

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

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

Case annotations: The Ponape State consent statute does not authorize the search of a nonconsenting bar or restaurant customer. Pon. Code. ch. 3, §§ 3-13. *FSM v. Tipen*, 1 FSM Intrm. 79,81 (Pon. 1982).

Under Ponape State law, a bar or restaurant patron's denial of an authorized person's request to search the person of the patron merely subjects the patron to exclusion from the establishment. Pon. Code ch. 3, §§ 3-13. *FSM v. Tipen*, 1 FSM Intrm. 79, 81 (Pon. 1982).

The art. IV, § 5 right to be secure against searches is not absolute. The Constitution only protects against unreasonable searches. *FSM v. Tipen*, 1 FSM Intrm. 79, 82 (Pon. 1982).

No right is held more sacred, or is more carefully guarded by the common law than the right of every individual to possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. *FSM v. Tipen*, 1 FSM Intrm. 79, 86 (Pon. 1982).

Constitutional protection of individual against unreasonable searches and limitation of powers of police apply wherever an individual may harbor a reasonable expectation of privacy. *FSM v. Tipen*, 1 FSM Intrm. 79, 86 (Pon. 1982).

Constitutional protection against unreasonable searches extends to contents of closed containers within one's possession and to those items one carries on one's person. *FSM v. Tipen*, 1 FSM Intrm. 79, 86 (Pon. 1982).

A citizen is entitled to protection of the privacy which he seeks to maintain even in a public place. *FSM v. Tipen*, 1 FSM Intrm. 79, 86 (Pon. 1982).

Burden is on gov. t to justify a search without a warrant. *FSM v. Tipen*, 1 FSM Intrm. 79, 87 (Pon. 1982).

Legality of search must be tested on basis of the information known to police officer immediately before search began. *FSM v. Tipen*, 1 FSM Intrm. 79, 88 (Pon. 1982).

FSM Supreme Court is vested, by statute, with authority to suppress or exclude, evidence obtained by unlawful search and seizure. 12 FSMC 312. *FSM v. Tipen*, 1 FSM Intrm. 79, 92 (Pon. 1982).

Where investigating officers have reason to believe that somebody on private premises may have information pertaining to their investigation, they may enter those private premises, without a warrant or prior judicial authorization, to make reasonably nonintrusive efforts to determine if anybody is willing to discuss substance of their investigations. *FSM v. Mark*, 1 FSM Intrm. 284, 288 (Pon. 1983).

Police officers who in the performance of their duty enter upon private property without an intention to look for evidence but merely to ask preliminary questions of occupants cannot be said to be conducting a search within the meaning of Constitution. *FSM v. Mark*, 1 FSM Intrm. 284, 289 (Pon. 1983).

Mere observation does not constitute a search. The term "search" implies exploratory investigation or quest. *FSM v. Mark*, 1 FSM Instr. 284, 289 (Pon. 1983).

Wide ranging and unwarranted movement of police officers on private land may constitute an unreasonable invasion of privacy, or establish that the investigation had evolved into a search. *FSM v. Mark*, 1 FSM Intrm. 284, 290 (Pon. 1983).

A warrant is not necessary to authorize seizure when marijuana is in plain view of a police officer who has a right to be in the position to have that view. *FSM v. Mark*, 1 FSM Intrm. 284, 294 (Pon. 1983).

It is generally agreed that for actions to constitute a search, there must be: 1) an examination of premises or a person; 2) in a manner encroaching upon one's reasonable expectation of privacy; 3) with an intention, or at least a hope, to discover contraband or evidence of guilt to be used in prosecution of a criminal action. *FSM v. Mark*, 1 FSM Intrm. 284, 298 (Pon. 1983).

The starting point and primary focus of legal analysis for a claim of unreasonable search and seizure should normally be the Constitution's Declaration of Rights, not the statutory "Bill of Rights." *FSM v. George*, 1 FSM Intrm. 449, 455 (Kos. 1984).

The principal difference between FSM Constitution art. IV, § 5 and 1 FSMC 103 is that the Constitution, in addition to prohibiting unreasonable searches and seizures also contains a prohibition against invasions of privacy. *FSM v. George*, 1 FSM Intrm. 449, 455 n. 1 (Kos. 1984).

The government bears the burden of proving the existence of voluntary consent. Acquiescence in the desire of law enforcement personnel to search will not be presumed but must be affirmatively demonstrated. *FSM v. George*, 1 FSM Intrm. 449, 456 (Kos. 1984).

A demand, even if courteously expressed, is different from a request, and a citizen's compliance with a police officer's demand, backed by apparent force of law, is perhaps subtly, but nonetheless significantly, different from voluntary consent to a request. *FSM v. George*, 1 FSM Intrm. 449, 458 (Kos. 1984).

On matters relating to a warrantless search, it is for the court to decide whether voluntary consent, as opposed to passive submission to legal authority, occurred. The government must put before the court facts, not mere conclusions of police officers, which will permit the judge to decide whether consent was given. *FSM v. George*, 1 FSM Intrm. 449, 458 (Kos. 1984).

Unconsented and warrantless entry into defendant's house, without any subsequent action on officer's part to impress upon the defendant that they could be influenced by his wishes as to whether a search might be conducted, erases any possibility of finding any aspect of search in house or resultant seizure of evidence, to be either consented to or untainted. *FSM v. George*, 1 FSM Intrm. 449, 459 (Kos. 1984).

While existence of probable cause to believe that a crime has been committed and that a particular person has committed it is not in itself sufficient to justify a warrantless search, the establishment of probable cause is nevertheless critical to any unconsented search. *FSM v. George*, 1 FSM Intrm. 449, 460-61 (Kos. 1984).

Without probable cause, no search warrant may be obtained and no unconsented search may be conducted. *FSM v. George*, 1 FSM Intrm. 449, 461 (Kos. 1984).

Constitutional prohibitions against unreasonable searches, seizures or invasions of privacy must be applied with full vigor when a dwelling place is the object of the search. *FSM v. George*, 1 FSM Intrm. 449, 461 (Kos. 1984).

Police officers desiring to conduct search should normally obtain search warrant. This requirement serves to motivate officers to assess their case and to obtain perspective from the very start. *FSM v. George*, 1 FSM Intrm. 449, 461-62 (Kos. 1984).

Officers entering house by consent for purposes of search must keep in mind eventual likelihood that they will need to establish that consent was voluntary. *FSM v. George*, 1 FSM Intrm. 449, 463 (Kos. 1984).

Only under rare circumstances would FSM Supreme Court likely find that homeowner who neither says nor does anything to indicate affirmative consent has consented to a warrantless search of his house. *FSM v. George*, 1 FSM Intrm. 449, 463 (Pon. 1984).

A constitutional search may be conducted without a warrant if search is incidental to a lawful arrest. *Ludwig v. FSM*, 2 FSM Intrm. 27, 32 (App. 1985).

Standard announced in second sentence of FSM Const. art. IV, § 5 for issuance of a warrant must be employed in determining reasonableness of search or seizure. Imposition of standard of probable cause for issuance of a warrant in FSM Const. art. IV, § 5 implies that no search or seizure may be considered reasonable unless justified by probable cause. *Ludwig v. FSM*, 2 FSM Intrm. 27, 32 (App. 1985).

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

Art. IV, § 5 of FSM Constitution, based upon the fourth amendment of U.S. Constitution, permits reasonable, statutorily authorized inspections of fishing vessel in FSM ports, under various theories upheld under U.S. Constitution, when vessel is reasonably suspected of having engaged in fishing activities. *Ishizawa v. Pohnpei*, 2 FSM Intrm. 67, 74 (Pon. 1985).

It is extraordinarily difficult for law enforcement authorities to police the vast waters of FSM. Yet, effective law enforcement to prevent fishing violations is crucial to economic interests of this new nation. Accordingly, historical doctrines applied under U.S. Constitution which expand right to search based upon border search, administrative inspection and exigent circumstances theories, appear suitable for application to fishing vessels within FSM. *Ishizawa v. Pohnpei*, 2 FSM Intrm. 67, 74 (Pon. 1985).

While power to seize vessel is crucial to interests of FSM and its states, there are also compelling factors demanding that seizures take place only where fully justified and that procedures be established and scrupulously followed to assure that power to seize is not abused. *Ishizawa v. Pohnpei*, 2 FSM Intrm. 67, 75 (Pon. 1985).

Searches and seizures both constitute a substantial intrusion upon privacy of an individual whose person or property is affected, but a seizure often imposes more onerous burdens. *Ishizawa v. Pohnpei*, 2 FSM Intrm. 67, 75 (Pon. 1985).

A temporary seizure is itself a significant taking of property, depriving the owner of possession, an important attribute of property. *Ishizawa v. Pohnpei*, 2 FSM Intrm. 67, 75 (Pon. 1985).

It is normally required that a hearing be held prior to seizure of a property. In "extraordinary situations" a seizure may take place prior to hearing, but the owner must be afforded a prompt post-seizure hearing at which the person seizing the property must at least make a showing of probable cause. Unreasonable delay in providing a post-seizure hearing may require that an otherwise valid seizure be set aside. *Ishizawa v. Pohnpei*, 2 FSM Intrm. 67, 76 (Pon. 1985).

General requirement under art. IV, § 5 of Constitution is that before search or seizure may occur there must exist "probable cause", that is, a reasonable ground for suspicion, sufficiently strong to warrant a cautious person to believe that a crime has been committed

and that the item to be seized has been used in the crime. *Ishizawa v. Pohnpei*, 2 FSM Intrm. 67, 76 (Pon. 1985).

Where a seizure is for forfeiture rather than evidentiary purposes, the constitutional prohibitions against taking property without due process come into play. *Ishizawa v. Pohnpei*, 2 FSM Intrm. 67, 76 (Pon. 1985).

Any attempt to grant statutory authority to permit seizure of a fishing vessel upon a lesser standard than probable cause would raise serious questions of compatibility with art. IV, §§ 3 and 4 of Constitution. Such an interpretation should be avoided unless clearly mandated by statute. *Ishizawa v. Pohnpei*, 2 FSM Intrm. 67, 77 (Pon. 1985).

In probable cause determinations court must regard evidence from vantage point of law enforcement officers acting on scene but must make its own independent determination as to whether, considering all facts at hand, a prudent and cautious law enforcement officer, guided by reasonable training and experience, would consider it more likely than not that a violation has occurred. *Ishizawa v. Pohnpei*, 2 FSM Intrm. 67, 77 (Pon. 1985).

Where defendants accompanied police officers, then defendants entered their homes and obtained stolen goods and turned them over to police, the question of whether there has been an unreasonable seizure in violation of art. IV, § 5 of Constitution turns on whether defendants' actions were voluntary. *FSM v. Jonathan*, 2 FSM Intrm. 189, 198-99 (Kos. 1986).

This court will apply exclusionary rule on a case-by-case basis. The exclusionary rule has been devised as a necessary device to protect right to be free from unreasonable search and seizure. *Kosrae v. Alanso*, 3 FSM Intrm. 39, 44 (Kos. S. Ct. Tr. 1985).

Under exclusionary rule, any evidence obtained through an illegal search and seizure, whether physical or verbal, is a fruit of the illegal search and seizure, is tainted by illegality, and must be excluded. *Kosrae v. Alanso*, 3 FSM Intrm. 39, 44 (Kos. S. Ct. Tr. 1985).

Few rights are more important than the freedom from unreasonable governmental intrusion into a citizen's privacy and courts must protect this right from well-intentioned, but unauthorized, governmental action. *Kosrae v. Alanso*, 3 FSM Intrm. 39, 44 (Kos. S. Ct. Tr. 1985).

To protect right to be free from unreasonable search and seizure, this court requires clear proof, not merely that consent was given, but also that a right was knowingly and voluntarily waived. It is fundamental that a citizen be aware of the right he is giving up in order for consent to be found. *Kosrae v. Alanso*, 3 FSM Intrm. 39, 44 (Kos. S. Ct. Tr. 1985).

Consent, given in the face of a police request to search without consenting person having been informed of his right to refuse consent, and without any written evidence that consent was voluntarily and knowingly given, renders such consent inadequate to permit a warrantless search absent probable cause. *Kosrae v. Alanso*, 3 FSM Intrm. 39, 44 (Kos. S. Ct. Tr. 1985).

Constitution does not protect a person against a "reasonable" search and/or seizure and a search is reasonable where a search warrant has been obtained prior to search. *Kosrae v. Paulino*, 3 FSM Intrm. 273, 275 (Kos. S. Ct. Tr. 1988).

Probable cause is not proof of guilt, but shows that a reasonable ground for suspicion, sufficiently strong to warrant a cautious man to believe that accused is guilty of the offense, exists. *Kosrae v. Paulino*, 3 FSM Intrm. 273, 276 (Kos. S. Ct. Tr. 1988).

An officer who, while standing on a road, sees a marijuana plant in plain view on top of a nearby house has not thereby engaged in an unlawful search. *Kosrae v. Paulino*, 3 FSM Intrm. 273, 276 (Kos. S. Ct. Tr. 1988).

Even on public premises a person may retain an expectation of privacy, but where a person residing on public land makes no effort to preserve privacy of marijuana plants and seedings, entry of police on premises and seizure of contraband that is plainly visible from outside the residence is not an unconstitutional search and seizure. *FSM v. Rodriguez*, 3 FSM Intrm. 368, 370 (Pon. 1988).

Protection in art. IV, § 5 of FSM Constitution against unreasonable search and seizure is based upon comparable provision in fourth amendment of U.S. Constitution. *FSM v. Rodriguez*, 3 FSM Intrm. 385, 386 (Pon. 1988).

Although individual acting without state authorization has constructed a sleeping hut and has planted crops on state-owned public land, state police officers may nevertheless enter the land without a search warrant to make reasonable inspections of it and may observe and seize illegally possessed plants in open view and plainly visible from outside sleeping hut. *FSM v. Rodriguez*, 3 FSM Intrm. 385, 386 (Pon. 1988).

When investigators, acting without search warrant on advance information, conduct searches in privately owned areas beyond immediate area of a dwelling house, and seize contraband, they do not thereby violate prohibitions in art. IV, § 5 of FSM Constitution against unreasonable search and seizure. *FSM v. Rosario*, 3 FSM Intrm. 387, 388-89 (Pon. 1988).

Issuance of a search warrant is indisputedly within FSM Supreme Court's jurisdiction. *Jano v. King*, 5 FSM Intrm. 388, 392 (Pon. 1992).

While constitutional provision barring invasion of privacy only protects persons from governmental intrusion into their affairs, not from intrusions by private persons, it does indicate a policy preference in favor of protection of privacy. *Nethon v. Mobil Oil Micronesia, Inc.*, 6 FSM Intrm. 451, 455 (Chk. 1994).

Standard for engaging in search of private property is less exacting than standard required for seizing such property. *FSM v. Zhong Yuan Yu No. 621*, 6 FSM Intrm. 584, 588 n.4 (Pon. 1994).

Because the purpose of art. IV, § 5 of Constitution is to protect privacy rights of individuals against unreasonable and unauthorized searches and seizures by gov. t officials it has been interpreted to require that an individual suspected of a crime be released from detention unless the gov. t can establish "probable cause" to hold that individual. *FSM v. Zhong Yuan Yu No. 621*, 6 FSM Intrm. 584, 588 (Pon. 1994).

Standard for determining probable cause is whether there is evidence and information sufficiently persuasive to warrant a cautious person to believe it is more likely than not that a violation of law has occurred and that the accused committed that violation. The probable

cause determination must be made by deliberate, impartial, judgment of a judicial officer. *FSM v. Zhong Yuan Yu* No. 621, 6 FSM Intrm. 584, 588-89 (Pon. 1994).

Often the determination of probable cause is made by a competent judicial officer upon issuance of an arrest warrant, but where an arrest is not made pursuant to a warrant the arrested is entitled to a judicial determination as to whether there is probable cause to detain accused. *FSM v. Zhong Yuan Yu* No. 621, 6 FSM Intrm. 584, 589 (Pon. 1994).

A probable cause hearing is an informal, non-adversarial proceeding in which the formal rules of evidence and the requirement of proof beyond a reasonable doubt do not apply. *FSM v. Zhong Yuan Yu* No. 621, 6 FSM Intrm. 584, 589 (Pon. 1994).

An individual whose property has been seized pursuant to a civil forfeiture proceeding is entitled to a post-seizure hearing in order to determine whether there is probable cause to seize and detain that property. The probable cause standard in a civil forfeiture case is whether there is evidence and information sufficiently persuasive to warrant a cautious person to believe it is more likely than not that a violation has occurred and that the property was used in that violation. *FSM v. Zhong Yuan Yu* No. 621, 6 FSM Intrm. 584, 589-90 (Pon. 1994).

The gov't has probable cause to detain a fishing vessel for illegal fishing when the evidence and information indicate that the vessel was conducting fishing operations within the FSM Exclusive Economic Zone, there was freshly caught fish aboard, and the permit provided to the officers contained a name different from actual name of vessel. *FSM v. Zhong Yuan Yu* No. 621, 6 FSM Intrm. 584, 590-91 (Pon. 1994).

For purposes of art. IV, § 5 protection, a search is any governmental intrusion into an area where a person has a reasonable expectation of privacy. Thus, constitutional protections do not attach unless search or seizure can be attributed to governmental conduct and defendant had a reasonable expectation of privacy in items searched. *FSM Social Security Admin. v. Weilbacher*, 7 FSM Intrm. 137, 142 (Pon. 1995).

Administrative searches designed to aid in collection of taxes rightly owing to gov't must be conducted according to same requirements laid down for other searches and seizures. *FSM Social Security Admin. v. Weilbacher*, 7 FSM Intrm. 137, 142 (Pon. 1995).

In an administrative agency inspection, as in any other governmental search and seizure, a warrant is unnecessary where gov't obtains voluntary consent of party to be searched. *FSM Social Security Admin. v. Weilbacher*, 7 FSM Intrm. 137, 143 (Pon. 1995).

An administrative agency may either request certain records be provided or formally subpoena the desired information, rather than obtain a court-ordered search warrant. In either situation, subject of inspection may decide whether to refuse or cooperate with government's request. Only when person refuses to permit the requested search does Constitution prohibit the administrative agency from coercing that person to turn over records without first obtaining a valid search warrant. *FSM Social Security Admin. v. Weilbacher*, 7 FSM Intrm. 137, 143 (Pon. 1995).

Where a person refuses to cooperate with the inspection requests of the administrative agency, the gov't will be required to demonstrate to a neutral and detached magistrate that the

requested material is reasonable to the enforcement of the administrative agency's statutory responsibilities and that the inspection is being conducted pursuant to a general and neutral enforcement plan in order to obtain required search warrant. *FSM Social Security Admin. v. Weilbacher*, 7 FSM Intrm. 137, 143 (Pon. 1995).

For court to order property seized pursuant to a search warrant to be returned, defendants' burden is to show both that there has been an illegal seizure by the state and that they have claim of lawful possession to property. *Chuuk v. Mijares*, 7 FSM Intrm. 149, 150 (Chk. S. Ct. Tr. 1995).

A party who denies ownership of seized items has no standing to ask for return of the property. *Chuuk v. Mijares*, 7 FSM Intrm. 149, 150 (Chk. S. Ct. Tr. 1995).

For a party to have valid claim of lawful possession of alcohol seized by the state that party must have paid possession tax on seized items. *Chuuk v. Mijares*, 7 FSM Intrm. 149, 150 (Chk. S. Ct. Tr. 1995).

Where defendant's motion is for return of seized property and he has failed to meet his burden to show right to lawful possession, a court need not reach the issue of the illegal seizure and suppression of evidence. *Chuuk v. Mijares*, 7 FSM Intrm. 149, 151 (Chk. S. Ct. Tr. 1995).

Section 6. The defendant in a criminal case has a right to a speedy public trial, to be informed of the nature of the accusation, to have counsel for his defense, to be confronted with the witnesses against him, and to compel attendance of witnesses in his behalf.

Case annotations: Right to Counsel

Constitution secures to criminal defendant, as a minimum, the right to receive reasonable notice of charges against defendant, right to examine any witnesses against defendant, and right to offer testimony and be represented by counsel. *In re Iriarte (II)*, 1 FSM Intrm. 225, 260 (Pon. 1983).

Where defendants had been advised of their right to counsel but there was no indication that they desired or requested counsel, there is no basis for finding that their right to counsel had been violated. *FSM v. Jonathan*, 2 FSM Intrm. 189, 199 (Kos. 1986).

When a defendant has expressed a wish to meet with counsel before further questioning, questioning must cease at once. Any attempt by police officers to ignore or override the defendant's wish, or to dissuade him from exercising his right, violates 12 FSMC 218. *FSM v. Edward*, 3 FSM Intrm. 224, 235 (Pon. 1987).

For a defendant to waive his right to silence or to counsel he must do so knowingly and intelligently. There exists a presumption against such waivers. *Moses v. FSM*, 5 FSM Intrm. 156, 159 (App. 1991).

Although implied waivers of a defendant's rights might be valid there is a presumption against a finding of a waiver of rights. *Moses v. FSM*, 5 FSM Intrm. 156, 159-60 (App. 1991).

Where defendant's counsel had five days to prepare for defense of accused, and was granted a two day continuance, in the absence of any showing in the record or representation by counsel

of resulting prejudice or ineffectiveness of counsel, trial court's refusal to grant longer continuance was not an abuse of discretion and did not violate art. IV, § 6 of FSM Constitution. *Hartman v. FSM*, 5 FSM Intrm. 224, 233-34 (App. 1991).

Speedy Trial

When defendant has already agreed to a trial date that meets constitutional requirement for a speedy trial, and no reason is offered why that date is no longer constitutionally sound, later motion for speedy trial may be denied. *FSM v. Wu Ya Si*, 6 FSM Intrm. 573, 574 (Pon. 1994).

Section 7. A person may not be compelled to give evidence that may be used against him in a criminal case, or be twice put in jeopardy for the same offense.

Case annotations: Courts may look to Journals of the Micronesian Constitutional Convention for assistance in determining meaning of constitutional language that does not provide an unmistakable answer. Journals provide no conclusion as to whether promises of leniency by police should be regarded as having compelled a defendant to give statements and other evidence but shows that the art. IV, § 7 protection against self-incrimination was based upon the fifth amendment to the U.S. Constitution. Therefore courts within the FSM may look to U.S. decisions to assist in determining meaning of art. IV, § 7. *FSM v. Jonathan*, 2 FSM Intrm. 189, 193-94 (Kos. 1986).

Where a police officer promised to reduce charges if defendant cooperated but there was no other showing of police intimidation or manipulation and the defendant had recognized that his guilt was apparent, the confession was not induced by the promises but instead was a voluntary response to the futility of carrying the deceit further. *FSM v. Jonathan*, 2 FSM Intrm. 189, 198 (Kos. 1986).

A confession which is the product of an essentially free and unconstrained choice by its maker may be used as evidence to establish guilt of defendant in court. *FSM v. Jonathan*, 2 FSM Intrm. 189, 194 (Kos. 1986).

Although questioning of witnesses and suspects is a necessary tool for effective enforcement of criminal law, courts have recognized that there is an unbroken line from physical brutality to more subtle police use of deception, intimidation and manipulation, and that vigilance is required. *FSM v. Jonathan*, 2 FSM Intrm. 189, 195 (Kos. 1986).

In the area of police questioning and confessions, the protection against self-incrimination is the principal protection, designed to restrict or prevent use of devices to subvert the will of an accused. *FSM v. Jonathan*, 2 FSM Intrm. 189, 195 (Kos. 1986).

Overall circumstances and not merely the existence or nonexistence of a promise determines whether a confession will be accepted as voluntary or rendered inadmissible as involuntary. *FSM v. Jonathan*, 2 FSM Intrm. 189, 196 (Kos. 1986).

Voluntariness of a confession may not be resolved by reference to any single infallible touchstone, such as whether a promise was made, but instead must be determined by reference to the totality of surrounding circumstances. *FSM v. Jonathan*, 2 FSM Intrm. 189, 197 (Kos. 1986).

Police may question persons who, while they are in police custody, fall under suspicion for another crime, without regard to the fact that other persons in a similar category would be released without questioning. *FSM v. Jonathan*, 2 FSM Intrm. 189, 199 (Kos. 1986).

Voluntary admissions prompted by accumulation of evidence against defendant are a legitimate goal of police investigation. *FSM v. Edward*, 3 FSM Intrm. 224, 232 (Pon. 1987).

Where admissions have been obtained in course of questioning conducted in violation of 12 FSMC 218, statutory policy calls for a presumption that subsequent admissions were obtained as a result of the violation. *FSM v. Edward*, 3 FSM Intrm. 224, 233 (Pon. 1987).

When defendant has expressed a wish to meet with counsel before further questioning, questioning must cease at once. Any attempt by police officers to ignore or override defendant's wish, or to dissuade him from exercising his right, violates 12 FSMC 218. *FSM v. Edward*, 3 FSM Intrm. 224, 235 (Pon. 1987).

A statement of defendant may be used as evidence against him only if statement was made voluntarily. *FSM v. Edward*, 3 FSM Intrm. 224, 236 (Pon. 1987).

In determining whether defendant's statement to police is "voluntary," consistent with due process requirements of the Constitution, courts should consider the totality of surrounding circumstances. Courts review actual circumstances surrounding confession and attempt to assess the psychological impact on accused of those circumstances. *FSM v. Edward*, 3 FSM Intrm. 224, 238 (Pon. 1987).

The court will not issue a writ of certiorari to review the trial court's suppression of defendant's confession in a case in which no assignments of error are furnished to the court, although such decision effectively terminates the case because gov. t cannot continue its prosecution without the confession, and although no appeal is available to the gov. t. *In re Edward*, 3 FSM Intrm. 285, 286-87 (App. 1987).

Where no motion to suppress a confession has been made before trial and no cause has been offered as to the failure to raise the objection, the trial court was justified in finding that the defendant had waived any objection to the admission of the confession. *In re Juvenile*, 4 FSM Intrm. 161, 163 (App. 1989).

Where trial record shows no waiver of a minor's rights against self-incrimination, where a remarkable discrepancy exists between police procedure for taking a statement and written evidence offered at trial, where the only evidence supporting the conviction other than the confession is an accomplice's testimony, where minor is 16 years of age and had been on detention some 2 weeks prior to his confession, and where parents of the minor were absent at the time the confession was made, the trial court erred in admitting defendant's confession. *In re Juvenile*, 4 FSM Intrm. 161, 164 (App. 1989).

Defendant's statement will be suppressed when defendant has not been advised of all rights set forth in 12 FSMC 218 (1)-(5), even though he was advised of right to remain silent and right to counsel and he waived those rights. *FSM v. Sangechik*, 4 FSM Intrm. 210, 211-12 (Chk. 1990).

For a defendant to waive his right to silence or to counsel he must do so knowingly and intelligently. There exists a presumption against such waivers. *Moses v. FSM*, 5 FSM Intrm. 156, 159 (App. 1991).

Although implied waivers of a defendant's rights might be valid there is a presumption against a finding of a waiver of rights. *Moses v. FSM*, 5 FSM Intrm. 156, 159-60 (App. 1991).

A form which advises a suspect of his right to lawyer, and of his right to remain silent but only asks if the suspect wants a lawyer now, is confusing and lacks a specific waiver as to the right to remain silent. *Moses v. FSM*, 5 FSM Intrm. 156, 161 (App. 1991).

A codefendant's inculpatory statement which has been admitted into evidence may not be used against any defendant other than the declarant without violating the right of confrontation guarantee of FSM Constitution. *Hartman v. FSM*, 5 FSM Intrm. 224, 229 (App. 1991).

Although there is a danger of prejudice in cases where a co-defendant's inculpatory statement is admitted into evidence, because court is hesitant to limit the broad discretion afforded the trial judge by FSM Crim. R. 14, and because many problems can be eliminated by redaction of the statement, the court will not adopt a per se rule of severance at this time. *Hartman v. FSM*, 5 FSM Intrm. 224, 230 (App. 1991).

For confession of defendant to be admissible as evidence defendant must not merely waive his right to counsel but must also specifically waive the independent right to remain silent. *Hartman v. FSM*, 5 FSM Intrm. 224, 234-35 (App. 1991).

By responding voluntarily to questions asked without coercion, after he has been advised of his rights, a defendant waives his right to remain silent. *FSM v. Hartman (I)*, 5 FSM Intrm. 350, 352 (Pon. 1992).

Use of a defendant's out of court statement as evidence against a codefendant would violate codefendant's "right of confrontation" since declarant is not a witness at the trial subject to cross examination. *Hartman v. FSM*, 6 FSM Intrm. 293, 301 (App. 1993).

If severance is denied, defendants' out of court statements ought to be redacted to eliminate in each references to other codefendants. Failure to do so may result in reversal of convictions in the interests of justice. After redaction, no prejudice will occur if statements then give no reference to any codefendant. Redaction can normally be accomplished by the parties. Thus court will not view statement until after redaction. *Hartman v. FSM*, 6 FSM Intrm. 293, 301-02 & n.12 (App. 1993).

By statute, statements taken as a result of a violation of defendant's statutory right to be brought before a judicial officer without unnecessary delay are inadmissible, even if voluntary. *Chuuk v. Arnish*, 6 FSM Intrm. 611, 613 (Chk. S. Ct. Tr. 1994).

Double Jeopardy

Principal purpose of protection against double jeopardy established by FSM Constitution, art. IV, § 7 is to prevent gov't from making repeated attempts to convict an individual for the same alleged act. *Laion v. FSM*, 1 FSM Intrm. 503, 521 (App. 1984).

Double jeopardy clause, FSM Const. art. IV, § 7, of Declaration of Rights of FSM Constitution was drawn from Bills of Rights of U.S. Constitution. *Laion v. FSM*, 503, 522 (App. 1984).

U.S. constitutional law at time of Micronesian Constitutional Convention furnishes guidance as to intended scope of FSM Constitution's double jeopardy clause. *Laion v. FSM*, 1 FSM Intrm. 503, 523 (App. 1984).

Double jeopardy clause of FSM Constitution protects against second prosecution for same offense after acquittal, against a second prosecution for same offense after conviction and against multiple punishments for same offense. *Laion v. FSM*, 1 FSM Intrm. 503, 523 (App. 1984).

When assault with a dangerous weapon requires use or attempted use of a dangerous weapon, a fact not required for aggravated assault, and aggravated assault requires an intent to cause serious bodily injury, which need not be proved for conviction of assault with a dangerous weapon, conviction on both charges for the same wrongful act will not violate double jeopardy clause of Constitution. *Laion v. FSM*, 1 FSM Intrm. 503, 524 (App. 1984).

Where trial court orders concurrent sentences of two convictions of different offenses flowing from a single wrongful act, there is not cumulative or multiple punishments that might violate double jeopardy clause. *Laion v. FSM*, 1 FSM Intrm. 503, 524 (App. 1984).

Where same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not. If test is met a dual conviction will not violate the constitutional protection against double jeopardy. *Laion v. FSM*, 1 FSM Intrm. 503, 523-25 (App. 1984).

While Congress is not prevented by double jeopardy clause from providing that two convictions of same import may flow from a single wrongful act, a court will not merely assume such a congressional intention. *Laion v. FSM*, 1 FSM Intrm. 503, 525 (App. 1984).

Where two statutory provisions aimed at similar types of wrongdoing and upholding citizen and public interests of same nature would apply to a solitary illegal act, which caused only one injury, statutes will be construed not to authorize cumulative convictions in absence of clear indication of legislative intent. However, gov. t is not denied right to charge separate offenses to guard against risk that a conviction may not be obtained on one of the offenses. *Laion v. FSM*, 1 FSM Intrm. 503, 529 (App. 1984).

Protection against double jeopardy in a second trial is not available until the person has first been tried in one trial. Jeopardy does not attach in a criminal trial until the first witness is sworn in to testify. *FSM v. Cheng Chia-W (I)*, 7 FSM Intrm. 124, 128 (Pon. 1995).

Section 8. Excessive bail may not be required, excessive fines imposed, or cruel and unusual punishments inflicted. The writ of habeas corpus may not be suspended unless required for public safety in cases of rebellion or invasion.

Case annotation: **Cruel and Unusual Punishment**

Actions of police officer in stripping prisoner to punish and humiliate him, then beating him and damaging his pickup truck, constituted violation of prisoner's constitutional rights to be free from cruel and unreal punishments and his due process rights. *Tolenoa v. Alokoa*, 2 FSM Intrm. 250 (Kos. 1986).

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

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

Where a person has not been tried, convicted and sentenced, no question of cruel and unusual punishment arises. *Paul v. Celestine*, 4 FSM Intrm. 205, 208 (App. 1990).

Use of force by police officers is not privileged or justified when arrestee was so drunk and unstable to resist or defend himself and when police officer used force because he was enraged at being insulted by arrestee. *Meitou v. Uwera*, 5 FSM Intrm. 139, 144 (Chk. S. Ct. Tr. 1991).

A person's constitutional right to due process of law, and his right to be free from cruel and unusual punishment is violated when an officer instead of protecting the person from attack, threw him to the ground, and beat the person in the jail. *Meitou v. Uwera*, 5 FSM Intrm. 139, 144 (Chk. S. Ct. Tr. 1991).

Constitutional provisions applicable to a prisoner may vary depending on his status. A pre-trial detainee has a stronger right to liberty, which right is protected by Due Process Clause, FSM Const. art. IV, § 3. A convicted prisoner's claims upon liberty have been diminished through due process so that person must rely primarily on art. IV, § 8 which protects him from cruel and unusual punishment. *Plais v. Panuelo*, 5 FSM Intrm. 179, 190 (Pon. 1991).

In a case where a convicted prisoner, who is also a pre-trial detainee, asserts civil rights claims arising out of ill-treatment after arrest, denial of access to family is a due process claim, and physical abuse involves due process as well as cruel and unusual punishment claims. *Plais v. Panuelo*, 5 FSM Intrm. 179, 190 (Pon. 1991).

In interpreting provision against cruel and unusual punishment in FSM Constitution, court should consider values and realities of Micronesia, but against background of law concerning cruel and unusual punishment and internat. l standards concerning human rights. *Plais v. Panuelo*, 5 FSM Intrm. 179, 196-97 (Pon. 1991).

Deliberate indifference to an inmate's medical needs can amount to cruel and unusual punishment. *Plais v. Panuelo*, 5 FSM Intrm. 179, 199-200 (Pon. 1991).

Confining prisoner in dangerously unsanitary conditions, which represent a broader gov't-wide policy of deliberate indifference to dignity and well-being of prisoners, is failure to provide civilized treatment or punishment, in violation of prisoners' protection against cruel and unusual punishment, and renders state liable under 11 FSMC 701(3). *Plais v. Panuelo*, 5 FSM Intrm. 179, 208 (Pon. 1991).

Revocation of probation of alcohol dependent person because he consumed alcohol or because of alcohol related offenses for which he was convicted does not constitute cruel and unusual punishment in violation of constitution. *FSM v. Phillip*, 5 FSM Intrm. 298, 300 (Kos. 1992).

Habeas Corpus

FSM Supreme Court has inherent constitutional power to issue all writs; this includes the traditional common law writ of mandamus. 4 FSMC 117. *Nix v. Ehmes*, 1 FSM Intrm. 114, 118 (Pon. 1982).

Art. XI, § 6(b) of FSM Constitution requires that FSM Supreme Court consider a petition for writ of habeas corpus alleging imprisonment of a petitioner in violation of his rights of due process. *In re Iriarte (I)*, 1 FSM Intrm. 239, 243-44 (Pon. 1983).

FSM Supreme Court's constitutional jurisdiction to consider writs of habeas corpus is undiminished by the fact that the courts whose actions are under consideration, the TT High Court and a Community Court, were not contemplated by FSM Constitution. *In re Iriarte (I)*, 1 FSM Intrm. 239, 244, 246 (Pon. 1983).

In habeas corpus proceeding, the court must apply due process standards to actions of courts which have issued orders of commitment. *In re Iriarte (I)*, 1 FSM Intrm. 239, 249 (Pon. 1983).

Judicial review of certification of extraditability, although not appealable, is available to an accused in custody by seeking a writ of habeas corpus. *In re Extradition of Jano*, 6 FSM Intrm. 23, 25 (App. 1993).

4 FSMC 117 gives both the trial division and the appellate division powers to issue all writs not inconsistent with law or with the rules of civil procedure. FSM Appellate Rule 22(a) requires petitions for writs of habeas corpus be first brought in the trial division. When circumstances have been shown to warrant, the appellate division clearly has the authority to suspend the rule. *In re Extradition of Jano*, 6 FSM Intrm. 31, 32 (App. 1993).

Judicial review of an extradition hearing is by petition for a writ of habeas corpus. *In re Extradition of Jano*, 6 FSM Intrm. 93, 97 (App. 1993).

Scope of habeas corpus review of extradition proceeding is 1) whether judge had jurisdiction, 2) whether court had jurisdiction over extraditee, 3) whether there is an extradition agreement in force, 4) whether crimes charged fall within the terms of the agreement, and 5) whether there was sufficient evidence to support a finding of extraditability. *In re Extradition of Jano*, 6 FSM Intrm. 93, 104 (App. 1993).

Bail

The object in determining conditions of pretrial release is to assure the presence of defendant at trial so that justice may be done while keeping in mind the presumption of innocence and permitting defendant the maximum amount of pretrial freedom. FSM Supreme Court should attempt to weigh the various forces likely to motivate a defendant to stay and face trial against those forces likely to impel him to leave. FSM Crim. R. 46(a)(2). FSM v. Jonas (I), 231a, 233 (Pon. 1982).

Where highest prior bail was \$1,500.00 imposition of bail in amount of \$10,000.00, on basis of dispute and unsubstantiated gov't suggestions that defendant has cash and assets available to him, would be unwarranted. FSM v. Jonas (I), 1 FSM Intrm. 231a, 236 (Pon. 1982).

Relief from improperly set or denied bail must be speedy to be effective. In re Iriarte (II), 1 FSM Intrm. 255, 265 (Pon. 1983).

The bearer of title of Nahniken, by virtue of his position's deep ties to Ponapean society, may be expected to appear and stand trial if accused of crime and to submit to sentence if found guilty. Bail, therefore should be granted. In re Iriarte (II), 1 FSM Intrm. 255, 265 (Pon. 1983).

A nahniken, just as any ordinary citizen, is entitled to bail and due process. In re Iriarte (II), 1 FSM Intrm. 255, 272 (Pon. 1983).

FSM Supreme Court must approach question of whether bail is "excessive" with recognition that defendant is presumed innocent, is to be treated with dignity, and needs a reasonable opportunity to prepare his defense. At the same time the judiciary must keep in mind his responsibility to the public to assure that defendant will be made to respond to charges leveled at him. FSM v. Etpison, 1 FSM Intrm. 370, 372 (Pon. 1983).

Once a justice certifies an accused as extraditable, the justice must then commit the person to the proper jail until surrendered. The extradition statute does not give the court the authority to release a person on bail pending any judicial review of the certification. In re Extradition of Jano, 6 FSM Intrm. 62, 63 (App. 1993).

In internat. l extradition case, bail can be granted only if "special circumstances" are shown. Neither risk of flight nor availability of suitable custodian are primary considerations. Rather the primary consideration is ability of gov't to surrender the accused to the requesting gov't. In re Extradition of Jano, 6 FSM Intrm. 62, 64 (App. 1993).

Excessive Fines

It is premature to challenge a statute as unconstitutional for imposing excessive fines until a fine has been imposed. FSM v. Cheng Chia-W (I), 7 FSM Intrm. 124, 126 (Pon. 1995).

Section 9. Capital punishment is prohibited.

Section 10. Slavery and involuntary servitude are prohibited except to punish crime.

Section 11. A bill of attainder or ex post facto law may not be passed.

Case annotations: **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).

A statute making all persons convicted of a felony in the Trust Territory courts ineligible for election to 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).

The statutory ineligibility of persons convicted of Trust Territory felonies is 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).

Ex Post Facto Laws

While every ex post facto law must necessarily be retrospective not every retrospective law is an ex post facto law. An ex post facto law is one which imposes punishment for past conduct, lawful at time it was engaged in. *Robert v. Chuuk State House of Representatives*, 6 FSM Intrm. 260, 266-67 (Chk. S. Ct. Tr. 1993).

Legislation is not an ex post facto law where source of legislative concern can be thought to be the activity or status from which the individual is barred, even though it may bear harshly upon one affected, but the contrary is the case where statute in question is evidently aimed at person or class of persons disqualified. *Robert v. Chuuk State House of Representatives*, 6 FSM Intrm. 260, 268-69 (Chk. S. Ct. Tr. 1993).

A provision barring those convicted of a felony, even if pardoned, from membership in legislature is concerned with qualifications of legislative membership, and is not just for purpose of punishing felons and those pardoned of a felony which would violate the constitutional ban on ex post facto laws. *Robert v. Chuuk State House of Representatives*, 6 FSM Intrm. 260, 269-71 (Chk. S. Ct. Tr. 1993).

Regulations imposing civil disqualifications for past criminal conduct are not punishment barred by constitutional ban against ex post facto laws. *Robert v. Chuuk State House of Representatives*, 6 FSM Intrm. 260, 270-71 (Chk. S. Ct. Tr. 1993).

Since retrospective application of constitutional provision barring persons convicted of felonies, even if pardoned, from holding legislative office is not an invalid ex post facto law, retrospective application of then provision is also not invalid as a bill of attainder or a denial of due process. *Robert v. Chuuk State House of Representatives*, 6 FSM Intrm. 260, 271-72 (Chk. S. Ct. Tr. 1993).

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 punishment for a crime and applies the increase to crimes committed before enactment of the laws; or 4) alters 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 to criminal acts only. This means retroactive noncriminal laws may be valid. *Robert v. Mori*, 6 FSM Intrm. 394, 400 (App. 1994).

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

Since 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).

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).

Section 12. A citizen of the Federated States of Micronesia may travel and migrate within the Federated States.

Section 13. Imprisonment for debt is prohibited.

ARTICLE V

Traditional Rights

Section 1. Nothing in this Constitution takes away a role or function of a traditional leader as recognized by custom and tradition, or prevents a traditional leader from being recognized, honored, and given formal or functional roles at any level of government as may be prescribed by this Constitution or by statute.

Case annotations: Defendants are not within coverage of FSM Const. art. V, § 1, preserving "the role or function of a traditional leader as recognized by custom and tradition," simply by virtue of their status as municipal police officers. *Teruo v. FSM*, 2 FSM Intrm. 167, 172 (App. 1986).

Section 2. The traditions of the people of the Federated States of Micronesia may be protected by statute. If challenged as violative of Article IV, protection of Micronesian tradition shall be considered a compelling social purpose warranting such governmental action.

Section 3. The Congress may establish, when needed, a Chamber of Chiefs consisting of traditional leaders from each state having such leaders, and of elected representatives from states having no traditional leaders. The constitution of a state having traditional leaders may provide for an active, functional role for them.

ARTICLE VI

Suffrage

Section 1. A citizen 18 years of age may vote in national elections. The Congress shall prescribe a minimum period of local residence and provide for voter registration, disqualification for conviction of crime, and disqualification for mental incompetence or insanity. Voting shall be secret.

ARTICLE VII

Levels of Government

Section 1. The three levels of government in the Federated States of Micronesia are national, state, and local. A state is not required to establish a new local government where none exists on the effective date of this Constitution.

Section 2. A state shall have a democratic constitution.

Case annotations: Pohnpei State Constitution was established under authority granted by art. VII, § 2 of FSM Constitution which mandates that a state shall have a democratic constitution and also Pohnpei State Law No. 2L-131-82, § 9, which mandated the Pohnpei State Constitutional Convention "to draft a constitution for the State of Ponape ... [that] ... shall make adequate provisions for the exercise of legislative, judicial and executive functions, and shall guarantee to all citizens of the State, a democratic form of government ..." *People of Kapingamarangi v. Pohnpei Legislature*, 3 FSM Intrm. 5, 8-9 (Pon. S. Ct. Tr. 1985).

ARTICLE VIII

Powers of Government

Section 1. A power expressly delegated to the national government, or a power of such an indisputably national character as to be beyond the power of a state to control, is a national power.

Case annotations: There appears nothing of an indisputably nat'l character in the power to control all lesser crimes. *FSM v. Boaz (II)*, 1 FSM Intrm. 28, 32 (Pon. 1981).

Constitution places diversity jurisdiction in Supreme Court, despite the fact that the issues involve matters within state or local, rather than nat'l, legislative powers. *In re Nahnsen*, 1 FSM Intrm. 97, 102 (Pon. 1982).

Power to regulate probate of wills or inheritance of property is not "beyond the power of a state to control" within meaning of art. VIII, § 1 of Constitution and is consequently a state

power. Nothing about the power to regulate probate of wills or inheritance of property suggests that these are beyond the power of a state to control. *In re Nahnsen*, 1 FSM Intrm. 97, 107 (Pon. 1982).

State officials generally should have greater knowledge of use, local custom and expectations concerning land and personal property. They should be better equipped than nat'l gov't to control and regulate these matters. Framers of Constitution specifically considered this issue and felt that powers of this sort should be state powers. *In re Nahnsen*, 1 FSM Intrm. 97, 107, 109 (Pon. 1982).

Allocation of judicial authority is made on basis of jurisdiction, generally without regard to whether state or nat'l powers are at issue. *In re Nahnsen*, 1 FSM Intrm. 97, 108 (Pon. 1982).

Prosecution of criminals is not a power having indisputably nat'l character. *Truk v. Hartman*, 1 FSM Intrm. 174, 178 (Truk 1982).

Exclusive nat'l gov't jurisdiction over major crimes is not mandated by Constitution; such jurisdiction would be exclusive in any event only if criminal jurisdiction was a power of indisputably nat'l character. *Truk v. Hartman*, 1 FSM Intrm. 174, 181 (Truk 1982).

Where jurisdiction exists by virtue of diversity of parties, FSM Supreme Court may resolve dispute despite the fact that matters squarely within legislative powers of states (e.g., probate, inheritance an land issue) may be involved. *Ponape Chamber of Commerce v. Nett*, 1 FSM Intrm. 389, 396 (Pon. 1984).

While FSM Constitution is supreme law of the land and FSM Supreme Court may under no circumstances acquiesce in unconstitutional governmental action, states should be given a full opportunity to exercise their legitimate powers in a manner consistent with commands of the Constitution without unnecessary intervention by nat'l courts. *Etpison v. Perman*, 1 FSM Intrm. 405, 428 (Pon. 1984).

There is nothing absurd about a weapons control scheme that recognizes that both nat'l and state governments have an interest in controlling the possession, use and sale of weapons. While Congress and the states may eventually wish to allocate their respective roles with more precision, the current Weapons Control Act appears to provide a workable system during these early years of transition and constitutional self-government. *Joker v. FSM*, 2 FSM Intrm. 38, 44 (App. 1985).

Weapons Control Act seems well attuned to recognition of shared nat'l-state interest in maintaining an orderly society and goal of cooperation in law enforcement as reflected in the Major Crimes Clause, art. IX, § 2(p) of the Constitution as well as the Joint Law Enforcement Act, 12 FSMC 1201. *Joker v. FSM*, 2 FSM Intrm. 38, 44 (App. 1985).

Major crimes obviously were not viewed by framers as simply a local or state problem. The Major Crimes Clause undoubtedly reflects their judgment that the very integrity of this new nation could be threatened if major crimes could be committed with impunity in any part of the nation, with nat'l gov't forced helplessly to stand aside. *Tammow v. FSM*, 2 FSM Intrm. 53, 58 (App. 1985).

Framers of Constitution stipulated that line for determining whether a crime is major be drawn on basis of severity or gravity of the crime rather than by reference to principles of federalism developed under U.S. Constitution. *Tammow v. FSM*, 2 FSM Intrm. 53, 58 (App. 1985).

Members of Micronesian Constitutional Convention obviously did not believe Major Crimes Clause was improperly at odds with their general view that governmental power should be less centralized under FSM Constitution than it had been in Trust Territory days. *Tammow v. FSM*, 2 FSM Intrm. 53, 59 (App. 1985).

The scope of state police powers under FSM Constitution must be determined by reference to powers of nat'l gov't under the Major Crimes Clause. It follows that legitimate exercise of nat'l gov't power to define major crimes cannot be viewed as an unconstitutional encroachment upon police powers of the states. *Tammow v. FSM*, 2 FSM Intrm. 53, 59 (App. 1985).

Power to impose taxes, duties, and tariffs based on imports is nat'l, not state, power and where Congress has exercised power and shares revenues with the states, a state may not also impose an additional import tax. *Wainit v. Truk (II)*, 2 FSM Intrm. 86, 88 (Truk 1985).

The nature of the expressly delegated powers in art. IX, § 2, of the Constitution — including the powers to impose taxes, to provide for nat'l defense, ratify treaties, regulate immigration and citizenship, regulate currency, foreign commerce and navigation, and to provide for a postal system — strongly suggests that they are intended to be exclusive province of nat'l gov't, since they call for a uniform nationally coordinated approach. *Innocenti v. Wainit*, 2 FSM Intrm. 173, 181-82 (App. 1986).

Pohnpei State Constitution was established under authority granted by art. VII, § 2 of FSM Constitution which mandates that a state shall have a democratic constitution and also Pohnpei State Law No. 2L-131-82, § 9, which mandated Pohnpei State Constitutional Convention "to draft a constitution for the State of Ponape . . . [that] shall make adequate provisions for the exercise of legislative, judicial and executive functions, and shall guarantee to all citizens of the State, a democratic form of government." *People of Kapingamarangi v. Pohnpei Legislature*, 3 FSM Intrm. 5, 8-9 (Pon. S. Ct. Tr. 1985).

Congress, under § 5 of art. XV, had power to provide for transition from gov't under Trusteeship to gov't under FSM Constitution. *Pohnpei v. Mack*, 3 FSM Intrm. 45, 49 (Pon. S. Ct. Tr. 1987).

Kosrae Constitution contemplates that justices of FSM Supreme Court may decide cases which arise within Kosrae and fall under the original jurisdiction of Kosrae State Court. In addition, Kosrae Constitution vests in Kosrae Chief Justice the power to include resources and justices of FSM Supreme Court as resources of Kosrae State Court, insofar as that is consistent with duties of FSM Supreme Court under FSM Constitution. *Heirs of Mongkeya v. Heirs of Mackwelung*, 3 FSM Intrm. 92, 97 (Kos. S. Ct. Tr. 1987).

Although nat'l law requires FSM Supreme Court to protect persons against violations of civil rights, strong considerations of federalism and local self-gov't suggest that local institutions should be given an opportunity to address local issues, even civil rights issues, especially when this can be done without placing rights of parties in serious jeopardy and when local

decision may obviate need for a constitutional ruling by nat'l court. *Hadley v. Kolonia Town*, 3 FSM Intrm. 101, 103 (Pon. 1987).

If a power is not enumerated in Constitution, the likelihood is that the framers intended it to be a state power, for the only unexpressed powers which may be exercised by nat'l gov't are powers of "such an indisputably nat'l character as to be beyond the power of a state to control." FSM Const. art. VIII, § 1. *Edwards v. Pohnpei*, 3 FSM Intrm. 350, 357 (Pon. 1988).

Wrongful death statutes, including \$100,000 ceiling on wrongful death claims, are part of the law of the states and are not nat'l law. *Edwards v. Pohnpei*, 3 FSM Intrm. 350, 359 (Pon. 1988).

FSM Supreme Court decision applying state law in case before it is final and *res judicata*; but if in a subsequent case a state court decides same issue differently, the state decision in that subsequent case is controlling precedent and nat'l courts should apply the state court rule in future cases. *Edwards v. Pohnpei*, 3 FSM Intrm. 350, 360 n.22 (Pon. 1988).

A lawsuit to enforce a mortgage is an attempt to enforce a type of lien against a delinquent debtor. Such a case bears a relationship to power to regulate "bankruptcy and insolvency," which Constitution in art. IX, § 2(g), places in the nat'l Congress. *Bank of Guam v. Semes*, 3 FSM Intrm. 370, 381 (Pon. 1988).

Nat'l Constitution does not prohibit state courts from hearing cases described in art. XI, § 6(b) if all parties accept state court jurisdiction, but parties to a dispute within scope of art. XI, § 6(b) have a constitutional rights to invoke jurisdiction of FSM Supreme Court trial division. *U Corp. v. Salik*, 3 FSM Intrm. 389, 392 (Pon. 1988).

Intent of framers of Constitution was that nat'l courts would handle most types of cases described in art. XI, § 6(b) of Constitution and nat'l courts therefore should not lightly find a waiver of right to invoke its jurisdiction. *U Corp. v. Salik*, 3 FSM Intrm. 389, 394 (Pon. 1988).

Under FSM Constitution, nat'l gov't, not state governments, assume any "right, obligation, liability, or contract of the gov't of the Trust Territory." *Salik v. U Corp. (I)*, 3 FSM Intrm. 404, 407 (Pon. 1988).

The fact that control over marine areas within twelve-mile zone is not mentioned in Constitution is strong indication that framers intended states to control ownership and use of marine resources within that area. *FSM v. Oliver*, 3 FSM Intrm. 469, 473 (Pon. 1988).

As a general proposition, court will not lightly assume that Congress intends to assert nat'l powers which may overlap with, or encroach upon, powers allocated to states under general scheme of federalism embodied in Constitution. *FSM v. Oliver*, 3 FSM Intrm. 469, 480 (Pon. 1988).

Nothing in language of statute, 23 FSMC 105, or in legislative history, indicates that Congress made an affirmative determination to enact nat'l legislation applicable within 12 miles of prescribed baselines. Therefore, 23 FSMC 105 gives nat'l gov't regulatory power only outside 12 mile zone. *FSM v. Oliver*, 3 FSM Intrm. 469, 480 (Pon. 1988).

Regulatory power beyond 12 miles from island baselines lies with nat'l gov't. *FSM v. Oliver*, 3 FSM Intrm. 469, 479 (Pon. 1988).

Decision making concerning allocation of functions as state and nat'l roles falls most squarely within role of Congress, for Congress is most political branch of nat'l gov't and is best suited to resolve policy issues. *In re Cantero*, 3 FSM Intrm. 481, 484 (Pon. 1988).

Art. XI, § 8 of Constitution, providing for state court certification of issues of nat'l law, gives FSM Supreme Court appellate division another tool to oversee development of nat'l law jurisprudence, but also provides option of remand so that the state court may address issues of nat'l law. *Bernard's Retail Store & Wholesale v. Johnny*, 4 FSM Intrm. 33, 35 (App. 1989).

No jurisdiction is conferred on state courts by art. XI, § 6(b) of FSM Constitution, but neither does diversity jurisdiction of § 6(b) preclude state courts from acting under state law, unless or until a party to litigation invokes nat'l court jurisdiction. *Hawk v. Pohnpei*, 4 FSM Intrm. 85, 89 (App. 1989).

In course of formation of FSM, allocation of responsibilities between states and nation was such that impact of nat'l courts in criminal matters was to be in area of major crimes and as ultimate arbiter of human rights issues. *Hawk v. Pohnpei*, 4 FSM Intrm. 85, 93 (App. 1989).

Questions regarding validity of provisions of promissory notes for personal loans, executed with nat'l bank operating in each state of FSM and having in part foreign ownership, are closely connected to powers of nat'l legislature to regulate banking, foreign and interstate commerce, and bankruptcy, and to establish usury limits, and they have a distinctly nat'l character. FSM Supreme Court therefore will formulate and apply rules of nat'l law in assessing such issues. *Bank of Hawaii v. Jack*, 4 FSM Intrm. 216, 218 (Pon. 1990).

Statutory provisions in TT Code concerning domestic relations are part of state law because domestic relations fall within powers of states and not nat'l gov't. *Pernet v. Aflague*, 4 FSM Intrm. 222, 224 (Pon. 1990).

Since determination of support payments payable by a divorced husband is a matter governed by state law, FSM Supreme Court in addressing such an issue is obligated to attempt to apply pertinent state statutes in same fashion as would highest state court in pertinent jurisdiction. *Pernet v. Aflague*, 4 FSM Intrm. 222, 224 (Pon. 1990).

State law provision attempting to place "original and exclusive jurisdiction" in Yap State Court cannot divest nat'l court of responsibilities placed upon it by nat'l constitution, which is "supreme law of the Federated States of Micronesia." *Gimnang v. Yap*, 5 FSM Intrm. 13, 23 (App. 1991).

Under nat'l law, governor of a state is allottee for all Compact funds unless he delegates in writing his right to be allottee, so where a state statute allots such funds to legislative branch without written delegation from governor, statute violates nat'l law. *Gouland v. Joseph*, 5 FSM Intrm. 263, 265 (Chk. 1992).

Nat'l court should not abstain from deciding criminal case where crime took place before effective date of 1991 amendment removing federal jurisdiction over major crimes because of

firmly expressed intention by Con Con delegates as to manner of transition from nat'l jurisdiction to state jurisdiction. *In re Ress*, 5 FSM Intrm. 273, 276 (Chk. 1992).

Scheme of nat'l, constitutionally-authorized foreign investment legislation is so pervasive there is no room for state to supplement it. Non-FSM citizen attorneys and their private practice of law are expressly subjected to nat'l legislative scheme. Insofar as attorneys who are engaged in private practice of law and whose business activities are within scope of nat'l FIA, the state FIA is invalid. *Berman v. Pohnpei*, 5 FSM Intrm. 303, 306 (Pon. 1992).

Although FSM Supreme Court has constitutional power to use its discretion to review a case from state trial court, generally, proper respect for state court requires that state appeal rights be exhausted before FSM Supreme Court would grant appellate review especially when important state interests are involved. *Damarlane v. Pohnpei Transp. Auth.*, 5 FSM Intrm. 322, 324 (App. 1992).

FSM Constitution distinguishes nat'l powers from state powers, FSM Const. art. VIII. *FSM v. Kotobuki Maru No. 23 (I)*, 6 FSM Intrm. 65, 69 (Pon. 1993).

If power is of an indisputable nat'l character such that it is beyond state's power to control, then that power is to be considered a nat'l power, even though it is not an express power granted by the Constitution. *FSM v. Kotobuki Maru No. 23 (I)*, 6 FSM Intrm. 65, 70-71 (Pon. 1993).

A state power can be concurrently nat'l to the extent that the state cannot adequately exercise that power in manner in which it is intended either by statute or by or constitutional framework for circumstances not foreseen by framers of our Constitution. *FSM v. Kotobuki Maru No. 23 (I)*, 6 FSM Intrm. 65, 72 (Pon. 1993).

To the extent that state is unable to police its waters and enforce its fishing regulations of its own, the nat'l gov't has an obligation to provide assistance. However, to the extent that the nat'l gov't must provide assistance, the power to regulate state waters is beyond the state's control and is in fact a concurrent nat'l power. *FSM v. Kotobuki Maru No. 23 (I)*, 6 FSM Intrm. 65, 73 (Pon. 1993).

A condition on an MMA fishing permit which prohibits fishing within 12 miles of FSM unless authorized by the state which has jurisdiction is an exercise of the nat'l government's unexpressed concurrent nat'l power. *FSM v. Kotobuki Maru No. 23 (I)*, 6 FSM Intrm. 65, 73 (Pon. 1993).

Nothing in FSM constitutional framework suggests that a state can unilaterally avoid the effect of a valid internat'l agreement, constitutionally arrived at, between the FSM and another nation. *In re Extradition of Jano*, 6 FSM Intrm. 93, 103-04 (App. 1993).

Comity, the respect of one sovereign for another, and respect for state sovereignty are important principles. *Pohnpei v. Ponape Constr. Co.*, 6 FSM Intrm. 221, 222-23 (App. 1993).

FSM Supreme Court will not interfere in pending state court proceeding where no authority has been cited to allow it to do so, where case has not been removed from state court, where it has not been shown that nat'l gov't is party to state court proceeding thereby putting case within FSM Supreme Court's exclusive jurisdiction, and where it has not been shown that

movants are parties to the state court proceeding and thus have standing to seek nat'l court intervention. *Pohnpei v. Kailis*, 6 FSM Intrm. 460, 463 (Pon. 1994).

Absence of an express grant of authority to nat'l gov't to regulate marine resources within 12 miles of island baselines indicates framers' intention that states have control over these resources. However, state authority to regulate marine resources located within 12 miles of island baselines is primary but not exclusive. *Pohnpei v. MV Hai Hsiang #36 (I)*, 6 FSM Intrm. 594, 598 (Pon. 1994).

Nonexclusive constitutional grant to states of regulatory power over marine resources located within 12 miles of island baselines cannot be read as creating exclusive state court jurisdiction over marine resources within 12 mile limit. *Pohnpei v. MV Hai Hsiang #36 (I)*, 6 FSM Intrm. 594, 598-99 & n. 7 (Pon. 1994).

Framers of FSM Constitution favored state control over marine resources within 12 miles of island baselines. *Pohnpei v. MV Hai Hsiang #36 (I)*, 6 FSM Intrm. 594, 601 (Pon. 1994).

Even when nat'l court places itself in shoes of the state court and interprets state law, the state court is always the final arbiter of the meaning of a state law. State court interpretations of state law which contradict prior rulings of nat'l courts are controlling. *Pohnpei v. MV Hai Hsiang #36 (I)*, 6 FSM Intrm. 594, 601 (Pon. 1994).

FSM Supreme Court has exclusive jurisdiction in actions by nat'l gov't to enforce terms of fishing agreements and permits to which it is a party. *FSM v. Hai Hsiang No. 63*, 7 FSM Intrm. 114, 116 (Chk. 1995).

Section 2. A power not expressly delegated to the national government or prohibited to the states is a state power.

Case annotations: Primary lawmaking powers for field of torts lie with states, not with nat'l gov't, but nat'l gov't may have an implied power to regulate tort law as part of exercise of other general powers. *Edwards v. Pohnpei*, 3 FSM Intrm. 350, 359 (Pon. 1988).

Powers not expressly delegated to nat'l gov't nor prohibited to the states are state powers. FSM Const. art. VIII, § 2. *FSM v. Oliver*, 3 FSM Intrm. 469, 473 (Pon. 1988).

Nat'l gov't has exclusive power to tax income and imports. Power to levy other taxes, unless specifically barred by Constitution, is exclusive state power. *Sigrah v. Kosrae*, 6 FSM Intrm. 168, 169-70 (App. 1993).

Section 3. State and local governments are prohibited from imposing taxes which restrict interstate commerce.

Case annotations: Chuuk state tax on lessor or landowner who rents or leases land, building or housing unit, for residential, or office space, or other use is not an unconstitutional encroachment on nat'l government's exclusive power to tax income. *Truk Continental Hotel, Inc. v. Chuuk*, 6 FSM Intrm. 310, 311 (Chk. 1994).

Nat'l gov't has exclusive power to tax income and imports. Power to levy other taxes, unless specifically barred by Constitution, is exclusive state power. *Sigrah v. Kosrae*, 6 FSM Intrm. 168, 169-70 (App. 1993).

Under traditional constitutional analysis, taxpayers' efforts to recover tax moneys unlawfully extracted from them by a state may be relegated to state procedures and decision-makers so long as there is a reasonable procedure under state law whereby taxpayer may obtain meaningful relief. *Gimnang v. Yap*, 5 FSM Intrm. 13, 23-24 (App. 1991).

Constitution prohibits state and local governments from imposing taxes which restrict interstate commerce. *Stinnett v. Weno*, 6 FSM Intrm. 312, 313 (Chk. 1994).

Since, given social and geographic configuration of State of Chuuk and structure of transportation services available, a travel agency would necessarily be essentially interstate commerce, a tax aimed solely at a travel agency restricts or is restrictive of interstate commerce and therefore may not be levied by a state or local gov't. *Stinnett v. Weno*, 6 FSM Intrm. 312, 313-14 (Chk. 1994).

ARTICLE IX

Legislative

Section 1. The legislative power of the national government is vested in the **Congress of the Federated States of Micronesia**.

Case annotations: Legislative Powers

It is doubtful that Congress would have power to require that all criminal prosecutions be in name of FSM. *FSM v. Boaz (II)*, 1 FSM Intrm. 2831 (Pon. 1981).

Seaman's Protection Act, originally enacted for entire Trust Territory by Congress of Micronesia, relates to matters that now fall within legislative powers of nat. l gov. t under art. IX, § 2 of Constitution, and has therefore become a nat. l law of FSM under *art. XV*. That being so, a claim asserting rights under the Act falls within the jurisdiction of the FSM Supreme Court under *art. XI*, § 6(b) of Constitution as a case arising under nat'l law. 19 FSMC 401-437. *Lonno v. Trust Territory (I)*, 1 FSM Intrm. 53(Kos. 1982).

Tax on gross revenues falls squarely within constitutional authorization given to Congress by art. IX, § 2(e) to tax income. *Ponape Federation of Coop. Ass'ns v. FSM*, 2 FSM Intrm. 124, 126 (Pon. 1985).

That Congress may tax "gross income" is plainly and unmistakably provided for in words of art. IX, § 2(e) of Constitution. *Ponape Federation of Coop. Ass'ns v. FSM*, 2 FSM Intrm. 124, 127 (Pon. 1985).

Congress enacted P.L. No. 1-72 and confirmed legislative power of state governments to supersede Trust Territory statutes within scope of their exclusive powers. *Pohnpei v. Mack*, 3 FSM Intrm. 45, 54 (Pon. S. Ct. Tr. 1987).

While Congress may have power to prohibit taking of and killing of turtles within 12 mile area as matter of nat'l law, it should lie with Congress, and not the court, to determine whether the power should be exercised. *FSM v. Oliver* , 3 FSM Intrm. 469, 480 (Pon. 1988).

Once Congress has set a policy direction, barring constitutional violation, it is duty of this court to ascertain and follow that guidance. *In re Cantero* , 3 FSM Intrm. 481, 484 (Pon. 1988).

Primary responsibility, perhaps even sole responsibility, for affirmative implementation of Professional Services Clause, FSM Const. art. XIII, § 1 , must lie with Congress. *Carlos v. FSM* , 4 FSM Intrm. 17, 29 (App. 1989).

Fixing of voting requirements is uniquely political task and falls within purview of political arms of gov't, so long as no legal rights are violated by a particular method selected. *Constitutional Convention 1990 v. President*, 4 FSM Intrm. 320, 324 (App. 1990).

Nature of constitutional convention as authorized by FSM Constitution, with direct control of people over identity of convention delegates, and ultimate acceptance of products of convention's efforts, and fact that framers view a constitutional convention as a standard and preferred amendment mechanism, preclude congressional control over convention's decision-making. *Constitutional Convention 1990 v. President*, 4 FSM Intrm. 320, 327 (App. 1990).

Congress has no power to specify voting requirements for Con Con and therefore any attempt to exercise this power to uphold tradition is also outside powers of Congress under art. V, § 2 of Constitution, which is not an independent source of congressional power but which merely confirms power of Congress, in exercising nat'l legislative powers, to make special provisions for Micronesian tradition. *Constitutional Convention 1990 v. President* , 4 FSM Intrm. 320, 328 (App. 1990).

Legislative enactment of Financial Management Act does not conflict with constitutional provision stating Chief Justice is chief administrator of nat'l judiciary. *Mackenzie v. Tuuth* , 5 FSM Intrm. 78, 80 (Pon. 1991).

Legislative passage of Financial Management Act rests upon provisions of Constitution, pursuant to which Dept. of Finance and General Fund were established to oversee nat. l administration and management of public money. *Mackenzie v. Tuuth* , 5 FSM Intrm. 78, 81 (Pon. 1991).

Historically the concept of a single, general fund administered by one person is found in laws enacted by Congress of Micronesia. Enactment of Financial Management Act reflects continuity of purpose and statutory consistency. *Mackenzie v. Tuuth* , 5 FSM Intrm. 78, 82 (Pon. 1991).

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

In absence of any authority or compelling policy arguments court cannot conclude that a law, the enforcement of which entails a harsh result, is unconstitutional, and can only note that the creation of potentially harsh results is well within the province of the nation's constitutionally empowered legislators. *Mid-Pacific Constr. Co. v. Semes* , 7 FSM Intrm. 102, 104 (Pon. 1995).

Congress has not unconstitutionally delegated its authority to define crimes by delegating to an executive agency the power to enter into fishing agreements because congressional approval is needed for these agreements to take effect. *FSM v. Cheng Chia-W (I)*, 7 FSM Intrm. 124, 127 (Pon. 1995).

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

- (a) to provide for the national defense;
- (b) to ratify treaties;
- (c) to regulate immigration, emigration, naturalization, and citizenship;
- (d) to impose taxes, duties, and tariffs based on imports;

Case annotations: State excise tax which levies tax at port of entry on items imported into a state and which must be paid prior to release of those items from the port of entry, is an import tax within the meaning of FSM Constitution art. IX, § 2(d). *Wainit v. Truk (II)*, 2 FSM Intrm. 86, 87 (Truk 1985).

Nat. l power to impose taxes based on imports is exclusive, and not shared by the states. *Innocenti v. Wainit* , 2 FSM Intrm. 173, 182 (App. 1986).

Taxes imposed on goods because of their entry into a port of entry of State of Truk, levied at port of entry in amounts based upon quality or value of imported goods, and which must be paid to the Division of Revenue prior to release of items from the port of entry, are taxes based on imports. Such a tax represents an effort to exercise powers expressly delegated to the nat. l gov. t, is beyond the powers of the state, and is null and void. *Innocenti v. Wainit* , 2 FSM Intrm. 173, 183-84 (App. 1986).

Although retroactive application of decision holding state tax unconstitutional would impose hardship upon a state, where funds collected under the tax have already been committed, such a result is not inequitable where the state legislature pushed on with the tax act despite strong resistance of business people to the tax in the form of a petition and establishment of an escrow account to hold contested payments, and a veto message by the governor of the state, and there is no evidence that the legislature seriously considered the constitutionality of the legislation. *Innocenti v. Wainit* , 2 FSM Intrm. 173, 186 (App. 1986).

A state excise tax imposed on imports is unconstitutional, regardless of the manner of tax payment. *Gimnang v. Yap* , 4 FSM Intrm. 212, 215 (Yap 1990).

Nat'l gov't has exclusive power to tax income and imports. Power to levy other taxes, unless specifically barred by Constitution, is exclusive state power. *Sigrah v. Kosrae* , 6 FSM Intrm. 168 , 169-70 (App. 1993).

Recovery of Taxes

The question whether taxes paid by plaintiffs under a taxing statute subsequently found to be unconstitutional may be refunded to them turns upon whether the tax was voluntarily paid. *Innocenti v. Wainit*, 2 FSM Intrm. 173, 187 (App. 1986).

Where taxpayers informed the gov't that they protested the tax as unconstitutional, and had to pay the tax in order to receive the taxed property, the payments are coerced, not voluntary, and taxpayers are entitled to the refund of all amounts paid. *Innocenti v. Wainit*, 2 FSM Intrm. 173, 187 (App. 1986).

The FSM Supreme Court will abstain from a claim for recovery of taxes where the defendant state requests abstention, the claim is for monetary relief, and the state has endeavored to develop a body of law in the areas of excise taxes and sovereign immunity. *Gimnang v. Yap*, 4 FSM Intrm. 212, 214 (Yap 1990).

Under traditional constitutional analysis, taxpayers' efforts to recover tax moneys unlawfully extracted from them by a state may be relegated to state procedures and decision-makers so long as there is a reasonable procedure under state law whereby the taxpayer may obtain meaningful relief. *Gimnang v. Yap*, 5 FSM Intrm. 13, 23-24 (App. 1991).

The name given a tax by a taxing authority is not necessarily controlling as to the type of tax it is. *Truk Continental Hotel, Inc. v. Chuuk*, 7 FSM Intrm. 117, 119 (App. 1995).

The interval in which a tax is reported and collected and whether it is imposed without regard to profit or loss does not alter whether it is an income tax. *Truk Continental Hotel, Inc. v. Chuuk*, 7 FSM Intrm. 117, 119 (App. 1995).

(e) to impose taxes on income;

Case annotation: The tax on gross revenues falls squarely within the constitutional authorization given to Congress by art. IX, § 2(e) to tax income. *Ponape Federation of Cooperative Associations v. FSM*, 2 FSM Intrm. 124, 126 (Pon. 1985).

Constitutional interpretation must start and end with the words of the provision when the words themselves plainly and unmistakably provide the answer to the issue posed. The Court may not look to constitutional history nor to United States interpretations of similar constitutional language in this circumstance. *Ponape Federation of Cooperative Associations v. FSM*, 2 FSM Intrm. 124, 126 (Pon. 1985).

That Congress may tax "gross income" is plainly and unmistakably provided for in the words of art. IX, § 2(e) of the Constitution. *Ponape Federation of Cooperative Associations v. FSM*, 2 FSM Intrm. 124, 127 (Pon. 1985).

Power granted to Congress by FSM Constitution art. IX, § 2(e) "to impose taxes on income" includes power to tax gross revenue. *Afituk v. FSM*, 2 FSM Intrm. 260, 264 (Truk 1986).

Gross revenue tax as enacted by Congress of Micronesia continued in effect in FSM by virtue of the transition article of the FSM Constitution but, because it was subsequently amended by

the FSM Congress and was included in the codification of FSM Statutes, may now be considered a law enacted by Congress. *Afituk v. FSM*, 2 FSM Intrm. 260, 264 (Truk 1986).

There is no evidence in the journal of the Constitutional Convention that the phrase "to impose taxes on income" in FSM Constitution, art. IX, § 2(e) was derived from the Sixteenth Amendment of the U.S. Constitution which permits the U.S. Congress to "lay and collect taxes on income" so in determining the meaning of the FSM constitutional provision, no particular weight should be given to U.S. cases. *Afituk v. FSM*, 2 FSM Intrm. 260, 264 (Truk, 1986).

Kosrae transaction tax of KC 9.301 is a selective tax rather than an income tax and is not an encroachment upon the nat'l government's exclusive power to tax income. *Youngstrom v. Kosrae*, 5 FSM Intrm. 73, 76 (Kos. 1991).

Nat. l gov. t has the exclusive power to tax income and imports. The power to levy other taxes, unless specifically barred by the Constitution, is an exclusive state power. *Sigrah v. Kosrae*, 6 FSM Intrm. 168, 169-70 (App. 1993).

A transaction tax oriented toward individual transactions and not total income, and only triggered by the transactions it covers, even though paid by the vendor, is analogous to a selective sales tax and is not an unconstitutional encroachment on the nat. l government's exclusive power to tax income. *Sigrah v. Kosrae*, 6 FSM Intrm. 168, 170 (App. 1993).

A Chuuk state tax on a lessor or landowner who rents or leases land, building or housing unit, for residential, or office space, or other use is not an unconstitutional encroachment on the nat. l government's exclusive power to tax income. *Truk Continental Hotel, Inc. v. Chuuk*, 6 FSM Intrm. 310, 311 (Chk. 1994) (Overruled in a February, 1995 case).

Only the nat'l gov't may constitutionally tax income. The states' taxing power does not include the power to tax income. *Truk Continental Hotel, Inc. v. Chuuk*, 7 FSM Intrm. 117, 119 (App. 1995).

Rents are income taxable under the FSM Income Tax Statute, and a state tax on gross rental receipts combines to create vertical multiple taxation of a form of income. *Truk Continental Hotel, Inc. v. Chuuk*, 7 FSM Intrm. 117, 119 (App. 1995).

The name given a tax by a taxing authority is not necessarily controlling as to the type of tax it is. *Truk Continental Hotel, Inc. v. Chuuk*, 7 FSM Intrm. 117, 119 (App. 1995).

The interval in which a tax is reported and collected and whether it is imposed without regard to profit or loss does not alter whether it is an income tax. *Truk Continental Hotel, Inc. v. Chuuk*, 7 FSM Intrm. 117, 119 (App. 1995).

If a state wishes to obtain funding from a consumption tax, it can avoid a constitutional confrontation by making the taxable incident the sale or rental transaction, and by expressing the requirement that the tax be paid by the consumer. Therefore a state tax on the gross rental receipts of a landlord is an unconstitutional tax on income. *Truk Continental Hotel, Inc. v. Chuuk*, 7 FSM Intrm. 117, 120 (App. 1995).

(f) to issue and regulate currency;

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

Case annotations: Interstate and Foreign Commerce

Although foreign and interstate commerce and shipping involve profound nat'l interests, where Congress has not seen fit to assert those interests and there is no nat'l regulation or law to enforce, the fact that a case affects interstate and foreign commerce and shipping is not sufficient to deny abstention if other strong grounds for abstention exist. *Ponape Transfer & Storage, Inc. v. Federated Shipping Co.*, 4 FSM Intrm. 37, 47 (Pon. 1989).

Questions regarding the validity of the provisions of promissory notes for personal loans, executed with a nat'l bank operating in each state of the FSM and having in part foreign ownership, are closely connected to the powers of the nat'l legislature to regulate banking, foreign and interstate commerce, and bankruptcy, and to establish usury limits, and they have a distinctly nat'l character. The FSM Supreme Court therefore will formulate and apply rules of nat'l law in assessing such issues. *Bank of Hawaii v. Jack*, 4 FSM Intrm. 216, 218 (Pon. 1990).

Power to regulate the incorporation and operation of corporations falls within the constitutional power of the nat'l gov't to regulate foreign and interstate commerce. *Mid-Pac Constr. Co. v. Senda*, 4 FSM Intrm. 376, 380 (Pon. 1990).

A municipal license fee ordinance which separately defines banking and insurance businesses and specifically imposes a different rate upon those businesses than would be imposed upon other kinds of businesses on its face appears to be an effort to regulate banking and insurance and is unconstitutional and void. *Actouka v. KoloniaTown*, 5 FSM Intrm. 121, 122 (Pon. 1991).

(h) to regulate navigation and shipping except within lagoons, lakes, and rivers;

(i) to establish usury limits on major loans;

(j) to provide for a national postal system;

(k) to acquire and govern new territory;

(l) to govern the area set aside as the national capital;

(m) to regulate the ownership, exploration, and exploitation of natural resources within the marine space of the Federated States of Micronesia beyond 12 miles from island baselines;

(n) to establish and regulate a national public service system;

(o) to impeach and remove the President, Vice-President, and justices of the Supreme Court;

(p) to define national crimes and prescribe penalties, having due regard for local custom and tradition;

Editor's note: Art. IX, § 2(p) was amended by Constitutional Convention Committee Proposal No. 90-13, SD1 which became effective on July 2, 1991. A copy of this amendment follows this Constitution.

The original language of art. IX, § 2(p) was as follows:

"(p) to define major crimes and prescribe penalties, having due regard for local custom and tradition; and"

Case annotations prior to the effective date of the constitutional amendment interpret art. IX, § 2(p) as originally worded.

Case annotations: . Major Crimes

A simple assault, one without a weapon or the intent to inflict serious bodily injury, is punishable only by six months' imprisonment. Therefore, it is neither a major crime under the Nat'l Criminal Code, because it does not call for three years' imprisonment, nor a felony. FSM v. Boaz (I), 1 FSM Intrm. 22, 24n.* (Pon. 1981).

Because Congress defined a major crime under the Nat'l Criminal Code as one calling for imprisonment of three years or more and because assaults under Title 11 of the Trust Territory Code are punishable by only six months' imprisonment, it is clear that the assault provisions of the Trust Territory Code are left intact. FSM v. Boaz (II), 1 FSM Intrm. 28, 30 (Pon. 1981).

Exclusive nat'l gov't jurisdiction over major crimes is not mandated by the Constitution; such jurisdiction would be exclusive in any event only if criminal jurisdiction was a power of indisputably nat'l character. Truk v. Hartman, 1 FSM Intrm. 174, 181 (Truk 1982).

The Nat'l Criminal Code is an exercise of Congress' power to define and provide penalties for major crimes. FSM Const. art. IX, § 2(p). In re Otokichy, 1 FSM Intrm. 183, 187 (App. 1982).

The Weapons Control Act violations punishable by imprisonment of three or more years are nat'l crimes. Joker v. FSM, 2 FSM Intrm. 38,41 (App. 1985).

In light of the Constitution's Transition Clause, action by the FSM Congress is not necessary in order to establish that violations of the Weapons Control Act are prohibited within the FSM. The only question is whether those are state or nat. l law prohibitions or both. If the definition of major crimes in the Nat. l Criminal Code bears upon the Weapons Control Act at all, it is only for that purpose of allocating between state and nat. l law. Joker v. FSM, 2 FSM Intrm. 38,43 (App. 1985).

The Weapons Control Act seems well attuned to the recognition of shared nat'l-state interest in maintaining an orderly society and the goal of cooperation in law enforcement as reflected in the Major Crimes Clause, art. IX, § 2(p) of the Constitution as well as the Joint Law Enforcement Act, 12 FSMC 1201. Joker v. FSM, 2 FSM Intrm. 38, 44 (App. 1985).

The Major Crimes Clause, with its admonition to Congress to have due regard for local custom and tradition, unmistakably reflects awareness of the framers that Congress would be empowered under this clause to regulate crimes that would require consideration of local custom and tradition. *Tammow v. FSM*, 2 FSM Intrm. 53, 57 (App. 1985).

Departure from the form of the U.S. Constitution reveals an intention by the framers of the FSM Constitution to depart from the substance as well, so far as major crimes are concerned. *Tammow v. FSM*, 2 FSM Intrm. 53, 58 (App. 1985).

Major crimes obviously were not viewed by the framers as simply a local or state problem. The Major Crimes Clause undoubtedly reflects their judgment that the very integrity of this new nation could be threatened if major crimes could be committed with impunity in any part of the nation, with the nat'l gov't forced helplessly to stand aside. *Tammow v. FSM*, 2 FSM Intrm. 53, 58 (App. 1985).

The framers of the Constitution stipulated that the line for determining whether a crime is major be drawn on the basis of severity or gravity of the crime rather than by reference to principles of federalism developed under the U.S. Constitution. *Tammow v. FSM*, 2 FSM Intrm. 53, 58 (App. 1985).

The members of the Micronesian Constitutional Convention obviously did not believe the Major Crimes Clause was improperly at odds with their general view that governmental power should be less centralized under the FSM Constitution than it had been in Trust Territory days. *Tammow v. FSM*, 2 FSM Intrm. 53, 59 (App. 1985).

The scope of state police powers under the FSM Constitution must be determined by reference to the powers of the nat'l gov't under the Major Crimes Clause. It follows that legitimate exercise of the nat'l gov't power to define major crimes can not be viewed as an unconstitutional encroachment upon the police powers of the states. *Tammow v. FSM*, 2 FSM Intrm. 53, 59 (App. 1985).

The precise line to be drawn in defining major crimes is to be determined by Congress. The policy determined in the Constitutional Convention was that the major-minor crimes distinction be based on the severity of the crime; and that local custom be taken into account. *Tammow v. FSM*, 2 FSM Intrm. 53, 60 (App. 1985).

Even where the parties have not asserted that any principle of custom or tradition applies, the Court has an obligation of its own to consider custom and tradition. *Semens v. Continental Air Lines, Inc.(I)*, 2 FSM Intrm. 131, 140 (Pon. 1985).

The general rule of criminal procedure is that jurisdiction over a particular crime places in the trial division the necessary authority to find a defendant guilty of any offense necessarily included in the offense charged. *Kosrae v. Tosie*, 4 FSM Intrm. 61, 63 (Kos. 1989).

Under the constitutional and statutory framework of the FSM, the FSM Supreme Court trial division, when exercising jurisdiction over cases reasonably initiated as major crimes charges, may also exercise jurisdiction over lesser included offenses prohibited by state law. *Kosrae v. Tosie*, 4 FSM Intrm. 61, 65 (Kos. 1989).

Rather than rely heavily on United States precedent for guidance in establishing principles of federalism in matters of criminal regulation, the FSM Supreme Court is under an affirmative obligation to develop approaches suited to permit implementation of the nat'l major crime responsibilities identified by Congress. *Kosrae v. Tosie*, 4 FSM Intrm. 61, 65 (Kos. 1989).

In the course of the formation of the FSM, the allocation of responsibilities between states and nation was such that the impact of the nat'l courts in criminal matters was to be in the area of major crimes and as the ultimate arbiter of human rights issues. *Hawk v. Pohnpei*, 4 FSM Intrm. 85, 93 (App. 1989).

National Crimes

The intent of the Constitutional Convention is that major crimes, as defined by Congress and committed prior to voter ratification, fall within the jurisdiction of the nat'l gov't and may be prosecuted pursuant to the nat'l law after the effective date of the amendment. *In re Ress*, 5 FSM Intrm. 273, 276 (Chk. 1992).

The nat'l court should not abstain from deciding a criminal case where the crime took place before the effective date of the 1991 amendment removing federal jurisdiction over major crimes because of the firmly expressed intention by the Constitutional Convention delegates as to the manner of transition from nat'l jurisdiction to state jurisdiction. *In re Ress*, 5 FSM Intrm. 273, 276 (Chk. 1992).

Where the crimes charged are no longer those expressly delegated to Congress to define, or are not indisputedly of a nat'l character the FSM Supreme Court has no subject matter jurisdiction. *FSM v. Jano*, 6 FSM Intrm. 9, 11 (Pon. 1993).

Ever since the ratification of the constitutional amendment removed from Congress the power to define "major crimes" and substituted for it the power to define "national crimes" the nat'l gov't has had no general criminal jurisdiction. That jurisdiction now lies with the states. *In re Extradition of Jano*, 6 FSM Intrm. 93, 102 (App. 1993).

Congress has not unconstitutionally delegated its authority to define crimes by delegating to an executive agency the power to enter into fishing agreements because congressional approval is needed for these agreements to take effect. *FSM v. Cheng Chia-W (I)*, 7 FSM Intrm. 124, 127 (Pon. 1995).

(q) to override a Presidential veto by not less than a 3/4 vote of all the state delegations, each delegation casting one vote; and

(r) to promote education and health by setting minimum standards, coordinating state activities relating to foreign assistance, providing training and assistance to the states and providing support for post-secondary educational programs and projects.

Editor's note: Art. IX, § 2(r) was added by Constitutional Convention Committee Proposal No. 90-25, CD1, SD1 which became effective on July 2, 1991. A copy of this amendment follows this Constitution.

Case annotations: The nature of the expressly delegated powers in art. IX, § 2, of the Constitution--including the power to impose taxes, to provide for the nat. l defense, ratify

treaties, regulate immigration and citizenship, regulate currency, foreign commerce and navigation, and to provide for a postal system--strongly suggests that they are intended to be the exclusive province of the nat'l gov't, since they call for a uniform nationally coordinated approach. *Innocenti v. Wainit*, 2 FSM Intrm. 173, 181-82 (App. 1986).

Section 3. The following powers may be exercised concurrently by Congress and the states:

- (a) to appropriate public funds;
- (b) to borrow money on the public credit; and
- (c) to establish systems of social security and public welfare.

Editor's note: Art. IX, § 3 was amended by Constitutional Convention Committee Proposal No. 90-25, CD1, SD1 which became effective on July 2, 1991. A copy of this amendment follows this Constitution.

The original language of art. IX, § 3 formerly included a subsection (c) which read as follows:

"(c) to promote education and health; and"

Section 4. A treaty is ratified by vote of 2/3 of the members of Congress, except that a treaty delegating major powers of government of the Federated States of Micronesia to another government shall also require majority approval by the legislatures of 2/3 of the states.

Section 5. National taxes shall be imposed uniformly. Not less than 50% of the revenues shall be paid into the treasury of the state where collected.

Section 6. Net revenue derived from ocean floor mineral resources exploited under Section 2(m) shall be divided equally between the national government and the appropriate state government.

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

Section 8. The Congress consists of one member elected at large from each state on the basis of state equality, and additional members elected from congressional districts in each state apportioned by population. Members elected on the basis of state equality serve for a 4-year term, and all other members for 2 years. Each member has one vote, except on the final reading of bills. Congressional elections are held biennially as provided by statute.

Section 9. A person is ineligible to be a member of Congress unless he is at least 30 years of age on the day of election and has been a citizen of the Federated States of Micronesia for

at least 15 years, and a resident of the state from which he is elected for at least 5 years. 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.

Case annotations: 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).

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).

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).

Section 10. At least every 10 years Congress shall reapportion itself. A state is entitled to at least one member of Congress on the basis of population in addition to the member elected at large. A state shall apportion itself by law into single member congressional districts. Each district shall be approximately equal in population after giving due regard to language, cultural, and geographic differences.

Section 11. A state may provide that one of its seats is set aside for a traditional leader who shall be chosen as provided by statute for a two-year term, in lieu of one representative elected on the basis of population. The number of congressional districts shall be reduced and reapportioned accordingly.

Section 12. A vacancy in Congress is filled for the unexpired term. In the absence of provision by law, an unexpired term is filled by special election, except that an unexpired term of less than one year is filled by appointment by the state chief executive.

Section 13. A member of Congress may not hold another public office or employment. During the term for which he is elected and three years thereafter, a member may not be elected or appointed to a public office or employment created by national statute during his term. A member may not engage in any activity which conflicts with the proper discharge of his duties. The Congress may prescribe further restrictions.

Case annotation: Where plaintiffs seek to challenge issuance to a third party of a permit which plaintiffs reasonably allege will cause them harm, and where they allege that the actions of a nat'l senator were crucial to issuance of the permit, those plaintiffs have standing to be heard on the question of whether the senator's membership on the board is violative of the "incompatibility clause," art. IX, § 3 of the FSM Constitution. *Aisek v. FSM Foreign Investment Board*, 2 FSM Intrm. 95, 101 (Pon. 1985).

Section 14. The Congress may prescribe an annual salary and allowances for members. An increase of salary may not apply to the Congress enacting it.

Section 15. A member of Congress is privileged from arrest during his attendance at Congress and while going to and from sessions, except for treason, felony, or breach of the peace. A member answers only to Congress for his statements in Congress.

Section 16. The Congress shall meet in regular, public session as prescribed by statute. A special session may be convened at the call of the President of the Federated States of Micronesia, or by the presiding officer on the written request of 2/3 of the members.

Section 17.

(a) The Congress shall be the sole judge of the elections and qualifications of its members, may discipline a member, and, by 2/3 vote, may suspend or expel a member.

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

(b) The Congress may determine its own rules of procedure and choose a presiding officer from among its members.

(c) The Congress may compel the attendance and testimony of witnesses and the production of documents or other matters before Congress or any of its committees.

Case annotations: Legislative power to investigate is not unlimited. There is no general authority to expose private affairs of individuals without justification in terms of the functions of the legislature, and right to privacy embodied in Article III, section 3 of the Chuuk Constitution is a restraint on the investigative power of the legislature. *In re Legislative Subpoena*, 7 FSM Intrm. 261, 265 (Chk. S. Ct. Tr. 1995).

Legislature's investigative powers are greatest when it is inquiring into and publicizing corruption, maladministration or inefficiency in agencies or branches of gov't. *In re Legislative Subpoena*, 7 FSM Intrm. 261, 265 (Chk. S. Ct. Tr. 1995).

Section 18. A majority of the members is a quorum, but a smaller number may adjourn from day to day and compel the attendance of absent members.

Section 19. The Congress shall keep and publish a journal of its proceedings. A roll call vote entered on the journal shall be taken at the request of 1/5 of the members present. Legislative proceedings shall be conducted in the English language. A member may use his own language if not fluent in English, and Congress shall provide translation.

Section 20. To become law, a bill must pass 2 readings on separate days. To pass first reading a 2/3 vote of all members is required. On final reading each state delegation shall cast one vote and a 2/3 vote of all the delegations is required. All votes shall be entered on the journal.

Section 21.

(a) The Congress may make no law except by statute and may enact no statute except by bill. The enacting clause of a bill is "BE IT ENACTED BY THE CONGRESS OF THE

FEDERATED STATES OF MICRONESIA:" A bill may embrace but one subject expressed in its title. A provision outside the subject expressed in the title is void.

(b) A law may not be amended or revised by reference to its title only. The law as revised or section as amended shall be published and re-enacted at full length.

Section 22. A bill passed by Congress shall be presented to the President for approval. If he disapproves of the bill, he shall return it with his objections to Congress within 10 days. If Congress has 10 or less days remaining in its session, or has adjourned, he shall return the bill within 30 days after presentation. If the President does not return a bill within the appropriate period, it becomes law as if approved.

ARTICLE X

Executive

Section 1. The executive power of the national government is vested in the President of the Federated States of Micronesia. He is elected by Congress for a term of four years by a majority vote of all the members. He may not serve for more than 2 consecutive terms.

Section 2. The following powers are expressly delegated to the President:

(a) to faithfully execute and implement the provisions of this Constitution and all national laws;

(b) to receive all ambassadors and to conduct foreign affairs and the national defense in accordance with national law;

(c) to grant pardons and reprieves, except that the chief executive of each state shall have this power concurrently with respect to persons convicted under state law; and

Case annotations: The only power given to the executive to modify a sentence is the power to grant pardons and reprieves. *FSM v. Finey*, 3 FSM Intrm. 82, 84 (Truk 1986).

No authority exists for the Court to grant home visits. *FSM v. Finey*, 3 FSM Intrm. 82, 84 (Truk 1986).

(d) with the advice and consent of Congress, to appoint ambassadors; all judges of the Supreme Court and other courts prescribed by statute; the principal officers of executive departments in the national government; and such other officers as may be provided for by statute. Ambassadors and principal officers serve at the pleasure of the President.

Section 3. The President:

(a) is head of state of the Federated States of Micronesia;

(b) may make recommendations to Congress, and shall make an annual report to Congress on the state of the nation; and

(c) shall perform such duties as may be provided by statute.

Section 4. A person is ineligible to become President unless he is a member of Congress for a 4-year term, a citizen of the Federated States of Micronesia by birth, and a resident of the Federated States of Micronesia for at least 15 years.

Section 5. After the election of the President, the Vice-President is elected in the same manner as the President, has the same qualifications, and serves for the same term of office. He may not be a resident of the same state. After the election of the President and the Vice-President, vacancies in Congress shall be declared.

Section 6. If the office of the President is vacant, or the President is unable to perform his duties, the Vice-President becomes President. The Congress shall provide by statute for the succession in the event both offices are vacant, or either or both officers are unable to discharge their duties.

Section 7. The compensation of the President or Vice-President may not be increased or reduced during his term. They may hold no other office and may receive no other compensation from the Federated States of Micronesia or from a state.

Section 8. Executive departments shall be established by statute.

Section 9.

(a) If required to preserve public peace, health, or safety, at a time of extreme emergency caused by civil disturbance, natural disaster, or immediate threat of war, or insurrection, the President may declare a state of emergency and issue appropriate decrees.

(b) A civil right may be impaired only to the extent actually required for the preservation of peace, health, or safety. A declaration of emergency may not impair the power of the judiciary except that the declaration shall be free from judicial interference for 30 days after it is first issued.

(c) Within 30 days after the declaration of emergency, the Congress of the Federated States of Micronesia shall convene at the call of its presiding officer or the President to consider revocation, amendment, or extension of the declaration. Unless it expires by its own terms, is revoked, or extended, a declaration of emergency is effective for 30 days.

ARTICLE XI

Judicial

Section 1. The judicial power of the national government is vested in a Supreme Court and inferior courts established by statute.

Case annotations: Judicial Powers

The FSM Supreme Court is empowered to exercise authority in probate matters where there is an independent basis for jurisdiction under the Constitution. *In re Nahnsen*,¹ *FSM Intrm.* 97, 104 (*Pon.* 1982).

There is no statutory limitation on the FSM Supreme Court's jurisdiction; the Judiciary Act of 1979 plainly contemplates that the FSM Supreme Court will exercise all the jurisdiction available to it under the Constitution. 4 FSMC 201-08. *In re Nahnsen*, 1 FSM Intrm. 97, 106 (Pon. 1982).

The FSM Supreme Court has inherent constitutional power to issue all writs; this includes the traditional common law writ of *mandamus*. 4 FSMC 117. *Nix v. Ehmes*, 1 FSM Intrm. 114, 118 (Pon. 1982).

The FSM Supreme Court's constitutional jurisdiction to consider writs of habeas corpus is undiminished by the fact that the courts whose actions are under consideration, the Trust Territory High Court and a Community Court, were not contemplated by the FSM Constitution. *In re Iriarte (I)*, 1 FSM Intrm. 239, 244, 246 (Pon. 1983).

The FSM Supreme Court is entitled and required to assure that the Trust Territory High Court, exercising governmental powers within the FSM, does not violate the constitutional rights of its citizens. *In re Iriarte (II)*, 1 FSM Intrm. 255, 268 (Pon. 1983).

The Constitution unmistakably places upon the judicial branch ultimate responsibility for interpretation of the Constitution. *Suldan v. FSM (II)*, 1 FSM Intrm. 339, 343 (Pon. 1983).

By using the U.S. Constitution as a blueprint, the framers created a presumption that they were adopting such a fundamental American Constitutional principle as judicial review, found to be inherent in the language and very idea of the U.S. Constitution. *Suldan v. FSM (II)*, 1 FSM Intrm. 339, 348 (Pon. 1983).

Where petitioners raise serious and substantial constitutional claims supported by authorities and reasoning of legal substance, the case falls within the jurisdiction of the FSM Supreme Court under art. XI, § 6(b) of the Constitution. *Ponape Chamber of Commerce v. Nett*, 1 FSM Intrm. 389, 391 (Pon. 1984).

The power to issue declaratory judgments is within the judicial power vested in the FSM Supreme Court by art. XI, § 1 of the Constitution and confirmed by the Judiciary Act of 1979. The FSM Supreme Court may exercise jurisdiction over an action seeking a declaratory judgment so long as there is a "case" within the meaning of art. XI, § 6(b). *Ponape Chamber of Commerce v. Nett*, 1 FSM Intrm. 389, 400 (Pon. 1984).

An attorney's professional activities are individually subject to regulation by the judiciary, not by the administrators of the Foreign Investment Act. *Michelsen v. FSM*, 3 FSM Intrm. 416, 427 (Pon. 1988).

The Constitution places control over admission of attorneys to practice before the nat'l courts, and regulation of the professional conduct of the attorneys, in the Chief Justice, as the chief administrator of the nat'l judiciary. *Carlos v. FSM*, 4 FSM Intrm. 17, 27 (App. 1989).

The FSM Constitution provides no authority for any courts to act within the FSM, other than the FSM Supreme Court, inferior courts to be established by statute, and state or local courts. *United Church of Christ v. Hamo*, 4 FSM Intrm. 95, 105 (App. 1989).

The provisions of the FSM Constitution spelling out jurisdiction and vesting the entire judicial power of the nat'l gov't in the FSM Supreme Court are self-executing, and the judicial power of the FSM Supreme Court is not dependent upon congressional action. *United Church of Christ v. Hamo*, 4 FSM Intrm. 95, 105-06 (App. 1989).

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

Although judiciaries are vested with power to require or authorize initiation of criminal contempt proceedings, and may appoint private counsel to prosecute those proceedings, judiciaries typically attempt to appoint for that purpose gov't attorneys who are already responsible for public prosecutions. *Damarlane v. Pohnpei Transp. Auth.*, 5 FSM Intrm. 62, 66 (Pon. 1991).

It is the duty of the FSM Supreme Court to review any nat'l law, including a treaty such as the Compact of Free Association, in response to a claim that the law or treaty violates constitutional rights, and if any provision of the Compact is contrary to the constitution, which is the supreme law of the land, then that provision must be set aside as without effect. *Samuel v. Pryor*, 5 FSM Intrm. 91, 98 (Pon. 1991).

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

Section 2. The Supreme Court is a court of record and the highest court in the nation. It consists of the Chief Justice and not more than 5 associate justices. Each justice is a member of both the trial division and the appellate division, except that sessions of the trial division may be held by one justice. No justice may sit with the appellate division in a case heard by him in the trial division. At least 3 justices shall hear and decide appeals. Decision is by a majority of those sitting.

Section 3. The Chief Justice and associate justices of the Supreme Court are appointed by the President with the approval of 2/3 of Congress. Justices serve during good behavior.

Section 4. If the Chief Justice is unable to perform his duties he shall appoint an associate justice to act in his stead. If the office is vacant, or the Chief Justice fails to make the appointment, the President shall appoint an associate justice to act as Chief Justice until the vacancy is filled or the Chief Justice resumes his duties.

Case annotations: The Chief Justice may appoint an acting chief justice if he is unable to perform his duties. "Unable to perform his duties" refers to a physical or mental disability of some duration, not to the legal inability to act on one particular case. *Jano v. King*, 5 FSM Intrm. 326, 331 (App. 1992).

Section 5. The qualifications and compensation of justices and other judges may be prescribed by statute. Compensation of judges may not be diminished during their terms of office unless all salaries prescribed by statute are reduced by a uniform percentage.

Section 6.

Case annotations: Parties cannot confer or divest a court of jurisdiction by stipulation or by assumption. *Luzama v. Pohnpei Enterprises Co.*, 7 FSM Intrm. 40, 45 (App. 1995).

When it appears that the court lacks subject matter jurisdiction the case will be dismissed. *Trance v. Penta Constr. Co.*, 7 FSM Intrm. 147, 148 (Chk. 1995).

An attorney disciplinary proceeding in state court for violations of state disciplinary rules may not be removed to the FSM Supreme Court. *Berman v. Santos*, 7 FSM Intrm. 231, 241 (Pon. 1995).

(a) The trial division of the Supreme Court has original and exclusive jurisdiction in cases affecting officials of foreign governments, disputes between states, admiralty or maritime cases, and in cases in which the national government is a party except where an interest in land is at issue.

Case annotations: Art. XI, § 6(a) of the Constitution places jurisdiction in the FSM Supreme Court over cases in which the nat'l gov't is a party. *Panuelo v. Pohnpei*, 2 FSM Intrm. 150, 153 (Pon. 1986).

A seaman's contract claim against the owner of the vessel upon which he served would be regarded as falling within the exclusive admiralty and maritime jurisdiction of the FSM Supreme Court. FSM Const. art. XI, § 6(a). *Lonno v. Trust Territory (I)*, 1 FSM Intrm. 53, 6871(Kos. 1982).

The Seaman's Protection Act, originally enacted for the entire Trust Territory by the Congress of Micronesia, relates to matters that now fall within the legislative powers of the nat'l gov't under art. IX, § 2 of the Constitution, and has therefore become a nat'l law of the FSM under art. XV. That being so, a claim asserting rights under the Act falls within the jurisdiction of the FSM Supreme Court under art. XI, § 6(b) of the Constitution as a case arising under nat'l law. 19 FSMC 401-437. *Lonno v. Trust Territory (I)*, 1 FSM Intrm. 53(Kos. 1982).

Activities and organizations created and controlled by the nat'l gov't should remain subject to FSM Const. art. XI, § 6(a), but organizations merely authorized or licensed by the nat'l gov't which operate for private purposes, with little governmental involvement or control, should not be treated as a part of the nat'l gov't. *FSM Dev. Bank v. Estate of Nanpei*, 2 FSM Intrm. 217, 219-20 (Pon. 1986).

The FSM Development Bank is an instrumentality of the nat'l gov't and part of the nat'l gov't for the purposes of FSM Const. art. XI, § 6(a), giving the trial division of the Supreme Court exclusive jurisdiction over cases in which the nat'l gov't is a party. *FSM Dev. Bank v. Estate of Nanpei*, 2 FSM Intrm. 217, 221 (Pon. 1986).

In an action on a delinquent promissory note brought by an instrumentality of the nat'l gov't which seeks to foreclose the mortgage securing the payment of the note, prior to the filing of

an answer no interest in land is at issue, and therefore, the motion to dismiss on the ground that the court lacked jurisdiction is denied. *FSM Dev. Bank v. Mori*, 2 FSM Intrm. 242, 244 (Truk 1987).

Exact scope of admiralty jurisdiction is not defined in the FSM Constitution or legislative history, but U.S. Constitution has a similar provision, so it is reasonable to expect that words in both Constitutions have similar meaning and effect. *Weilbacher v. Kosrae*, 3 FSM Intrm. 320, 323 (Kos. S. Ct. Tr. 1988).

A dispute arising out of injury sustained by a passenger on a vessel transporting passengers from Kosrae to Pohnpei, at a time when the vessel is 30 miles from Kosrae, falls within the exclusive admiralty jurisdiction of the FSM Supreme Court. *Weilbacher v. Kosrae*, 3 FSM Intrm. 320, 323 (Kos. S. Ct. Tr. 1988).

The FSM Supreme Court's grant of original and exclusive jurisdiction in admiralty and maritime cases implies the adoption of admiralty or maritime cases as of the drafting and adoption of the FSM Constitution. *Federal Business Dev. Bank v. S.S. Thorfinn*, 4 FSM Intrm. 57, 59 (Truk 1989).

The maritime jurisdiction conferred on the FSM Supreme Court by the Constitution is not to be decided with reference to the details of U.S. cases and statutes concerning admiralty jurisdiction but instead with reference to the general maritime law of seafaring nations of the world, and to the law of nations. *Federal Business Dev. Bank v. S.S. Thorfinn*, 4 FSM Intrm. 367, 374 (App. 1990).

The FSM Supreme Court has jurisdiction over all cases which are maritime in nature including all maritime contracts, torts and injuries. *Federal Business Dev. Bank v. S.S. Thorfinn*, 4 FSM Intrm. 367, 374 (App. 1990).

The question of the enforceability of ship mortgages is a matter that falls within the maritime jurisdiction of the FSM Supreme Court under art. XI, § 6(a) of the Constitution. *Federal Business Dev. Bank v. S.S. Thorfinn*, 4 FSM Intrm. 367, 376 (App. 1990).

Where a claim is against the nat'l gov't and an interest in land is not placed at issue the claim is within the exclusive jurisdiction of the FSM Supreme Court and it cannot abstain on the claim. *Damarlane v. Pohnpei Transp. Auth.*, 5 FSM Intrm. 67A, 67E (Pon. 1991).

The framers of the Constitution made clear that the term "exclusive" in art. XI, § 6(a) of the FSM Constitution means that for the types of cases listed in that section, the trial division of the FSM Supreme Court is the only court of jurisdiction. *Faw v. FSM*, 6 FSM Intrm. 33, 35 (Yap 1993).

Because the FSM Supreme Court is the only court of jurisdiction in cases arising under art. XI, § 6(a) of the FSM Constitution, the court has no discretion to abstain in such cases. *Faw v. FSM*, 6 FSM Intrm. 33, 36 (Yap 1993).

A state law cannot divest the FSM Supreme Court of exclusive jurisdiction in cases arising under art. XI, § 6(a) of the FSM Constitution. *Faw v. FSM*, 6 FSM Intrm. 33, 36-37 (Yap 1993).

The FSM Supreme Court has exclusive jurisdiction in actions by the nat'l gov't to enforce the terms of fishing agreements and permits to which it is a party. *FSM v. Hai Hsiang* No. 63, 7 FSM Intrm. 114, 116 (Chk. 1995).

(b) The national courts, including the trial division of the Supreme Court, have concurrent original jurisdiction in cases arising under this Constitution; national law or treaties; and in disputes between a state and a citizen of another state, between citizens of different states, and between a state or a citizen thereof, and a foreign state, citizen, or subject.

Case annotations: National Law

The Nat'l Criminal Code places in the FSM Supreme Court exclusive jurisdiction over allegations of violations of the Code. No exception to that jurisdiction is provided for juveniles, so charges of crimes leveled against juveniles are governed by the Nat'l Criminal Code. *FSM v. Albert*, 1 FSM Intrm. 14,15 (Pon. 1981).

The repealer clause of the Nat'l Criminal Code repealed those provisions of Title 11 of the Trust Territory Code above the monetary minimum of \$1,000 set for major crimes. Where the value is below \$1,000, § 2 does not apply because it is not within the nat'l court jurisdiction. *FSM v. Hartman*, 1 FSM Intrm. 43 (Truk 1981).

Title 11 of the Trust Territory Code, prior to the effective date of the Nat'l Criminal Code, is not a nat'l law because its criminal jurisdiction was not expressly delegated to the nat'l gov't, nor is the power it confers of indisputably nat'l character; therefore, it is not within the jurisdiction of the FSM Supreme Court. *Truk v. Otokichy (I)*, 1 FSM Intrm. 127, 130 (Truk 1982).

The FSM Supreme Court has jurisdiction to try Title 11 Trust Territory Code cases if they arise under a nat'l law. Title 11 of the Trust Territory Code is not a nat'l law. It was not adopted by Congress as a nat'l law and it did not become nat'l law by virtue of the transition article. *Truk v. Hartman*, 1 FSM Intrm. 174, 178 (Truk 1982).

Exclusive nat'l gov't jurisdiction over major crimes is not mandated by the Constitution; such jurisdiction would be exclusive in any event only if criminal jurisdiction was a power of indisputably nat'l character. *Truk v. Hartman*, 1 FSM Intrm. 174, 181 (Truk 1982).

The Nat'l Government has exclusive jurisdiction over crimes arising under nat'l law. 11 FSMC 901. *Truk v. Hartman*, 1 FSM Intrm. 174, 181 (Truk 1982).

Sections of Title 11 of the Trust Territory Code covering matters within the jurisdiction of Congress owe their continuing vitality to § 102 of the Nat'l Criminal Code. Thus, the criminal prosecutions thereunder are a nat'l matter and fall within the FSM Supreme Court's constitutional jurisdiction. 11 FSMC 102. *In re Otokichy*, 1 FSM Intrm. 183, 185 (App. 1982).

§ 102(2), the savings clause of the Nat'l Criminal Code, authorizes prosecutions of Title 11 Trust Territory Code offenses occurring prior to the enactment of the Nat'l Criminal Code. Therefore, these prosecutions fall within the FSM Supreme Court's constitutional jurisdiction. 11 FSMC 102(2). *In re Otokichy*, 1 FSM Intrm. 183, 190 (App. 1982).

Presumably, Congress inserted no specific jurisdictional provision in § 102 of the Nat'l Criminal Code because Congress recognized that the FSM Supreme Court would have jurisdiction over all cases arising under nat. l law by virtue of art. XI, § 6(b) of the Constitution. 11 FSMC 102. In re Otokichy, 1 FSM Intrm. 183, 193 (App. 1982).

The Trust Territory Weapons Control Act is not inconsistent with any provision of the Constitution. It therefore continued in effect. When the Nat'l Criminal Code was enacted, and major crimes were defined, the Trust Territory Weapons Control Act became nat'l law and trials for violations thereof were within the jurisdiction of the FSM Supreme Court. 11 FSMC 1201-1231. FSM v. Nota, 1 FSM Intrm. 299, 302-03 (Truk 1983).

Where petitioners raise serious and substantial constitutional claims supported by authorities and reasoning of legal substance, the case falls within the jurisdiction of the FSM Supreme Court under art. XI, § 6(b) of the Constitution. Ponape Chamber of Commerce v. Nett, 1 FSM Intrm. 389, 391 (Pon. 1984).

Art. XI, § 6(a) of the Constitution places jurisdiction in the FSM Supreme Court over cases in which the nat'l gov't is a party. Panuelo v. Pohnpei (I), 2 FSM Intrm. 150, 153 (Pon. 1986).

Nat'l civil rights claims under 11 FSMC 701 furnish a jurisdictional basis for the case to be heard by the FSM Supreme Court. Panuelo v. Pohnpei (I), 2 FSM Intrm. 150, 153 (Pon. 1986).

The FSM Supreme Court trial division is required to decide all nat. l law issues presented to it. Certification to state court is only proper for state or local law issues. Edwards v. Pohnpei, 3 FSM Intrm. 350, 354 (Pon. 1988).

The Trust Territory of the Pacific Islands, which still exists and has governmental powers in the Republic of Palau, is now "foreign" to the FSM and a corporation organized under the laws of the Trust Territory may itself be regarded as foreign for purposes of diversity of citizenship jurisdiction. U Corp. v. Salik, 3 FSM Intrm. 389, 392 (Pon. 1988).

In the absence of any special limitation, issues that arise under any state or nat'l law within the particular state may fall within the jurisdiction of the state and local courts of that state through state constitutional and statutory provisions which place the "judicial power of the state" within those courts. Gimnang v. Yap, 5 FSM Intrm. 13, 17 (App. 1991).

Art. XI, §§ 6(b) and 8 of the FSM Constitution places primary responsibility in the nat'l courts for the kind of cases arising under the constitution or requiring interpretation of the Constitution, nat'l law or treaties; and in disputes between a state and a citizen of another state, between state, citizen, of different states, and between a state or a citizen, a foreign state, citizen, or subject but they do not prohibit state court jurisdiction over issues of nat'l law or cases which arise under nat'l law. Gimnang v. Yap, 5 FSM Intrm. 13, 18 (App. 1991).

Issues that arise under any state or nat'l law within the particular state may fall within the jurisdiction of the state and local courts of that state through state constitutional and statutory provisions which place the "judicial power of the state" within those courts, subject to the possibility that state or local courts may sometimes be barred from exercising jurisdiction in some such cases by the action of Congress, of this court, or of the state legislature. Gimnang v. Yap, 5 FSM Intrm. 13, 18 (App. 1991).

Art. XI, § 8 of the FSM constitution does not bar state courts from exercising jurisdiction over cases which arise under nat'l law within the meaning of art. XI, § 6(b). *Gimnang v. Yap*, 5 FSM Intrm. 13, 18 (App. 1991).

The intent of the Constitutional Convention is that major crimes, as defined by Congress and committed prior to voter ratification, fall within the jurisdiction of the nat'l gov't and may be prosecuted pursuant to the nat'l law after the effective date of the amendment. *In re Ress*, 5 FSM Intrm. 273, 276 (Chk. 1992).

The nat'l court should not abstain from deciding a criminal case where the crime took place before the effective date of the 1991 amendment removing federal jurisdiction over major crimes because of the firmly expressed intention by the Constitutional Convention delegates as to the manner of transition from nat'l jurisdiction to state jurisdiction. *In re Ress*, 5 FSM Intrm. 273, 276 (Chk. 1992).

Where the crimes charged are no longer those expressly delegated to Congress to define, or are not indisputedly of a nat'l character the FSM Supreme Court has no subject matter jurisdiction. *FSM v. Jano*, 6 FSM Intrm. 9, 11 (Pon. 1993).

The term "concurrent" in art. XI, § 6(c) of the FSM Constitution has the same meaning as in § 6(b); i.e., that jurisdiction is concurrent as between the FSM Supreme Court and any other nat'l courts that may be established by statute. It would be illogical and contrary to norms of constitutional interpretation to assume a different meaning for "concurrent" in § 6(c) than in § 6(b), since it is quite clear that the two sections are to be read together. *Faw v. FSM*, 6 FSM Intrm. 33, 35 (Yap 1993).

Abstention and Certification

Nat'l courts are not required to certify to state courts state law issues of first impression. Whether to certify a question to state court is left to the sound discretion of the trial court on a case by case basis. *Youngstrom v. Youngstrom*, 7 FSM Intrm. 34, 36 (App. 1995).

A most important issue in determining whether to certify an issue to state court is whether it will result in undue delay and whether that delay will prejudice a party. *Youngstrom v. Youngstrom*, 7 FSM Intrm. 34, 36 (App. 1995).

The decision whether the FSM Supreme Court will exercise its inherent power to abstain from a case is left to the sound discretion of the trial division which must exercise it carefully and sparingly. *Conrad v. Kolonia Town*, 7 FSM Intrm. 97, 99 (Pon. 1995).

Counseling against the unfettered use of abstention is the FSM Supreme Court's solemn obligation to consider the interests and protect the rights of those who wish to invoke its constitutional jurisdiction. *Conrad v. Kolonia Town*, 7 FSM Intrm. 97, 99 (Pon. 1995).

When issues of nat'l law are involved there is a particularly strong presumption against full abstention from the case. *Conrad v. Kolonia Town*, 7 FSM Intrm. 97, 100 (Pon. 1995).

There is a presumption favoring abstention in claims involving state law and money damages against the state touch upon the particularly strong state interest of fiscal autonomy and

federalism. Even in those cases the FSM Supreme Court will not abstain when abstention will result in substantial delay or additional cost. *Conrad v. Kolonia Town*, 7 FSM Intrm. 97, 100 (Pon. 1995).

Where a case involves several substantive FSM constitutional claims the FSM Supreme Court will not and most likely cannot exercise its discretion to abstain. *Conrad v. Kolonia Town*, 7 FSM Intrm. 97, 101 (Pon. 1995).

Extension of the presumption of abstention in certain cases to municipalities is inappropriate. *Conrad v. Kolonia Town*, 7 FSM Intrm. 97, 101 (Pon. 1995).

Full abstention is not appropriate where claims are not essentially state law claims, and are made against another nation, thus falling within the nat'l court's primary jurisdiction. *Damarlane v. Pohnpei Transp. Auth.*, 5 FSM Intrm. 67A, 67E (Pon. 1991).

Abstention may be appropriate for causes of action that raise issues of state law only, but may not be where substantive issues of nat'l law are raised. A nat'l court may not abstain from deciding a nat'l constitutional claim. *Damarlane v. Pohnpei Transp. Auth.*, 5 FSM Intrm. 67A, 67E (Pon. 1991).

Diversity

The Trust Territory is not a foreign state such as to give the FSM Supreme Court diversity jurisdiction over a suit against the Trust Territory. *Neimes v. Maeda Constr. Co.*, 1 FSM Intrm. 47, 51 (Truk 1981).

Under the present state of affairs, the Trust Territory gov. t cannot be considered a foreign state, citizen or subject thereof within the meaning of art. XI, § 6(b) of the Constitution. *Lonno v. Trust Territory (I)*, 1 FSM Intrm. 53,74 (Kos. 1982).

The Supreme Court of the FSM is specifically given jurisdiction over disputes between citizens of a state and foreign citizens. FSM Const. art. XI, § 6(b). The jurisdiction is based upon the citizenship of the parties, not on the subject matter of the dispute. *In re Nahnsen*, 1 FSM Intrm. 97, 101 (Pon. 1982).

The Constitution places diversity jurisdiction in the Supreme Court, despite the fact that the issues involve matters within state or local, rather than nat'l, legislative powers. FSM Const. art. XI, § 6(b). *In re Nahnsen*, 1 FSM Intrm. 97, 102 (Pon. 1982).

A primary purpose of diversity jurisdiction is to minimize any belief of the parties that a more local tribunal might favor local parties in disputes with "outsiders." *In re Nahnsen*, 1 FSM Intrm. 97, 102 (Pon. 1982).

A requirement for complete diversity among all parties has no constitutional support as a prerequisite to FSM Supreme Court jurisdiction. *In re Nahnsen*, 1 FSM Intrm. 97, 105-06 (Pon. 1982).

Where jurisdiction exists by virtue of diversity of the parties, the FSM Supreme Court may resolve the dispute despite the fact that matters squarely within the legislative powers of states

(e.g., probate, inheritance and land issues) may be involved. *Ponape Chamber of Commerce v. Nett*, 1 FSM Intrm. 389, 392 (Pon. 1984).

Under art. XI, § 6(b) of the FSM Constitution, it is proper to employ the rule of pendent jurisdiction over cases involving interpretations of the Constitution or nat'l law, so that the court may resolve state or local issues involved in the same case. *Ponape Chamber of Commerce v. Nett*, 1 FSM Intrm. 389, 396 (Pon. 1984).

Diversity of citizenship is determined as of commencement of the action. Where diversity existed between the parties at the date and time the suit commenced, diversity will not be defeated by later developments. *Etpison v. Perman*, 1 FSM Intrm. 405, 414 (Pon. 1984).

As a general proposition, a court system resolves disputes by considering and deciding between competing claims of two or more opposing parties. *In re Sproat*, 2 FSM Intrm. 1, 4 (Pon. 1985).

Where there is diversity of citizenship between the parties, litigation involving domestic relations issues, including custody and child support, falls within the jurisdiction of the FSM Supreme Court. *Mongkeya v. Brackett*, 2 FSM Intrm. 291, 292 (Kos. 1986).

For purposes of diversity jurisdiction under art. XI, § 6(b) of the Constitution, a corporation is considered a foreign citizen when any of its shareholders are not citizens of the FSM. *Federated Shipping Co. v. Ponape Transfer & Storage (III)*, 3 FSM Intrm. 256, 260 (Pon. 1987).

Although the FSM Supreme Court has often decided matters of tort law without stating explicitly that state rather than nat'l law controls, there has been acknowledgment that state law controls in the resolution of contract and tort issues. When the Supreme Court, in the exercise of its jurisdiction, decides a matter of state law, its goal should be to apply the law the same way the highest state court would. *Edwards v. Pohnpei*, 3 FSM Intrm. 350, 360 n.22 (Pon. 1989).

Only nat'l courts are given jurisdiction by art. XI, § 6(b) of the Constitution and the concurrent jurisdiction referred to there is between the trial division of the FSM Supreme Court, and any other nat'l courts which may be established in the future. *Bank of Guam v. Semes*, 3 FSM Intrm. 370, 377 (Pon. 1988).

Lack of mention of state and local courts in FSM Constitution art. XI, § 6(b) reveals that nat'l courts are to play the primary role in handling the kinds of cases, identified in that section, but nothing in art. XI, § 6(b) may be read as absolutely preventing state courts from exercising jurisdiction over those kinds of cases. *Bank of Guam v. Semes*, 3 FSM Intrm. 370, 379 (Pon. 1988).

Parties to a dispute in which there is diversity have a constitutional right to invoke the jurisdiction of a nat'l court, but if all parties agree, and if state law permits, a state court may hear and decide the kinds of cases described in art. XI, § 6(b) of the Constitution. *Bank of Guam v. Semes*, 3 FSM Intrm. 370, 379 (Pon. 1988).

Failure to mention nat'l courts in § 25 of the Pohnpei State Real Property Mortgage Act should not be read as an attempt to deprive litigants of access to the FSM Supreme Court's trial division. *Bank of Guam v. Semes*, 3 FSM Intrm. 370, 380 (Pon. 1988).

The Constitution requires only that one plaintiff has citizenship different from one defendant for there to be diversity jurisdiction. *U Corp. v. Salik*, 3 FSM Intrm. 389, 392 (Pon. 1988).

The nat'l Constitution does not prohibit state courts from hearing cases described in art. XI, § 6(b) if all parties accept state court jurisdiction, but parties to a dispute within scope of art. XI, § 6(b) have a constitutional rights to invoke jurisdiction of FSM Supreme Court trial division. *U Corp. v. Salik*, 3 FSM Intrm. 389, 392 (Pon. 1988).

Intent of framers of the Constitution was that nat. l courts would handle most types of cases described in art. XI, § 6(b) of the Constitution and nat. l courts therefore should not lightly find a waiver of right to invoke its jurisdiction. *U Corp. v. Salik*, 3 FSM Intrm. 389, 394 (Pon. 1988).

A party named as a defendant in state court litigation which falls within the scope of art. XI, § 6(b) of the Constitution may invoke nat'l court jurisdiction through a petition for removal and is not required to file a complaint. *U Corp. v. Salik*, 3 FSM Intrm. 389, 394 (Pon. 1988).

The Truk State Court will not assert jurisdiction in a diversity case because the "The national courts, including the trial division of the Supreme Court, have concurrent original jurisdiction . . . in disputes between a state and a citizen of another state, between citizens of different states, and between a state or a citizen thereof, and a foreign state, or subject." FSM Const. art. XI, § 6(b). *Flossman v. Truk*, 3 FSM Intrm. 438, 440 (Truk S. Ct. Tr. 1988).

State courts are not prohibited by art. XI, § 6(b) of the FSM Constitution from hearing and determining cases where the defendants are from FSM states other than the prosecuting state. Jurisdiction over criminal matters between the nat'l and state governments is determined by the severity of the crime; not diversity of citizenship. *Pohnpei v. Hawk*, 3 FSM Intrm. 543, 554 (Pon. S. Ct. App. 1988).

"Concurrent jurisdiction" as used in art. XI, § 6(b) of the FSM Constitution means concurrent jurisdiction between nat'l courts, including the trial divisions of the FSM Supreme Court and of the four state courts. *Pohnpei v. Hawk*, 3 FSM Intrm. 543, 554-55 (Pon. S. Ct. App. 1988).

When all of the parties are citizens of foreign states there is no diversity of citizenship subject matter jurisdiction under art. XI, § 6(b). *International Trading Co. v. Hitec Corp.*, 4 FSM Intrm. 1, 2 (Truk 1989).

A joint venture, without the powers to sue or be sued in the name of the association and without limited liability of the individual members of the association, is not a citizen of Truk State for diversity purposes even though its principal place of business is in Truk State. *International Trading Corp. v. Hitec Corp.*, 4 FSM Intrm. 1, 2 (Truk 1989).

A cautious, reasoned use of the doctrine of abstention is not a violation of the FSM Supreme Court's duty to exercise diversity jurisdiction, or of the litigants' constitutional rights, under art. XI, § 6(b) of the FSM Constitution. *Ponape Transfer & Storage, Inc. v. Federated Shipping Co.*, 4 FSM Intrm. 37, 39 (Pon. 1989).

While the FSM Constitution provides initial access to the FSM Supreme Court for any party in art. XI, § 6(b) litigation, the court may, having familiarized itself with the issues, invoke the doctrine of abstention and permit the case to proceed in a state court, since the power to grant abstention is inherent in the jurisdiction of the FSM Supreme Court, and nothing in the FSM Constitution precludes the court from abstaining in cases which fall within its jurisdiction under art. XI, § 6(b). *Ponape Transfer & Storage, Inc. v. Federated Shipping Co.*, 4 FSM Intrm. 37, 42-43 (Pon. 1989).

No jurisdiction is conferred on state courts by FSM Constitution - Article 11 art. XI, § 6(b) of the FSM Constitution, but neither does the diversity jurisdiction of § 6(b) preclude state courts from acting under state law, unless or until a party to the litigation invokes nat'l court jurisdiction. *Hawk v. Pohnpei*, 4 FSM Intrm. 85, 89 (App. 1989).

It is consistent with the broad plan of the framers of the FSM Constitution that the Constitution would not require that diversity jurisdiction be available in criminal proceedings. *Hawk v. Pohnpei*, 4 FSM Intrm. 85, 94 (App. 1989).

Although the purpose of diversity jurisdiction is to provide parties who are not citizens of the state where a matter arises with a nat'l forum for which the federation of states is responsible, the need to safeguard the legitimate rights of a noncitizen in a state forum must be balanced against the understandable concern of the society of that state to control standards of behavior in accordance with its own set of values. *Hawk v. Pohnpei*, 4 FSM Intrm. 85, 94 (App. 1989).

The diversity jurisdiction provisions of art. XI, § 6(b) of the FSM Constitution do not apply to criminal proceedings. *Hawk v. Pohnpei*, 4 FSM Intrm. 85, 94 (App. 1989).

Jurisdiction based upon diversity of citizenship between the parties is concurrent in the Supreme Court and the nat'l courts, and therefore a party to state court litigation where diversity exists has a constitutional right to invoke the jurisdiction of the nat'l court. In re *Estate of Hartman*, 4 FSM Intrm. 386, 387 (Chk. 1989).

Issues concerning land usually fall into state court jurisdiction, but if there are diverse parties having bona fide interests in the case or dispute, the Constitution places jurisdiction in the nat'l courts even if interests in land are at issue. *Etscheit v. Adams*, 5 FSM Intrm. 243, 246 (Pon. 1991).

When an estate is a party it is the citizenship of the estate representative that is to be considered for diversity purposes. *Etscheit v. Adams*, 5 FSM Intrm. 243, 246 (Pon. 1991).

Where, for six and a half years after the nat'l court had come into existence the noncitizen petitioners made no attempt to invoke the nat'l court's jurisdiction, the noncitizen petitioners affirmatively indicated their willingness to have the case resolved in court proceedings, first in the Trust Territory High Court and later in Pohnpei state court, and thus have waived their right to diversity jurisdiction in the nat'l courts. *Etscheit v. Adams*, 5 FSM Intrm. 243, 247-48 (Pon. 1991).

The fact that a "tactical stipulation," made in 1988 to eliminate all noncitizens as parties to the litigation and thus place the litigation within the sole jurisdiction of the state court, may

have been violated in 1991, does not retroactively change the effect of the stipulation for purposes of jurisdiction. *Etscheit v. Adams*, 5 FSM Intrm. 243, 248 (Pon. 1991).

Nat'l courts can exercise jurisdiction over divorce cases where there is diversity of citizenship although domestic relations are primarily the subject of state law. *Youngstrom v. Youngstrom*, 5 FSM Intrm. 335, 336 (Pon. 1992).

In a diversity of citizenship case the FSM Supreme Court will normally apply state law. *Youngstrom v. Youngstrom*, 5 FSM Intrm. 335, 337 (Pon. 1992).

For purposes of diversity jurisdiction a corporation is considered a foreign citizen when any of its shareholders are not FSM citizens. *Luzama v. Pohnpei Enterprises Co.*, 7 FSM Intrm. 40, 44 (App. 1995).

For purposes of diversity jurisdiction a joint venture is considered a foreign citizen when the parties to it are not FSM citizens. *Luzama v. Pohnpei Enterprises Co.*, 7 FSM Intrm. 40, 44 (App. 1995).

For purposes of diversity jurisdiction it is the citizenship of the estate administrator that is to be considered for determining citizenship of a decedent's estate. *Luzama v. Pohnpei Enterprises Co.*, 7 FSM Intrm. 40, 44 (App. 1995).

Where the constitutional language itself, following FSM precedents on constitutional interpretation, only requires minimal diversity for the nat'l courts to have jurisdiction, and the constitutional journals do not reveal any intent to depart from the plain meaning of the constitutional language, there are no sound reasons why 12 years of FSM jurisprudence requiring only minimal diversity should be overturned. *Luzama v. Pohnpei Enterprises Co.*, 7 FSM Intrm. 40, 48 (App. 1995).

The FSM Supreme Court has diversity jurisdiction only in disputes between a state and a citizen of another state, between citizens of different states, and between a state or a citizen thereof, and a foreign state, citizen, or subject. Diversity jurisdiction thus does not exist when all the parties are foreign citizens, even though they may be citizens of different foreign nations. In such cases, the court's subject matter jurisdiction must be based on some other ground. *Trance v. Penta Constr. Co.*, 7 FSM Intrm. 147, 148 (Chk. 1995).

Pendent

Where the FSM Supreme Court has jurisdiction over a violation of the Nat'l Criminal Code, it cannot then take jurisdiction over a non-major crime, which arose out of the same transaction and formed part of the same plan, under the theory of ancillary jurisdiction. *FSM v. Hartman*, 1 FSM Intrm. 43,44-46 (Truk 1981).

Under art. XI, § 6(b) of the FSM Constitution, it is proper to employ the rule of pendent jurisdiction over cases involving interpretations of the Constitution or nat'l law, so that the court may resolve state or local issues involved in the same case. *Ponape Chamber of Commerce v. Nett*, 1 FSM Intrm. 389, 396 (Pon. 1984).

Where a substantial constitutional issue is involved in a case, the nat'l court may exercise pendent jurisdiction over state or local claims which derives from the same nucleus of

operative fact and are such that the plaintiff would ordinarily be expected to try them all in one judicial proceeding. *Ponape Chamber of Commerce v. Nett*, 1 FSM Intrm. 389, 396 (Pon. 1984).

Even though the requirements for pendent jurisdiction are met in a case, a nat'l court has discretion to decline to exercise jurisdiction over state claims. This determination should turn on considerations of judicial economy, convenience and fairness to litigants and should be instructed by a desire of the federal or nat'l court to avoid needless decisions of state law. *Ponape Chamber of Commerce v. Nett*, 1 FSM Intrm. 389, 397 (Pon. 1984).

A nat'l court may exercise pendent jurisdiction over state law claims included in a plaintiff's cause of action if they arise out of a common nucleus of operative fact and are such that they ordinarily would be expected to be tried in one judicial proceeding, but its exercise of pendent jurisdiction will be limited so as to avoid heedless decisions of state laws. *Ponape Constr. Co. v. Pohnpei*, 6 FSM Intrm. 114, 116 (Pon. 1993).

(c) When jurisdiction is concurrent, the proper court may be prescribed by statute.

Case annotations: Case or Dispute

A case must be one appropriate for judicial determination, that is, a justiciable controversy, as distinguished from a difference or dispute of a hypothetical or abstract character, or one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. *In re Sproat*, 2 FSM Intrm. 1,5 (Pon. 1985).

One reason the judicial power is limited to cases or disputes is to prevent the Judiciary from intruding into areas committed to other branches of gov't. *In re Sproat*, 2 FSM Intrm. 1, 7 (Pon. 1985).

The principal objectives of the case and dispute requirement are to enhance the ability of the courts to make fair and intelligent decisions, and to keep the judicial power within its proper role. *Innocenti v. Wainit*, 2 FSM Intrm. 173, 178-79 (App. 1986).

A concrete case or dispute clearly exists where a state legislature contends that an act of the legislature requires payment of a tax on imports and others insist that the act is null and void, and, depending on the outcome of the controversy, money may or may not be collected, and penalties may or may not be imposed. *Innocenti v. Wainit*, 2 FSM Intrm. 173, 179 (App. 1986).

Where there is no indication that the sentencing order in question is an attempt to modify or affect the powers of the Director of Public Safety, absent indications that the order prevents the director from doing anything he wishes, the order creates no case or dispute as to the scope of the director's powers, and the court is thus without jurisdiction to speak on the issue. *Loch v. FSM*, 2 FSM Intrm. 224, 237 (App. 1986).

Art. XI, § 6(c) of the Constitution places authority to prescribe jurisdiction only in the nat. l Congress, and not in state legislatures. *Bank of Guam v. Semes*, 3 FSM Intrm. 370, 379 (Pon. 1988).

The term "concurrent" in art. XI, § 6(c) of the FSM Constitution has the same meaning as in § 6(b); i.e., that jurisdiction is concurrent as between the FSM Supreme Court and any other national courts that may be established by statute. It would be illogical and contrary to norms of constitutional interpretation to assume a different meaning for "concurrent" in § 6(c) than in § 6(b), since it is quite clear that the two sections are to be read together. *Faw v. FSM*, 6 FSM Intrm. 33, 35 (Yap 1993).

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

While the court has statutory authority to hear appeals regarding the conduct of elections, its power to grant relief is limited to ordering a recount or a revote. Only Congress can decide who is to be seated and once it has seated a member unconditionally the matter is nonjusticiable. *Aten v. National Election Comm'r (III)*, 6 FSM Intrm. 143, 145 & n.1 (App. 1993).

Case or Dispute; Mootness

A claim becomes moot when the parties lack a legally cognizable interest in the outcome. If an appellant court finds that any relief it could grant would be ineffectual, it must treat the case as moot. *Berman v. FSM Supreme Court (II)*, 7 FSM Intrm. 11, 16 (App. 1995).

Case or Dispute; Ripeness

When a party has been specifically warned by the attorney general that he is required to obtain a foreign investment permit under national statute which imposes criminal sanctions for failure to comply, the question of whether a permit is required is sufficiently ripe to support a suit seeking declaratory judgment. *Michelsen v. FSM*, 3 FSM Intrm. 416, 419 (Pon. 1988).

Case or Dispute; Standing

The jurisdictional language in the FSM Constitution is patterned upon the U.S. Constitution. *In re Sproat*, 2 FSM Intrm. 1, 4 n.2 (Pon. 1985).

It is thought that the judicial power to declare the law will more likely be exercised in enlightened fashion if it is employed only where the Court is exposed to the differing points of view of adversaries. Thus judicial decision-making power is typically exercised by a court which has heard competing contentions of adversaries having sufficient interests in the outcome to thoroughly consider, research and argue the points at issue. Even then, a court's declarations of law should be limited to rulings necessary to resolve the dispute before it. *In re Sproat*, 2 FSM Intrm. 1, 4 (Pon. 1985).

Though the words used in art. XI, § 6 of the FSM Constitution, including the case or dispute requirements, are based on the similar case and controversy provisions set out in art. III of the U.S. Constitution, courts within the F.S.M. are not to consider themselves bound by the details and minute points of decisions of U.S. courts attempting to ferret out the precise

meaning of art. III. *Aisek v. FSM Foreign Investment Board*, 2 FSM Intrm. 95, 98 (Pon. 1985).

Standing to sue was an unsettled area of U.S. law when the FSM Constitution was ratified and the issue of standing to sue within the FSM is one that calls for independent analysis rather than rigid adherence to the decisions of U.S. courts construing that Constitution. *Aisek v. FSM Foreign Investment Bd.*, 2 FSM Intrm. 95, 98-99 (Pon. 1985).

In deciding who may litigate in the FSM Supreme Court, the goal is to develop principles consistent with the language of the Constitution and calculated to meet the needs of the people and institutions within the FSM. *Aisek v. FSM Foreign Investment Bd.*, 2 FSM Intrm. 95, 100 (Pon. 1985).

Where dive shop operators allege actual or threatened economic injury as a result of increased competition flowing from business activities of a pleasure cruise ship providing diving opportunities in the same geographical area where the plaintiffs operate, and where they have placed before the court information sufficient to establish the reasonableness of their fear of economic injury, their law suit challenging the legality of the issuance of a foreign investment permit to a cruise ship may not be dismissed for lack of standing. *Aisek v. FSM Foreign Investment Bd.*, 2 FSM Intrm. 95, 100 (Pon. 1985).

Where plaintiffs seek to challenge issuance to a third party of a permit which plaintiffs reasonably allege will cause them harm, and where they allege that the actions of a nat'l senator were crucial to issuance of the permit, those plaintiffs have standing to be heard on the question of whether the senator's membership on the board is violative of the "incompatibility clause," art. IX, § 13 of the FSM Constitution. *Aisek v. FSM Foreign Investment Bd.*, 2 FSM Intrm. 95, 101 (Pon. 1985).

There is in the FSM no separate requirement that there be a nexus, that is, a logical connection between persons threatened by injury from the actions of an administrative agency and the statutory provisions under which the agency is operating. *Aisek v. FSM Foreign Investment Bd.*, 2 FSM Intrm. 95, 102 (Pon. 1985).

The principal objectives of the case and dispute requirement are to enhance the ability of the courts to make fair and intelligent decisions, and to keep the judicial power within its proper role. *Innocenti v. Wainit*, 2 FSM Intrm. 173, 178-79 (App. 1986).

The issue of standing to sue, because it was a particularly unsettled area in U.S. law when the FSM Constitution was drafted and ratified, is an area especially calling for independent analysis rather than adherence to decisions construing similar provisions in the U.S. Constitution. *Innocenti v. Wainit*, 2 FSM Intrm. 173, 178-79 (App. 1986).

A concrete case or dispute clearly exists where a state legislature contends that an act of the legislature requires payment of a tax on imports and others insist that the act is null and void, and, depending on the outcome of the controversy, money may or may not be collected, and penalties may or may not be imposed. *Innocenti v. Wainit*, 2 FSM Intrm. 173, 179 (App. 1986).

The standing requirement is not expressly stated in the Constitution but implied as an antecedent to the constitutional case or dispute requirement, and should be interpreted so as to

implement the objectives of that requirement. *Innocenti v. Wainit*, 2 FSM Intrm. 173, 179 (App. 1986).

Business people have standing to challenge the constitutionality of an excise tax based on imports where the addition of the tax increases the cost that business people must pay for goods intended for resale to consumers. *Innocenti v. Wainit*, 2 FSM Intrm. 173, 180 (App. 1986).

Plaintiff's possessory interest in land is sufficient to maintain standing to bring action for damages wrought when a road was built across the land. *Benjamin v. Kosrae*, 3 FSM Intrm. 508, 511 (Kos. S. Ct. Tr. 1988).

When a public officer is requested to perform a duty mandated by law which he feels would violate the constitution, he has standing to apply to the court for a declaratory judgment declaring the statute unconstitutional. *Siba v. Sigrah*, 4 FSM Intrm. 329, 334 (Kos. S. Ct. Tr. 1990).

A party has standing to sue when that party has a sufficient stake or interest in an otherwise justiciable controversy to obtain judicial resolution of that controversy. The implied requirement that a party have standing should be interpreted so as to implement the objectives of the constitutional requirement that a case or dispute exist. *In re Parcel No. 046-A-01*, 6 FSM Intrm. 149, 153 (Pon. 1993).

A leasehold interest in land is a sufficient possessory interest to give a party standing to maintain an action for trespass. *In re Parcel No. 046-A-01*, 6 FSM Intrm. 149, 154 (Pon. 1993).

Private individuals lack standing to assert claims on behalf of the public. When the state gov't has certified ownership of land, and the traditional leaders' suit to have that land declared public land failed, private individuals cannot raise the same claim. *In re Parcel No. 046-A-01*, 6 FSM Intrm. 149, 157 (Pon. 1993).

Noncitizen plaintiffs have standing to sue for trespass if they have a leasehold interest in the land. *Ponape Enterprises Co. v. Soumei*, 6 FSM Intrm. 341, 343 (Pon. 1994).

The FSM will not apply a Trust Territory rule on that only the gov't had standing to challenge title to land based Trust Territory Code provisions to deny standing to private persons challenging title to land under entirely separate FSM Constitutional provisions on citizenship, especially since the authority for the Trust Territory rule was derived from now deleted language in an American legal encyclopedia. *Etschreit v. Adams*, 6 FSM Intrm. 365, 383-84 (Pon. 1994).

Section 7. The appellate division of the Supreme Court may review cases heard in the national courts, and cases heard in state or local courts if they require interpretation of this Constitution, national law, or a treaty. If a state constitution permits, the appellate division of the Supreme Court may review other cases on appeal from the highest state court in which a decision may be had.

Case annotations: APPEAL AND CERTIORARI

An appeal at the early stage of development of FSM judicial systems is a significant event calling for relatively large expenditure of judiciary resources. In order to preserve and uphold the legitimate right of parties to appropriate appeals, the FSM Supreme Court must be vigilant and exercise its inherent powers to avoid unnecessary expenditure of resources for premature or unauthorized appeals. *FSM v. Yal'Mad*, 1 FSM Intrm. 196, 197-98 (App. 1982).

FSM Appellate Rule 9's purpose is to permit a defendant held in custody, or subjected to conditions of release, to receive expedited review of that restriction of his freedom. There is no suggestion in the rule nor in any other authority indicating that the gov. t is entitled to appeal from the pretrial release of a defendant. *FSM v. Yal'Mad*, 1 FSM Intrm. 196, 198 (App. 1982).

Tardiness of the appellant in filing his brief, with no explanation offered in response to a motion for dismissal or when the brief is submitted, constitutes a ground for dismissal of an appeal. FSM App. R. 31(a) & (c). *Alaphonso v. FSM*, 1 FSM Intrm. 209, 229-30 (App. 1982).

In absence of express appellate division permission to appear without supervision of an attorney, the court will require all appellate level briefs and other documents to be signed by an attorney authorized to practice before the FSM Supreme Court. Any appellate submissions not so signed will be rejected. *Alaphonso v. FSM*, 1 FSM Intrm. 209, 230 n.13 (App. 1982).

The Trust Territory High Court has the legitimate authority to issue writs of certiorari for cases from the FSM Supreme Court; the Supreme Court cannot disregard an opinion resulting from such review. *Jonas v. FSM*, 1 FSM Intrm. 322, 326-29 (App. 1983).

A writ of certiorari is improvidently granted by the Trust Territory High Court unless a decision of the FSM Supreme Court affects the ability of the Secretary of the Interior to fulfill his responsibilities under Executive Order 11021. *Jonas v. FSM*, 1 FSM Intrm. 322, 329 n.1 (App. 1983).

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

Upon showing of excusable neglect or good cause, Rule 4(a)(5) permits extension of time for filing notice of appeal, upon motion made within 30 days after expiration of the 42 days prescribed in Rule 4(a)(1). *Jonas v. Mobil Oil Micronesia, Inc.*, 2 FSM Intrm. 164, 166 (App. 1986).

Rule 26(b) provides for enlargement of time for doing most acts but explicitly excludes enlargement of time to file notice of appeal. A court can grant no relief under Rule 26 for late filing of a notice of appeal. *Jonas v. Mobil Oil Micronesia, Inc.*, 2 FSM Intrm. 164, 166 (App. 1986).

The interest protected by having exact time limits is in preserving finality of judgments. *Jonas v. Mobil Oil Micronesia, Inc.*, 2 FSM Intrm. 164, 166 (App. 1986).

A court has no authority to grant enlargement of time to file notice of appeal pursuant to motion filed after the maximum period of 72 days. *Jonas v. Mobil Oil Micronesia, Inc.*, 2 FSM Intrm. 164, 166 (App. 1986).

Where a party on appeal challenges the intervention in the appeal of another party, and the issue on the merits is decided in favor of the challenging party, no harm is visited on the challenging party by allowing the intervention, and the court is not required to rule on the propriety of that intervention. *Innocenti v. Wainit*, 2 FSM Intrm. 173, 180 (App. 1986).

In a new nation in which the courts have not yet established a comprehensive jurisprudence, where an issue is one of first impression and of fundamental importance to the new nation, the court should not lightly impose sanctions upon an official who pushes such an issue to a final court decision, and should make some allowance for wishful optimism in an appeal. *Innocenti v. Wainit*, 2 FSM Intrm. 173, 188 (App. 1986).

Only attorneys admitted to practice before the FSM Supreme Court or trial counselors supervised by an attorney admitted to practice may appear before the FSM Supreme Court on appeals from state court cases. *Kephas v. Kosrae*, 3 FSM Intrm. 248, 252 (App. 1987).

A delay of only two days in filing the appellate brief does not warrant dismissal of the appeal when there is no showing of prejudice. *Kephas v. Kosrae*, 3 FSM Intrm. 248, 253 (App. 1987).

Unexcused and extended delay in service of appellant's brief after certification of the record warrants dismissal of the appeal. *Kephas v. Kosrae*, 3 FSM Intrm. 248, 254 (App. 1987).

Failure of the appellant to include a transcript in the record on an appeal based upon a claim of insufficiency of evidence warrants dismissal of the appeal. *Kephas v. Kosrae*, 3 FSM Intrm. 248, 254 (App. 1987).

That fee arrangements had not been made is not good cause in support of a motion to enlarge time for filing appellees brief when the motion is filed well after the brief was due and after oral argument was held. *Paul v. Celestine*, 3 FSM Intrm. 572, 574 (App. 1987).

The appellate court, for good cause shown, may upon motion enlarge the time prescribed by the appellate rules or by its order for doing any act, or may permit an act to be done after the expiration of such time. *Kimoul v. FSM*, 4 FSM Intrm. 344, 345 (App. 1990).

FSM Appellate Rule 26(b) gives the appellate court broad discretion to enlarge time upon a showing of good cause. *Kimoul v. FSM*, 4 FSM Intrm. 344, 346 (App. 1990).

Under the FSM Appellate Rule 4(a)(1), a notice of appeal must be filed within 42 days after entry of the judgment. *Kimoul v. FSM*, 4 FSM Intrm. 344, 346 (App. 1990).

Where the delay was only ten days, no prejudice to the appellant has been suggested, the appellant has not opposed the motion for extension of time and the court finds a substantial public interest in having the position of the gov't considered in the criminal appeal, the court may appropriately enlarge the time and permit late filing of the government's brief. *Kimoul v. FSM*, 4 FSM Intrm. 344, 346 (App. 1990).

The date of notice from the clerk that the record is ready, not the filing of the Certification of Record, triggers the running of the due date of an appellant's brief. *Federated Shipping Co. v. Ponape Transfer & Storage*, 5 FSM Intrm. 89, 91 (App. 1989).

Where an appellate court has held that a trial judge is under a clear and non-discretionary duty to step aside from presiding over a case and the petitioner has a constitutional right to obtain compliance with that duty, all documents issued after the date of the appellate decision are null and void and shall be expunged from the record and the judge shall be enjoined from taking any further action as a judge in the case. *Etschreit v. Santos*, 5 FSM Intrm. 111, 113 (App. 1991).

When the language of an FSM appellate rule is nearly identical to a U.S.' counterpart, FSM courts will look to the U.S. federal courts for guidance in interpreting the rule. *Jano v. King*, 5 FSM Intrm. 326, 329 (App. 1992).

Conducting trials de novo and making findings of fact is normally the province of the trial court and not of the appellate division, which is generally unsuited for such inquiries. *Moroni v. Secretary of Resources & Dev.*, 6 FSM Intrm. 137, 138 (App. 1993).

It is within the court's discretion to dismiss an appeal where the appellant has failed to file a brief within the time prescribed when the appellee has moved for dismissal. In deciding a motion to dismiss an appeal under FSM Appellate Rule 31(c), the court may consider, among other things, the length of delay in filing briefs; nature of the reason for any filing delay; evidence of prejudice to the opposing party; and extent of the delaying party's efforts to correct procedural defects. *Nakamura v. Bank of Guam (I)*, 6 FSM Intrm. 224, 227 (App. 1993).

Prejudice to an appellee may be shown by failure of an appellant to file a notice of issues presented and contents of the appendix as required under FSM Appellate Rule 30(b). *Nakamura v. Bank of Guam (I)*, 6 FSM Intrm. 224, 227 (App. 1993).

The service on opposing counsel of a signed and dated copy of a brief filed with the appellate division, although not explicitly stated in FSM Appellate Rule 31(d), is a procedural requirement of the FSM Supreme Court. *Nakamura v. Bank of Guam (I)*, 6 FSM Intrm. 224, 228 (App. 1993).

The requirement under FSM Appellate Rule 30(a) of an appendix is only waived at the court's discretion and by court order. *Nakamura v. Bank of Guam (I)*, 6 FSM Intrm. 224, 228 (App. 1993).

Parties to an appeal must reference properly and clearly in their briefs the parts of the record containing material in support of their arguments, and unless the court has waived an appendix under Appellate Rule 30(f), references should be to the appropriate pages of the appendix. *Nakamura v. Bank of Guam (I)*, 6 FSM Intrm. 224, 228 (App. 1993).

Facts asserted to excuse the filing of an appellate brief within the time prescribed must be proved. *Nakamura v. Bank of Guam (I)*, 6 FSM Intrm. 224, 228 (App. 1993).

FSM Appellate Rule 28(a) requires, among other things, that arguments in an appellant's brief be supported by citations to authority; failure to provide such support will be deemed a waiver by appellant of the claims being argued. *McCaffrey v. FSM Supreme Court*, 6 FSM Intrm. 279, 283 (App. 1993).

Where the appellant at oral argument contended that a grant of an interest in land was for an indefinite term and the court inquired of the appellant whether the grant was perpetual or forever the issue of whether a perpetual grant was for an indefinite term was fairly before the appellate court and could be decided by it even though the issue had not been briefed nor had the appellee urged it. *Nena v. Kosrae (II)*, 6 FSM Intrm. 437, 439 (App. 1994).

The proper procedure, in accordance with Kosrae State law and the FSM appellate rules, in filing a notice of appeal from a decision of the Kosrae State Court is to file notice in both Kosrae State Court and the FSM Supreme Court, either with the trial division in Kosrae or directly with the appellate division. *Tafunsak v. Kosrae*, 6 FSM Intrm. 467, 468 (App. 1994).

A properly filed notice of appeal transfers jurisdiction from the trial court to the appellate court. *Election Commissioner v. Petewon*, 6 FSM Intrm. 491, 498 (Chk. S. Ct. App. 1994).

An appellate court cannot hold a party in contempt for violating a trial court's orders because his actions were not a violation of the appellate court's orders or done in the appellate court's presence. *Onopwi v. Aizawa*, 6 FSM Intrm. 537, 539 (Chk. S. Ct. App. 1994).

For good cause shown, an appellate court may grant an enlargement of time for any act, except notice of appeal or times set by statute in administrative appeals, including a petition for rehearing. *Nena v. Kosrae (III)*, 6 FSM Intrm. 564, 567 (App. 1994).

Decisions Reviewable

For an interlocutory appeal, FSM Appellate Rule 5 must be read as requiring a prescribed statement from the trial court. *Lonno v. Trust Territory (II)*, 1 FSM Intrm. 75, 77 (Kos. 1982).

The court will not issue a writ of certiorari to review the trial court's suppression of defendant's confession in a case in which no assignments of error are furnished to the court, although such decision effectively terminates the case because the gov. t cannot continue its prosecution without the confession, and although no appeal is available to the gov. t. In *re Edward*, 3 FSM Intrm. 285, 286-87 (App. 1987).

A petition for certiorari will not be granted unless it delineates the act or acts alleged to be in error with sufficient particularity to demonstrate material, harmful error. In *re Edward*, 3 FSM Intrm. 285, 288 (App. 1987).

There are no FSM statutory or constitutional provisions that expand or establish the grounds for a writ of certiorari beyond its customary scope. In *re Edward*, 3 FSM Intrm. 285, 289 (App. 1987).

Generally, an appeal from a ruling of a trial judge is to be taken only after completion of all trial proceedings, upon issuance of a final judgment. In *re Main*, 4 FSM Intrm. 255, 257 (App. 1990).

The appellate division of the Supreme Court of the FSM may accept direct filing of a case and an expedited briefing schedule may be established where there is limited time available and prompt resolution of the issues in the case is decidedly in the national interest. *Constitutional Convention 1990 v. President*, 4 FSM Intrm. 320, 324 (App. 1990).

Although the FSM Supreme Court has the constitutional power to use its discretion to review a case from a state trial court, generally, proper respect for the state court requires that state appeal rights be exhausted before the FSM Supreme Court would grant appellate review especially when important state interests are involved. *Damarlane v. Pohnpei Transp. Auth.*, 5 FSM Intrm. 322, 324 (App. 1992).

Where it is unclear as to what rights a state trial court found the appellants had and the FSM court is unequipped to define those rights, and when the FSM appellate panel remains unsatisfied that the due process issue was raised below, although not determinative these are additional factors militating against FSM Supreme Court, appellate division review of a state trial court decision. *Damarlane v. Pohnpei Transp. Auth.*, 5 FSM Intrm. 322, 325 (App. 1992).

Generally only final judgments or orders can be appealed, but the appellate division may, at its discretion, permit an appeal of an interlocutory order. The court, in exercising its discretion should weigh the advantages and disadvantages of an immediate appeal and consider the appellant's likelihood of success before granting permission. *Jano v. King*, 5 FSM Intrm. 326, 329 (App. 1992).

Where a court order takes no action concerning an existing injunction and states that it may modify the injunction depending on the happening of certain events, that order does not come within the provision of the rule allowing interlocutory appeals of orders granting, continuing, modifying, or dissolving, or refusing to dissolve or modify an injunction. *Damarlane v. Pohnpei Transp. Auth.*, 5 FSM Intrm. 332, 334 (App. 1992).

The right to appeal an interlocutory order which affects an injunction is an exception to the general rule that permits appeals only from final decisions. The exception reflects the importance of prompt action when injunctions are involved since the threat of irreparable harm is a prerequisite to injunctive relief. *Damarlane v. Pohnpei Transp. Auth.*, 5 FSM Intrm. 332, 334 (App. 1992).

The well established general rule is that only final judgment decisions may be appealed. A final decision generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. *In re Extradition of Jano*, 6 FSM Intrm. 23, 24 (App. 1993).

Certifications of extraditability are not final decisions of the trial court since the final decision-making authority rests with the Secretary of External Affairs. Therefore they are not appealable. *In re Extradition of Jano*, 6 FSM Intrm. 23, 25 App. 1993).

Judicial review of a certification of extraditability, although not appealable, is available to an accused in custody by seeking a writ of habeas corpus. *In re Extradition of Jano*, 6 FSM Intrm. 23, 25 (App. 1993).

Where the FSM statute governing extradition proceeding is silent on the appealability of extradition proceedings and where the statute has been borrowed from another jurisdiction where extradition proceedings are not appealable it is presumed that the meaning and application of the statute is as it was interpreted by the courts of the source. *In re Extradition of Jano*, 6 FSM Intrm. 23, 25 (App. 1993).

An appeals court has no jurisdiction over a motion for an injunction filed after final dismissal of the appeal case. *Damarlane v. Pohnpei Transp. Auth. (II)*, 6 FSM Intrm. 167, 168 (App. 1993).

In civil cases appeals may be taken from all final decisions of the Kosrae State Court. Finality should be given practical rather than technical construction, however, a summary judgment on the issue of liability, is not final or appealable until after the damage issue is resolved. Giving the word "final" its ordinary meaning, a decision that does not entirely dispose of one claim of a complaint containing four cannot be said to be final. *Kosrae v. Melander*, 6 FSM Intrm. 257, 259 (App. 1993).

Under the FSM Constitution the FSM Supreme Court may hear cases on appeal from the highest state court in which a decision may be had if that state's constitution permits it. The Chuuk State Constitution permits such appeals, which, in civil cases, Chuuk statute provides be made by certiorari. *Gustaf v. Mori*, 6 FSM Intrm. 284, 285 (App. 1993).

Because a decision of a single justice in the appellate division of the Chuuk State Supreme Court may be reviewed by an appellate panel of the same court it is not a final decision of the highest state court in which a decision may be had, which it must be in order for the FSM Supreme Court to hear it on appeal. *Gustaf v. Mori*, 6 FSM Intrm. 284, 285 (App. 1993).

Where summary judgment has been granted on the issue of liability, but the issue of damages is still pending, the right to appeal has not been lost even though 10 months have elapsed because no final judgment has been entered and the deadline for filing an appeal does not begin to run until a final judgment has been entered. *Kihara Real Estate, Inc. v. Estate of Nanpei (II)*, 6 FSM Intrm. 354, 356 (Pon. 1994).

When an appeal from an administrative agency decision involves issue of extreme time sensitivity and of nat. l 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).

The general rule is that appellate review of a trial court is limited to final orders and judgments. However, certain interlocutory orders involving injunctions, receivers and receiverships, and interlocutory decrees determining rights and liabilities in admiralty cases, are reviewable in the appellate division. In exceptional cases, the extraordinary writs of mandamus or of prohibition may be issued to correct a trial court's decisions before final judgment. Appellate review may also be granted when the trial court has issued an order pursuant to Appellate Rule 5(a). *Etscheit v. Adams*, 6 FSM Intrm. 608, 610 (App. 1994).

"Direct" appeals to the appellate division have been limited to entire cases appealed from administrative agencies decisions. *Etscheit v. Adams*, 6 FSM Intrm. 608, 610 (App. 1994).

Civil case appeals to the FSM Supreme Court may be taken from final decisions of the highest state courts in Yap and Pohnpei if the cases require interpretation of the nat. l constitution, nat. l law, or a treaty; and in other cases where appeals from final decisions of the highest state courts are permitted under the Constitution of that state. A final decision is one which leaves nothing open to further dispute and which ends the litigation on the merits leaving the trial court with no alternative but to execute judgment. *Damarlane v. United States*, 7 FSM Intrm. 202, 203-04 (App. 1995).

A state appellate court opinion in response to questions of state law certified to it by the FSM Supreme Court trial division is not a final decision and therefore not reviewable by the FSM Supreme Court appellate division. *Damarlane v. United States*, 7 FSM Intrm. 202, 204 (App. 1995).

Standard of Review

A criminal sentence may be affirmed on appeal when a review of the record reveals that the sentence is appropriate. *Malakai v. FSM*, 1 FSM Intrm. 338, 338 (App. 1983).

In considering challenges that there was insufficient evidence to justify the trial court's findings that the defendant aided and abetted, and is therefore criminally liable for the assaults with dangerous weapons, to the FSM Supreme Court recognizes the obligation of its appellate tribunal to review the evidence in the light most favorable to the trial court's factual determinations. The standard of review extends to inferences drawn from the evidence as well. *Engichy v. FSM*, 1 FSM Intrm. 532, 545 (App. 1984).

The standard of review is not whether the appellate court is convinced beyond a reasonable doubt but whether the court can conclude that the trier of fact could, acting reasonably, be convinced beyond a reasonable doubt by the evidence which it had a right to believe and accept as true. *Engichy v. FSM*, 1 FSM Intrm. 532, 546 (App. 1984).

An appellate court should not overrule or set aside a finding of fact of a trial court where there is credible evidence in the record to support that finding. *Engichy v. FSM*, 1 FSM Intrm. 532, 556 (App. 1984).

The trial court's findings will be upheld so long as they rationally reflect evidence which is reasonable and combines with other evidence to present a coherent, believable, overall picture. *Engichy v. FSM*, 1 FSM Intrm. 532, 557 (App. 1984).

Normally the trial court fashions the remedies and sanctions for failure of a party to comply with discovery requirements. The exercise of the trial court's discretion should not be disturbed by an appellate court absent a showing that the trial court's action has unfairly resulted in substantial hardship and prejudice to a party. *Engichy v. FSM*, 1 FSM Intrm. 532, 558 (App. 1984).

The standard to be applied in reviewing a trial court's finding of intention to kill is not whether the appellate court is convinced that there was intention to kill but whether the appellate court believes that the evidence was sufficient to persuade a reasonable trier of fact beyond a reasonable doubt of the intention to kill. *Loch v. FSM*, 1 FSM Intrm. 566, 575-76 (App. 1984).

The trial court finding of recklessness is a finding of fact which may not be set aside on appeal unless it is clearly erroneous. FSM Civ. R. 52(a)Ray v. Electrical Contracting Corp., 2 FSM Intrm. 21, 25 (App. 1985).

The appellate process contemplates that any issue brought before an appellate court will first have been ruled upon by a trial judge. Loch v. FSM, 2 FSM Intrm. 234, 236 (App. 1986).

An issue not presented to and ruled upon by the trial court cannot properly come before the appellate division for review. In the absence of an objection in the trial court the appellate division will refuse to consider the issue. Loney v. FSM, 3 FSM Intrm. 151, 154 (App. 1987).

A conviction for robbery is a finding which can only be reversed if the court's finding is clearly erroneous. Loney v. FSM, 3 FSM Intrm. 151, 155

The standard of review on appeal on the issue of the sufficiency of the evidence is very limited only findings that are clearly erroneous can be set aside. Opet v. Mobil Oil Micronesia, Inc., 3 FSM Intrm. 159, 165 (App. 1987).

Standard to be applied in reviewing a claim of insufficiency of evidence in a criminal proceeding is whether the appellate court can conclude that the trier of fact could reasonably have been convinced beyond a reasonable doubt by the evidence which it had a right to believe and accept as true. Runmar v. FSM, 3 FSM Intrm. 308, 315 (App. 1988).

The appellate court may notice error, even though not properly raised or preserved in the trial court, where the error affects the substantial rights of a minor under the particular circumstances of a case. In re Juvenile, 4 FSM Intrm. 161, 164 (App. 1989).

The general rule is that on appeal a party is bound by the theory advanced in the trial court, and cannot urge a ground for relief which was not presented there, particularly where the party had ample opportunity to raise the issues in the trial court instead of presenting them for the first time on appeal. Paul v. Celestine, 4 FSM Intrm. 205, 210 (App. 1990).

In reviewing a sentencing decision of a trial court, an appellate court should follow the standards generally applied in criminal appeals, upholding findings of fact supported by credible evidence but overruling those legal rulings with which the appellate court disagrees. Tammed v. FSM, 4 FSM Intrm. 266, 274 (App. 1990).

Normally the trial court fashions the remedies and sanctions for failure of a party to comply with discovery requirements and the exercise of the trial court's discretion should not be disturbed by an appellate court absent a showing that the trial court's action has unfairly resulted in substantial hardship and prejudice to a party. Bernardo v. FSM, 4 FSM Intrm. 310, 313 (App. 1990).

For false evidence to lead to reversal of a conviction, there must be some reason to believe that the trier of fact may have been misled and that this may have contributed to the conviction. Bernardo v. FSM, 4 FSM Intrm. 310, 314 (App. 1990).

An appeal from the decision of the trial judge may be only on the grounds of abuse of discretion resulting from the justice exceeding constraints imposed by the parole statute, Pub.

L. No. 5-24 (5th Cong., 1st Spec. Sess. 1987). *Yalmaid v. FSM*, 5 FSM Intrm. 32, 34 (App. 1991).

A defendant that has failed to raise and preserve the issue has waived his right to object to the admission of evidence, but when a plain error that affects the constitutional rights of the defendant has occurred the court may notice the error. *Moses v. FSM*, 5 FSM Intrm. 156, 161 (App. 1991).

In a criminal case, the task of an appeals court is to determine whether the trier of fact could reasonably have been convinced of the charge beyond a reasonable doubt by the evidence. *Tosie v. FSM*, 5 FSM Intrm. 175, 178 (App. 1991).

The test on appeal is not whether the appellate court is convinced beyond a reasonable doubt, but whether the trial court acting reasonably is convinced. *Otto v. Kosrae*, 5 FSM Intrm. 218, 222 (App. 1991).

Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded. FSM Crim. R. 52(a). *Otto v. Kosrae*, 5 FSM Intrm. 218, 222 (App. 1991).

An issue raised in closing argument at trial can be properly brought before the appellate court. *Otto v. Kosrae*, 5 FSM Intrm. 218, 222 (App. 1991).

The standard of review on a question of the sufficiency of the evidence is whether it is clearly erroneous. *Senda v. Mid-Pac Constr. Co.*, 5 FSM Intrm. 277, 280 (App. 1992).

In reviewing the sufficiency of evidence to warrant conviction, the issue is whether the evidence, viewed in a light most favorable to the finding, would justify a finder of fact, acting reasonably, to conclude that guilt was established beyond a reasonable doubt. *Welson v. FSM*, 5 FSM Intrm. 281, 285 (App. 1992).

In reviewing a criminal conviction on appeal the appellate court need not go beyond the standard of review in *Engichy v. FSM*, 1 FSM Intrm. 532, to require that the test be whether the trier of fact could reasonably conclude that the evidence is inconsistent with every hypothesis of innocence. *Jonah v. FSM*, 5 FSM Intrm. 308, 310-11 (App. 1992).

The appellate court will not decide a constitutional issue if not raised below and because unnecessary constitutional adjudication is to be avoided. *Jonah v. FSM*, 5 FSM Intrm. 308, 313 (App. 1992).

In order to overturn the trial judge's denial of a motion to recuse, the appellant must show an abuse of discretion by the trial judge. The appellate court will not merely substitute its judgment for that of the trial judge. *Jano v. King*, 5 FSM Intrm. 326, 330 (App. 1992).

An abuse of discretion by the trial court occurs when its decision is clearly unreasonable, arbitrary, or fanciful; or it is based on an erroneous conclusion of law; or the record contains no evidence upon which the court could rationally have based its decision. *Jano v. King*, 5 FSM Intrm. 326, 330 (App. 1992).

An issue not raised at trial cannot be introduced for the first time on appeal. *Alfonso v. FSM*, 5 FSM Intrm. 402, 404 (App. 1992).

The proper standard of appellate review for a criminal conviction challenged for insufficiency of evidence is whether the appellate panel, in considering the evidence in the light most favorable to the trial court's findings of fact, determines that a reasonable trier of fact could be convinced of the defendant's guilt beyond a reasonable doubt. *Alfons v. FSM*, 5 FSM Intrm. 402, 405 (App. 1992).

The standard of review of a trial court's factual findings is whether those findings are clearly erroneous. The appeals court cannot substitute its judgment for that of the trial judge but in reviewing the findings it may examine all of the evidence in the record in determining whether the trial court's factual findings are clearly erroneous, and if it is left with the definite and firm conviction that a mistake has been committed with respect to the findings, it must reject the findings as clearly erroneous. *Kapas v. Church of Latter Day Saints*, 6 FSM Intrm. 56, 59 (App. 1992).

Clear error in key factual findings merits setting aside conclusions of law and is one factor indicating incorrect use of discretion. *Kapas v. Church of Latter Day Saints*, 6 FSM Intrm. 56, 60 (App. 1992).

Where no motion has been made to amend the complaint at the trial level and the issue was not tried with the express or implied consent of the parties the general rule is that one cannot raise on appeal an issue not presented in the trial court. *Nena v. Kosrae (I)*, 6 FSM Intrm. 251, 253-54 (App. 1993).

Where the trial court found no negligence and the appeal court upon review of the record does not find the trial court's factual findings to be clearly erroneous the trial court's dismissal of the negligence claim will be affirmed. *Nena v. Kosrae (I)*, 6 FSM Intrm. 251, 254 (App. 1993).

Where the trial court's finding that damages were not proven at trial is not clearly erroneous the appellate court will not remand to the trial court for further presentation of evidence on that issue. *Wito Clan v. United Church of Christ*, 6 FSM Intrm. 291, 292 (App. 1993).

Although, ordinarily, an issue must be raised at the trial level for it to be preserved for appeal, whether a court has subject matter jurisdiction is an issue that may be raised at any time. *Hartman v. FSM*, 6 FSM Intrm. 293, 296 (App. 1993).

In determining whether a trial court's findings are clearly erroneous, an appellate court must construe the evidence in the light most favorable to the appellee. A finding is clearly erroneous when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Kinere v. Kosrae*, 6 FSM Intrm. 307, 309 (App. 1993).

The fashioning of remedies and sanctions for a party's failure to comply with discovery requirements is a matter within the trial court's discretion and should not be disturbed by an appellate court absent a showing that the trial court's action has unfairly resulted in substantial hardship and prejudice to a party. *Nakamura v. Bank of Guam (II)*, 6 FSM Intrm. 345, 349 (App. 1994).

If a judge does not specifically rely on the objected to evidence, the appellate court must presume that he did not rely on that evidence and therefore that any error in admitting the evidence did not result in substantial hardship or prejudice to a party. *Nakamura v. Bank of Guam (II)*, 6 FSM Intrm. 345, 349 (App. 1994).

An appellate court should not set aside a trial court's finding of fact where there is credible evidence in the record to support that finding. The trial court, unlike the appellate court, had the opportunity to view the witnesses and the manner of their testimony. *Nakamura v. Bank of Guam (II)*, 6 FSM Intrm. 345, 349 (App. 1994).

A claim that a trial court's decision did not address all the issues raised is not a basis for remand as long as the trial judge made a finding of such essential facts as provide a basis for the decision. The test as to the adequacy of the findings is whether they are sufficiently comprehensive and pertinent to the issue to form a basis for the decision. *Nakamura v. Bank of Guam (II)*, 6 FSM Intrm. 345, 349 (App. 1994).

It is not an abuse of the trial court's discretion for a trial court to admit testimony that is inconsistent with that witness's answer to an interrogatory. Admissions made in interrogatories are not binding and the answering party may introduce other evidence on the subject of the admissions at trial. Contradictions between a party's answers to interrogatories and court testimony go to the weight and credibility of the testimony, not to its admissibility. Conflicting testimony may be admitted, and it is the responsibility of the finder of fact to weigh all the answers and resolve the conflict. *Nakamura v. Bank of Guam (II)*, 6 FSM Intrm. 345, 350 (App. 1994).

Where a party at trial claims surprise, and the judge offers that party a chance to cure any prejudice this might have caused and they make the tactical choice to decline the opportunity it is a tactical choice the party must live with and is not a basis for reversal. *Nakamura v. Bank of Guam (II)*, 6 FSM Intrm. 345, 351-52 (App. 1994).

Where there is no indication that the trial court relied on certain evidence the presumption is there was no such reliance, and any error in its admission is not prejudicial. *Nakamura v. Bank of Guam (II)*, 6 FSM Intrm. 345, 351 (App. 1994).

Where a trial court's decision does not state that it reached any conclusion about a certain disputed fact the appellate court may presume that it was not a basis for the trial court's decision. *Nakamura v. Bank of Guam (II)*, 6 FSM Intrm. 345, 352 (App. 1994).

Appeals of Rule 11 sanctions are reviewed under an abuse of discretion standard. *Berman v. Kolonia Town*, 6 FSM Intrm. 433, 436 (App. 1994).

The standard of review of a trial court's ruling on a motion for relief from judgment is whether the trial court has abused its discretion. *Senda v. Mid-Pacific Constr. Co.*, 6 FSM Intrm. 440, 445 (App. 1994).

Whether the lower court erred by issuing a preliminary injunction that did not require the return of funds obtained in violation of a TRO involves a trial court's exercise of discretion and is reviewed using an abuse of discretion standard. *Onopwi v. Aizawa*, 6 FSM Intrm. 537, 539 (Chk. S. Ct. App. 1994).

The standard of review for an appeal from the trial division's determination of an administrative agency appeal is whether the finding of the trial division was justified by substantial evidence of record. *FSM v. Moroni*, 6 FSM Intrm. 575, 577 (App. 1994).

An issue not presented to and ruled upon by the trial court cannot properly come before the appellate division for review. *FSM v. Moroni*, 6 FSM Intrm. 575, 579 (App. 1994).

Factual determinations of a trial court, such as the appropriate size and period for an award of child support, will be overturned on appeal only if the findings of the trial court are clearly erroneous. *Youngstrom v. Youngstrom*, 7 FSM Intrm. 34, 36 (App. 1995).

A court must deny a motion for summary judgment unless the court, viewing the facts presented and the inferences made in the light most favorable to the non-moving party, finds there is no genuine issue as to any material fact. Thus if the appellants can show there was a genuine issue of material fact then the trial court's summary judgment must be reversed. *Luzama v. Pohnpei Enterprises Co.*, 7 FSM Intrm. 40, 48 (App. 1995).

Rehearing

Where the points of law and fact referred to in a petition for rehearing were not overlooked or misapprehended in the previous consideration of the appeal the petition will be denied. *Carlos v. FSM*, 4 FSM Intrm. 32, 33 (App. 1989).

Where appellants request a rehearing on the grounds that it is no longer equitable that the judgment have prospective application, and neither the appellate order of dismissal nor the judgment in the state court had by their terms any prospective application the motion will be denied. *Damarlane v. Pohnpei Transp. Auth. (I)*, 6 FSM Intrm. 166, 167 (App. 1993).

After an appellate court has issued its opinion it may grant a petition for a rehearing if it has overlooked or misapprehended points of law or fact. Ordinarily, such petitions are summarily denied. *Nena v. Kosrae (II)*, 6 FSM Intrm. 437, 438 (App. 1994).

A motion for reconsideration of denial of rehearing will be considered as a second petition for rehearing, and as such it cannot be granted it unless the court has overlooked or misapprehended points of law or fact. *Nena v. Kosrae (III)*, 6 FSM Intrm. 564, 567 (App. 1994).

A court has the power to enlarge the time to petition for rehearing and to modify an erroneous decision although the time for rehearing has expired, and sometimes may consider petitions for rehearing filed even after rehearing has been denied. *Nena v. Kosrae (III)*, 6 FSM Intrm. 564, 567-68 (App. 1994).

Stay

A stay is normally granted only where the court is persuaded as to the probability of ultimate success of the movant. *In re Raitoun*, 1 FSM Intrm. 562, 563 (App. 1984).

In determining whether to grant a stay, a single appellate judge, acting alone, must consider whether it is more likely than not that the petitioner would be able to persuade a full appellate panel as to the soundness of his legal position and that there are such special circumstances

that the trial court should be mandated to modify its conduct of the trial. *In re Raitoun*, 1 FSM Intrm. 561, 563 (App. 1984).

In weighing the possibility of success of an application for a writ of mandamus on grounds that one public defender's conflict should be imputed to all lawyers in the Public Defender's office, when the original disqualification is based upon a conflict of the attorney's loyalties because of his familial relationship with the victim, but no issue of confidentiality is raised, and only the issue of loyalty is present, but no showing is made that the other lawyers could not give full loyalty to the client; there exists no substantial possibility of an appellate court granting the writ and a stay of proceedings pending consideration of the application should not be granted. *Office of the Public Defender v. Trial Division*, 4 FSM Intrm. 252, 254 (App. 1990).

Under FSM Appellate Rule 27(c) a motion for a stay of proceedings pending consideration of a motion for a writ of mandamus to require a trial court to appoint a lawyer other than the Public Defender is denied where there: 1) is no substantial possibility that a full panel would grant the writ, 2) is no showing of irreparable harm if the stay is denied, and 3) are no equities presented in favor of a stay. *Office of the Public Defender v. Trial Division*, 4 FSM Intrm. 252, 255 (App. 1990).

Where the record fails to reflect that the functions of the judiciary have been prevented or substantially impaired by the financial management and fiscal powers exercised by the Secretary of Finance, the judiciary has not been deprived of its essential role and constitutional independence. *Mackenzie v. Tuuth*, 5 FSM Intrm. 78, 84 (Pon. 1991).

The Constitution mandates that the Chief Justice by rule may govern the admission to practice of attorneys, but a rule which differentiates between FSM citizens and noncitizens inherently relates to the regulation of immigration and foreign relations which are powers expressly delegated to the other two branches of gov. t. *Berman v. Pohnpei*, 5 FSM Intrm. 303, 305 (Pon. 1992).

The Chief Justice has the constitutional authority to make rules for the appointment of special judges, and Congress has the constitutional authority to amend them. Congress has provided the Chief Justice with the statutory authority to appoint temporary justices. Where Congress has acted pursuant to its constitutional authority to provide statutory authority to the court, the court need not have exercised its concurrent rule-making authority. *Jano v. King*, 5 FSM Intrm. 326, 331 (App. 1992).

Congress and the President respectively have the power to regulate immigration and conduct foreign affairs while the Chief Justice may make rules governing the admission of attorneys. Therefore a rule of admission that treats aliens unequally promulgated by the Chief Justice implicates powers expressly delegated to other branches. *Berman v. FSM Supreme Court (I)*, 5 FSM Intrm. 364, 366 (Pon. 1992).

Without a rational valid basis for the rule limiting the number of times an alien may take the bar exam it will be held unconstitutional even if it would be constitutional if the regulation were made by Congress or the President. *Berman v. FSM Supreme Court (I)*, 5 FSM Intrm. 364, 367 (Pon. 1992).

When an appellant has applied to the appellate division for a stay it normally will be considered by all justices of the appellate division, but in exceptional cases application may be made to and considered by a single justice. The power of the appellate division or a single justice thereof to stay proceedings during the pendency of an appeal is not limited by the Rules of Civil Procedure. *Pohnpei v. Ponape Constr. Co.*, 6 FSM Intrm. 221, 222 (App. 1993).

The purpose of requiring a supersedeas bond for a stay is to protect the interests of the appellees. A bond protects the appellees by providing a fund out of which it may be paid if the money judgment is affirmed, and it meets the concerns of the appellee that the appellant might flee the jurisdiction or conceal or dissipate assets so as to render itself judgment-proof. The latter concerns are not present when the appellant is a state. *Pohnpei v. Ponape Constr. Co.*, 6 FSM Intrm. 221, 223 (App. 1993).

A court may modify an injunction to preserve the status quo during the pendency of an appeal. *Ponape Enterprises Co. v. Luzama*, 6 FSM Intrm. 274, 276-77 (Pon. 1993).

While a supersedeas bond is a prerequisite to granting a stay from a money judgment, no such bond is required in order to obtain a modification of an injunction pending appeal. It may be granted upon such terms as to bond or otherwise as the court considers for the security of the adverse party's rights. *Ponape Enterprises Co. v. Luzama*, 6 FSM Intrm. 274, 277 (Pon. 1993).

The criteria for granting a stay pending appeal under Rule 62 are: 1) whether the appellant has shown that without the stay he will be irreparably harmed; 2) whether issuance of the stay would substantially harm other parties interested in the proceedings; 3) whether the public interest would be served by granting a stay; and 4) whether the appellant has made a strong showing that he is likely to prevail on the merits of the appeal. *Ponape Enterprises Co. v. Luzama*, 6 FSM Intrm. 274, 277-78 (Pon. 1993).

When summary judgment is granted enjoining trespassing farmers, removing the farmers from the land while their appeal is pending might more substantially alter the status quo than a stay allowing them to remain on the land. *Ponape Enterprises Co. v. Luzama*, 6 FSM Intrm. 276, 278 (Pon. 1993).

A stay on appeal may be granted even when the moving party has less than a 50% chance of success if the question is a difficult one, or an issue of first impression about which respectable minds might differ. *Ponape Enterprises Co. v. Luzama*, 6 FSM Intrm. 274, 279 (Pon. 1993).

An appellant may apply to the trial division for a stay of judgment. If the stay is denied by the trial division he may apply to the appellate division. If the stay is granted and its terms seem onerous, the petitioner may apply to the appellate division for a modification of the stay, and may also request an expedited briefing schedule. *Senda v. Trial Division*, 6 FSM Intrm. 336, 338 (App. 1994).

The FSM Code provision authorizing the general powers of the Supreme Court gives the court the authority to grant a stay of proceedings in one case pending the outcome of another case which addresses the same or similar issues. *Ponape Enterprises Co. v. Bergen*, 6 FSM Intrm. 411, 414 (Pon. 1994).

Factors for a court to consider in determining it whether should exercise its discretion to grant a stay of proceedings in one case pending the outcome of another case which addresses the same or similar issues include whether judicial economy will be furthered by a stay because the cases on appeal may have claim or issue preclusive effect on the case to be stayed; the balance of the competing interests; the orderly administration of justice and whether the case is one of great public importance. *Ponape Enterprises Co. v. Bergen*, 6 FSM Intrm. 411, 414 (Pon. 1994).

A stay should be granted in one case pending the outcome of another case on appeal which addresses the same or similar issues, when it is in the interests of avoiding the waste of judicial resources, managing the court's calendar, sparing the parties unnecessary litigation efforts, and avoiding inconsistent or confusing outcomes, especially if granting the stay will not adversely affect the parties opposing the stay to any substantial extent because they are also parties to the other case on appeal. *Ponape Enterprises Co. v. Bergen*, 6 FSM Intrm. 411, 415-16 (Pon. 1994).

Because speedy and final resolution of questions regarding the constitutional roles of the state and nat'l gov'ts will avoid unnecessary conflict and possible jurisdictional tension between the state and nat'l courts, it is proper to stay an order of abstention pending appeal in such cases. *Pohnpei v. MV Hai Hsiang #36 (II)*, 6 FSM Intrm. 604, 605 (Pon. 1994).

The rule requiring a supersedeas bond to be posted before a stay may granted pending appeal is applicable only to appeals from money judgments. *Pohnpei v. MV Hai Hsiang #36 (II)*, 6 FSM Intrm. 604, 605 (Pon. 1994).

Section 8. When a case in a state or local court involves a substantial question requiring the interpretation of the Constitution, national law, or a treaty, on application of a party or on its own motion the court shall certify the question to the appellate division of the Supreme Court. The appellate division of the Supreme Court may decide the case or remand it for further proceedings.

Case annotations: Certification of Issues

Pursuant to art. XI, § 8 of the FSM Constitution, a state court receiving a proper motion is required to certify any substantial constitutional question to the Appellate Division of the Supreme Court for proper disposition. *Koike v. Ponape Rock Products Co.*, 1 FSM Intrm. 496, 501 (Pon. 1984).

Art. XI, § 8 of the Constitution, providing for state court certification of issues of nat'l law, gives the FSM Supreme Court appellate division another tool to oversee the development of nat'l law jurisprudence, but also provides the option of remand so that the state court may address issues of nat'l law. *Bernard's Retail Store & Wholesale v. Johnny*, 4 FSM Intrm. 33, 35 (App. 1989).

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

Unless definite articulable reasons to the contrary appear, questions certified under art. XI, § 8 of the Constitution normally will be remanded to the state court. *Bernard's Retail Store & Wholesale v. Johnny*, 4 FSM Intrm. 33, 35 (App. 1989).

Where the issues certified to the FSM Supreme Court by a state court under art. XI, § 8 of the FSM Constitution are narrowly framed and not capable of varying solutions, and it appears that a greater service may be provided by simply answering the questions posed by the state court, the FSM Supreme Court will not remand the certified questions to the state court. *Bernard's Retail Store & Wholesale v. Johnny*, 4 FSM Intrm. 33, 35 (App. 1989).

Certified questions are decided by those constitutionally appointed justices who are not disqualified. *Etschreit v. Adams*, 6 FSM Intrm. 608, 609 (App. 1994).

The Constitution provides that the FSM Supreme Court Appellate Division may decide questions certified from state and local courts, not from the FSM Supreme Court Trial Division. *Etschreit v. Adams*, 6 FSM Intrm. 608, 610 (App. 1994).

Certification is normally granted by the court that will be applying the guidance sought to its decision, not yet made, not by the court that is requested to hear the certified question. *Etschreit v. Adams*, 6 FSM Intrm. 608, 610 (App. 1994).

Abstention and Certification

As the Ponape District Court bears the closest resemblance to the state court system contemplated by the Constitution, it is appropriate to provide the District Court an opportunity to render an opinion on local issues. *In re Nahnsen*, 1 FSM Intrm. 97, 97 (Pon. 1982).

State courts, rather than nat'l courts, should normally resolve probate and inheritance issues especially where interests in land are at issue. *In re Nahnsen*, 1 FSM Intrm. 97, 97 (Pon. 1982).

It would be contrary to the desire of the framers of the Constitution that local officials retain control over local matters if the FSM Supreme Court were to relinquish jurisdiction over issues involving local and state powers to the Trust Territory High Court, which is the least local tribunal now existing in the Trust Territory. *In re Nahnsen*, 1 FSM Intrm. 97, 110 (Pon. 1982).

The Ponape District Court, although not granted jurisdiction over land matters, may be given the opportunity to hear certified questions from the FSM Supreme Court on issues in a probate case involving land in order to further the intent of the framers that local decision-makers play a part in decisions of a local nature. *In re Nahnsen*, 1 FSM Intrm. 97, 110-12 (Pon. 1982).

Even though the requirements for pendent jurisdiction are met in a case, a nat'l court has discretion to decline to exercise jurisdiction over state claims. This determination should turn on considerations of judicial economy, convenience and fairness to litigants and should be instructed by a desire of the federal or nat'l court to avoid needless decisions of state law. *Ponape Chamber of Commerce v. Nett*, 1 FSM Intrm. 389, 397 (Pon. 1984).

Where a Public Land Authority has erred procedurally, but there is no suggestion of bad faith or substantive violations by the Authority, the FSM Supreme Court may appropriately employ the doctrine of primary jurisdiction to remand the public land issue to the Authority for its decision. *Etpison v. Perman*, 1 FSM Intrm. 405, 429 (Pon. 1984).

A reasoned request by a state that the FSM Supreme Court abstain from deciding a particular issue should be granted unless the opposing party establishes that the benefits of abstention in terms of federalism and judicial harmony, and respect for state sovereignty, would be substantially outweighed by delay, harm or injustice. *Panuelo v. Pohnpei (I)*, 2 FSM Intrm. 150, 156 (Pon. 1986).

Where neither land, inheritance nor any other crucial interest of the state is involved; where the state has developed no extensive administrative apparatus or practical knowledge relating to the state issue with which a state court would be more familiar; where the state issue is not, strictly speaking, constitutional; and where the state has tendered the issue to the FSM Supreme Court and no party has requested abstention, the FSM Supreme Court should decide the issue rather than abstaining in favor of the state court. *Panuelo v. Pohnpei (I)*, 2 FSM Intrm. 150, 157-59 (Pon. 1986).

Where litigation in which a state of the FSM is a defendant involves an issue concerning the meaning of a provision of the state Constitution, and the parties in that litigation request that the issue of the meaning of the provision be certified to the supreme court of the state, it is an appropriate exercise of the inherent powers of the FSM Supreme Court to devise a procedure for tendering the issue to the state supreme court, so long as the state court approves. *Panuelo v. Pohnpei (III)*, 2 FSM Intrm. 244, 246 (Pon. 1986).

Abstention in favor of state court jurisdiction is inappropriate in a case which concerns leasehold of a dock facility, raises issues of nat. l commercial import, and was filed almost two years ago during which time several opinions were rendered. *Federated Shipping Co. v. Ponape Transfer & Storage (III)*, 3 FSM Intrm. 256, 260-61 (Pon. 1987).

The factors to be considered in the decision about whether the FSM Supreme Court should certify an issue to the state supreme court include: possible harm to the party seeking relief; the likelihood of significant delay; and the objections raised by the opposing party. *Hadley v. Kolonia Town*, 3 FSM Intrm. 101, 103 (Pon. 1987).

Certification of appropriate issues to the Pohnpei Supreme Court appellate division by the FSM Supreme Court is consistent with the interaction between state and nat'l courts, as contemplated by the FSM Const. art. XI, §§ 7, 8, 10, and as interpreted in earlier case law. *Hadley v. Kolonia Town*, 3 FSM Intrm. 101, 103-04 (Pon. 1987).

The FSM Supreme Court has earlier explained that in the interests of judicial harmony and out of respect for state sovereignty, it is an appropriate exercise of the FSM Supreme Court's inherent powers to devise a procedure for tendering state constitutional issues to the state courts, so long as the state court approves. *Hadley v. Kolonia Town*, 3 FSM Intrm. 101, 104 (Pon. 1987).

The FSM Supreme Court trial division is required to decide all nat. l law issues presented to it. Certification to state court is only proper for state or local law issues. *Edwards v. Pohnpei*, 3 FSM Intrm. 350, 354 (Pon. 1988).

Determination as to whether a statute is a state or nat. l law must be made on a statute-by-statute or a section-by-section basis. *Edwards v. Pohnpei*, 3 FSM Intrm. 350, 355 (Pon. 1988).

As a general rule the FSM Supreme Court trial division is obliged to exercise its jurisdiction and may not abstain simply because unsettled issues of state law are presented. *Edwards v. Pohnpei*, 3 FSM Intrm. 350, 360 (Pon. 1988).

The FSM Constitution, art. XI, § 8, as well as general principles of federalism and considerations of judicial harmony, give the FSM Supreme Court power to certify state law issues to state courts. *Edwards v. Pohnpei*, 3 FSM Intrm. 350, 361 (Pon. 1988).

Considerations of federalism and state sovereignty create a presumption in litigation when a state is defendant in an action for money damages that a request by the state defendant for certification to state court of unresolved and significant issues of state law will be granted. *Edwards v. Pohnpei*, 3 FSM Intrm. 350, 362 (Pon. 1988).

While the FSM Supreme Court may certify legal issues in a case before it to the highest state court, questions which require application of law to facts may not be certified. *Edwards v. Pohnpei*, 3 FSM Intrm. 350, 363 (Pon. 1988).

Certification of issues to other courts typically causes delay and increases the cost of litigation and therefore should be employed only for unsettled legal issues. *Edwards v. Pohnpei*, 3 FSM Intrm. 350, 363 (Pon. 1988).

FSM Supreme Court's trial division does not lose jurisdiction over a case merely because land issues are involved, but if such issues are presented, certification procedures may be employed to avoid encroachment upon state decision-making prerogatives. *Bank of Guam v. Semes*, 3 FSM Intrm. 370, 381 (Pon. 1988).

Because the interest of developing a dynamic and well reasoned body of Micronesian jurisprudence, is best served when all courts have the benefit of one another's opinions to consider and question; when the litigants are private parties the FSM Supreme Court normally should attempt to resolve all issues presented, even when matters of state law are involved. *Federated Shipping Co. v. Ponape Transfer & Storage Co.*, 4 FSM Intrm. 3, 13 (Pon. 1989).

Art. XI, § 8 of the Constitution, providing for state court certification of issues of nat'l law, gives the FSM Supreme Court appellate division another tool to oversee the development of nat'l law jurisprudence, but also provides the option of remand so that the state court may address issues of nat'l law. *Bernard's Retail Store & Wholesale v. Johnny*, 4 FSM Intrm. 33, 35 (App. 1989).

Where the issues certified to the FSM Supreme Court by a state court under art. XI, § 8 of the FSM Constitution are narrowly framed and not capable of varying solutions, and it appears that a greater service may be provided by simply answering the questions posed by the state court, the FSM Supreme Court will not remand the certified questions to the state court. *Bernard's Retail Store & Wholesale v. Johnny*, 4 FSM Intrm. 33, 35 (App. 1989).

A cautious, reasoned use of the doctrine of abstention is not a violation of the FSM Supreme Court's duty to exercise diversity jurisdiction, or of the litigants' constitutional rights, under art. XI, § 6(b) of the FSM Constitution. *Ponape Transfer & Storage, Inc. v. Federated Shipping Co.*, 4 FSM Intrm. 37, 39 (Pon. 1989).

The FSM Supreme Court may and should abstain in a case where land use rights are at issue, where the state is attempting to develop a coherent policy concerning the disposition of public lands, where there is a similar litigation already pending in state court, where the state requests abstention as defendant in an action which may expose it to monetary damages, where Congress has not asserted any nat. l interests which may be affected by the outcome of the litigation, and where abstention will not result in delay or injustice to the parties. *Ponape Transfer & Storage, Inc. v. Federated Shipping Co.*, 4 FSM Intrm. 37, 39 (Pon. 1989).

While the FSM Constitution provides initial access to the FSM Supreme Court for any party in art. XI, § 6(b) litigation, the court may, having familiarized itself with the issues, invoke the doctrine of abstention and permit the case to proceed in a state court, since the power to grant abstention is inherent in the jurisdiction of the FSM Supreme Court, and nothing in the FSM Constitution precludes the court from abstaining in cases which fall within its jurisdiction under art. XI, § 6(b). *Ponape Transfer & Storage, Inc. v. Federated Shipping Co.*, 4 FSM Intrm. 37, 42-43 (Pon. 1989).

Abstention by nat'l courts is desirable in a case affecting state efforts to establish a coherent policy concerning how private persons may obtain rights to use land currently held by the state gov't. *FSM 4 Intrm. 037-047 Ponape Transfer & Storage, Inc. v. Federated Shipping Co.*, 4 FSM Intrm. 37, 44 (Pon. 1989).

In a case brought before the FSM Supreme Court where similar litigating involving the same parties and issues is already pending before a state court, and a decision by the state court in the litigation would resolve all controversies among the parties, the risk of costly, duplicative litigation is one factor to be considered by the nat'l court in determining whether to abstain. *Ponape Transfer & Storage, Inc. v. Federated Shipping Co.*, 4 FSM Intrm. 37, 44 (Pon. 1989).

Although foreign and interstate commerce and shipping involve profound nat'l interests, where Congress has not seen fit to assert those interests and there is no nat'l regulation or law to enforce, the fact that a case affects interstate and foreign commerce and shipping is not sufficient to deny abstention if other strong grounds for abstention exist. *Ponape Transfer & Storage, Inc. v. Federated Shipping Co.*, 4 FSM Intrm. 37, 47 (Pon. 1989).

There are no statutory or constitutional obligations which require the FSM Supreme Court to abstain or certify questions merely because unsettled matters of state law are at issue. *Pryor v. Moses*, 4 FSM Intrm. 138, 141 (Pon. 1989).

The choice of whether to abstain from a decision or certify questions is one that lies wholly within the discretion of the FSM Supreme Court, and the judge must not undertake that decision lightly. *Pryor v. Moses*, 4 FSM Intrm. 138, 141 (Pon. 1989).

The list of areas in which the FSM Supreme Court will consider it appropriate to liberally defer to state courts must be open and flexible, responding to the particular state of legal and social development in Micronesia, and when issues important to Micronesians become the

focus of concerted state efforts to establish a coherent body of law, the FSM Supreme Court will take those developments into account in evaluating requests for certification or abstention. *Pryor v. Moses*, 4 FSM Intrm. 138, 142 (Pon. 1989).

Where two private parties are involved, special considerations of state sovereignty are not as weighty in considering requests for abstention or certification, and the FSM Supreme Court normally should attempt to resolve all issues presented, even when matters of state law are involved. *Pryor v. Moses*, 4 FSM Intrm. 138, 143 (Pon. 1989).

Requiring the FSM Supreme Court to abstain from deciding virtually all state law matters of first impression would not be in the interests of the efficient administration of justice, and would not be consistent with the jurisdictional provisions of the FSM Constitution. *Pryor v. Moses*, 4 FSM Intrm. 138, 143 (Pon. 1989).

Because it is appropriate to seek to develop legal standards through careful consideration of every individual case and all its attendant facts, to certify questions of law in a factual vacuum as a regular and frequent practice ill serves the primary purpose of the courts to address the justice of each separate case. *Pryor v. Moses*, 4 FSM Intrm. 138, 144-45 (Pon. 1989).

In a case where there is no state party and no issues of land or other matters crucial to state interests for which the state is actively developing policy and law, the healthy and efficient administration of justice demands that the FSM Supreme Court fulfill its duty to exercise jurisdiction and refuse to abstain or certify issues. *Pryor v. Moses*, 4 FSM Intrm. 138, 145 (Pon. 1989).

The FSM Supreme Court will abstain from a claim for recovery of taxes where the defendant state requests abstention, the claim is for monetary relief, and the state has endeavored to develop a body of law in the areas of excise taxes and sovereign immunity. *Gimnang v. Yap*, 4 FSM Intrm. 212, 214 (Yap 1990).

On a claim for declaratory relief from an unconstitutional excise tax, the FSM Supreme Court trial division will not abstain, where the issue could later be certified to the FSM Supreme Court appellate division and result in delay, where the trial court has already retained the case longer than contemplated, where the issue is narrowly posed and not capable of varying resolutions, and where it appears that a greater service may be provided by deciding the issue. *Gimnang v. Yap*, 4 FSM Intrm. 212, 214 (Yap 1990).

It is not appropriate to abstain from deciding a claim for injunctive relief where it is undisputed that the court has jurisdiction and where the interests of time can be of pressing importance. *Gimnang v. Yap*, 4 FSM Intrm. 212, 214 (Yap 1990).

The nat'l courts, in carrying out their judicial responsibilities, do have inherent power to certify issues, or to abstain partially or completely from exercising jurisdiction in a particular issue or to exercise jurisdiction over part or all of a case. *Gimnang v. Yap*, 5 FSM Intrm. 13, 19 (App. 1991).

A nat'l court ordinarily should refrain from deciding a case in which state action is challenged as violating the federal constitution, if unsettled questions of state law may be dispositive and obviate the need for the constitutional determination. *Gimnang v. Yap*, 5 FSM Intrm. 13, 21 (App. 1991).

A nat'l court may not abstain from exercising its constitutional jurisdiction when it is directly faced with a constitutional issue and surely may never abstain completely from exercising jurisdiction in a case where there remains to be resolved a substantial issue under the nat. l constitution. *Gimnang v. Yap*, 5 FSM Intrm. 13, 25 (App. 1991).

In a case arising under nat'l law there is an especially strong presumption against full abstention, and there is a serious question whether the trial division of a nat'l court may ever certify a question of nat'l law to a state court for decision unless it can reasonably be expected that the particular claim can be resolved entirely through the application of state law.

Damarlane v. Pohnpei Transp. Auth., 5 FSM Intrm. 67A, 67C (Pon. 1991).

When there are identifiable, particularly strong state interests, such as questions concerning the ownership of land or where there are monetary claims against the state or its agencies, the nat'l courts should exercise restraint, and look with sympathy upon a state request for abstention. *Damarlane v. Pohnpei Transp. Auth.*, 5 FSM Intrm. 67A, 67D (Pon. 1991).

Although it may be appropriate to defer to state courts the resolution of land related state law issues, abstention and certification of issues should not be allowed to thwart the more fundamental goal and obligation of the judicial system to render just decisions in a speedy fashion at a minimum of costs to litigants and society alike. Therefore a reasonable balance must be sought between responsiveness to state interests and the obligation of the nat'l courts to carry out their own jurisdictional responsibilities. *Damarlane v. Pohnpei Transp. Auth.*, 5 FSM Intrm. 67A, 67D (Pon. 1991).

Full abstention is not appropriate where claims are not essentially state law claims, and are made against another nation, thus falling within the nat'l court's primary jurisdiction. *Damarlane v. Pohnpei Transp. Auth.*, 5 FSM Intrm. 67A, 67E (Pon. 1991).

Abstention may be appropriate for causes of action that raise issues of state law only, but may not be where substantive issues of nat'l law are raised. A nat'l court may not abstain from deciding a nat'l constitutional claim. *Damarlane v. Pohnpei Transp. Auth.*, 5 FSM Intrm. 67A, 67E (Pon. 1991).

Where a claim is against the nat'l gov't and an interest in land is not placed at issue the claim is within the exclusive jurisdiction of the FSM Supreme Court and it cannot abstain on the claim. *Damarlane v. Pohnpei Transp. Auth.*, 5 FSM Intrm. 67A, 67E (Pon. 1991).

Where a case requires decisions as to the rights of owners of land in Pohnpei, it is appropriate that these issues be certified for presentation to the Pohnpei Supreme Court if it can be done without undue expense to the litigants, or extended delay. *Damarlane v. Pohnpei Transp. Auth.*, 5 FSM Intrm. 67A, 67F (Pon. 1991).

If nat'l court jurisdiction exists the nat'l court should promptly grant the petition to remove. Thereafter the nat'l court can entertain a motion to abstain or to certify specific issues to the state court. Proceedings in the nat'l court do not have to stop while a certified issue is presented to a state court. *Etscheit v. Adams*, 5 FSM Intrm. 243, 246 (Pon. 1991).

The nat'l court should not abstain from deciding a criminal case where the crime took place before the effective date of the 1991 amendment removing federal jurisdiction over major

crimes because of the firmly expressed intention by the Constitutional Convention delegates as to the manner of transition from nat'l jurisdiction to state jurisdiction. *In re Ress*, 5 FSM Intrm. 273, 276 (Chk. 1992).

It is appropriate for the state court to rule upon the non-constitutional grounds and upon the alleged violation of the Pohnpei Constitution. The plaintiff may raise at a later time the allegation that the ordinance violates the FSM Constitution if that is still necessary after disposition by the state court. *Berman v. Pohnpei*, 5 FSM Intrm. 303, 306-07 (Pon. 1992).

Where there is a long delay in moving for certification of an issue and it appears the motion's sole purpose is to cause further delay, the doctrine of laches may bar the granting of the motion. *Youngstrom v. Youngstrom*, 5 FSM Intrm. 335, 337-38 (Pon. 1992).

A bond of debt is simply a loan instrument. Therefore when determining its legal effect does not require a determination concerning interests in land there is insufficient basis for abstention. *Kihara v. Nanpei*, 5 FSM Intrm. 342, 345 (Pon. 1992).

Because the FSM Supreme Court is the only court of jurisdiction in cases arising under art. XI, § 6(a) of the FSM Constitution, the court has no discretion to abstain in such cases. *Faw v. FSM*, 6 FSM Intrm. 33, 36 (Yap 1993).

A strong presumption exists under FSM law for deferring land matters to local land authorities. *Kapas v. Church of Latter Day Saints*, 6 FSM Intrm. 56, 60 (App. 1992).

Determination of property boundaries is the responsibility of the state land commissions, and the nat'l court should not intercede where the local agency has not completed its work. *Kapas v. Church of Latter Day Saints*, 6 FSM Intrm. 56, 60 (App. 1992).

The FSM Supreme Court has a constitutional duty to hear disputes wherein the parties are diverse, even if land issues are involved, although the court may abstain from exercising such jurisdiction on a case-by-case basis where other factors weighing in favor of abstention are present. *Etschheit v. Mix*, 6 FSM Intrm. 248, 250 (Pon. 1993).

Where a complaint arises from actions concerning the internal operations of municipal gov't, and the claims sound in tort, abstention in favor of state court adjudication is appropriate. *Mendiola v. Berman (I)*, 6 FSM Intrm. 427, 429 (Pon. 1994).

That a defendant files a counterclaim alleging violation of constitutional rights does not in itself make abstention of the case as a whole inappropriate. *Mendiola v. Berman (II)*, 6 FSM Intrm. 449, 450 (Pon. 1994).

Deference to state court jurisdiction is warranted in cases involving municipal gov. t issues, given the greater familiarity with such issues at the state level and the greater importance to state interests. *Mendiola v. Berman (II)*, 6 FSM Intrm. 449, 450-51 (Pon. 1994).

Even though the nat'l court has jurisdiction abstention may be warranted in civil forfeiture fishing case for fishing in state waters where defendants are also part of a companion criminal case in state court. *Pohnpei v. M/V Zhong Yuan Yu #606*, 6 FSM Intrm. 464, 465-66 (Pon. 1994).

The circumstance that decisions of the Appellate Division of the Chuuk State Supreme Court may be appealed to the Appellate Division of the FSM Supreme Court and the method chosen by the sovereign State of Chuuk to select members of their appellate panels will not foreclose the FSM Supreme Court trial division from certifying a question to the Chuuk State Supreme Court Appellate Division where there are other elements in favor of certification. *Stinnett v. Weno*, 6 FSM Intrm. 478, 479-80 (Chk. 1994).

Certification of questions to a state court is appropriate where the decision of the state court on state law may be dispositive, eliminating the need to address the FSM Constitutional issues and where important questions as to the source of authority of one of its political subdivisions to impose a tax and the nature of the exercise of municipal taxing authority are involved. *Stinnett v. Weno*, 6 FSM Intrm. 478, 480 (Chk. 1994).

Considerations of federalism and local self-gov. t lead to the utility of certification. *Stinnett v. Weno*, 6 FSM Intrm. 478, 480 (Chk. 1994).

Certification to a state court does not prevent the FSM Supreme Court from addressing the FSM constitutional issues if that becomes necessary. *Stinnett v. Weno*, 6 FSM Intrm. 478, 480 (Chk. 1994).

Where the validity of a municipal tax ordinance is questioned under the state constitution and right of the taxpayer to a refund it is appropriate for the FSM Supreme Court to certify the question to the appellate division of the state court. *Chuuk Chamber of Commerce v. Weno*, 6 FSM Intrm. 480, 481 (Chk. 1994).

When a nat'l court abstains it simply says that it is not going to decide the issue and allows the parties to file in state or local court; it does not submit or transfer anything to another court. *Gimnang v. Trial Division*, 6 FSM Intrm. 482, 485 (App. 1994).

Unlike abstention, when a nat'l court certifies a state law issue it poses specific questions to the appellate division of the state court. *Gimnang v. Trial Division*, 6 FSM Intrm. 482, 485 (App. 1994).

The choice of whether to abstain from a decision or to certify questions is one that lies wholly within the discretion of the trial court. *Gimnang v. Trial Division*, 6 FSM Intrm. 482, 485 (App. 1994).

Abstention is left to the sound discretion of the court, but the Supreme Court may not abstain for cases involving issues of interpreting the Constitution. *Pohnpei v. MV Hai Hsiang #36 (I)*, 6 FSM Intrm. 594, 603 (Pon. 1994).

Because speedy and final resolution of questions regarding the constitutional roles of the state and nat'l gov'ts will avoid unnecessary conflict and possible jurisdictional tension between the state and nat'l courts, it is proper to stay an order of abstention pending appeal in such cases. *Pohnpei v. MV Hai Hsiang #36 (II)*, 6 FSM Intrm. 604, 605 (Pon. 1994).

Certification is normally granted by the court that will be applying the guidance sought to its decision, not yet made, not by the court that is requested to hear the certified question. *Etscheit v. Adams*, 6 FSM Intrm. 608, 610 (App. 1994).

Section 9. The Chief Justice is the chief administrator of the national judicial system and may appoint an administrative officer who is exempt from civil service. The Chief Justice shall make and publish and may amend rules governing national courts, and by rule may:

Case annotations: The legislative enactment of the Financial Management Act does not conflict with the constitutional provision stating the Chief Justice is the chief administrator of the nat'l judiciary. *Mackenzie v. Tuuth*, 5 FSM Intrm. 78, 80 (Pon. 1991).

The constitutional provision making the Chief Justice the chief administrator of the nat'l judiciary was not intended to establish a separate administration of funds allotted to the judiciary; it is not so specific as to overcome the presumption of the constitutionality of the Financial Management Act as it relates to the judiciary. *Mackenzie v. Tuuth*, 5 FSM Intrm. 78, 82-83 (Pon. 1991).

(a) divide the inferior national courts and the trial division of the Supreme Court into geographical or functional divisions;

(b) assign judges among the divisions of a court and give special assignments to retired Supreme Court justices and judges of state and other courts;

Case annotations: The Chief Justice has the constitutional authority to make rules for the appointment of special judges, and Congress has the constitutional authority to amend them. Congress has provided the Chief Justice with the statutory authority to appoint temporary justices. Where Congress has acted pursuant to its constitutional authority to provide statutory authority to the court, the court need not have exercised its concurrent rule-making authority. *Jano v. King*, 5 FSM Intrm. 326, 331 (App. 1992).

(c) establish rules of procedure and evidence;

Case annotations: Many of the following case annotations regard procedural rules promulgated by the Supreme Court pursuant to the preceding constitutional provision and do not directly interpret the preceding the constitutional provision itself. They are nevertheless included here for reference purposes.

CIVIL PROCEDURE

Except in the most extraordinary circumstances, a court should not accept one party's unsupported representations that another party to the litigation has no further interest in the case. *In re Nahnsen*, 1 FSM Intrm. 97, 100 (Pon. 1982).

FSM Civil Rule 3 confirms that the filing of a complaint is the essential first step for instituting civil litigation. The Rules of Civil Procedure specify no other method for a party to obtain judicial action from the court in civil litigation. *Koike v. Ponape Rock Products Co.*, 1 FSM Intrm. 496, 500 (Pon. 1984).

The court must try to apply the Court Rules of Civil Procedure in a way that is consistent with local customary practice. *Hadley v. Board of Trustees*, 3 FSM Intrm. 14, 16 (Pon. S. Ct. Tr. 1985).

Where purchasers at a judicial sale are not served by summons and complaint pursuant to FSM Civil Rule 3 but receive notice of a motion seeking confirmation of the sale and made by a creditor of the party whose property was sold, and where the purchasers do not object to the motion, confirmation of the sale is effective and binding on the purchasers and is not violative of their rights of due process. *Sets v. Island Hardware*, 3 FSM Intrm. 365, 368 (Pon. 1988).

Procedural matters in litigation before the FSM Supreme Court are governed by the FSM Rules of Civil Procedure and nat. l statutes, rather than by state law. *Salik v. U Corp.*, 4 FSM Intrm. 48, 49-50 (Pon. 1989).

Courts have inherent power, and an obligation, to monitor the conduct of counsel and to enforce compliance with procedural rules. *Leeruw v. Yap*, 4 FSM Intrm. 145, 150 (Yap 1989).

Under Civil Rule 54(c) the court has full authority except in default judgments, to award the party granted judgment any relief to which it is entitled whether that party prayed for it or not. *Billimon v. Chuuk*, 5 FSM Intrm. 130, 137 (Chk. S. Ct. Tr. 1991).

Time requirements set by court rules are more subject to relaxation than are those established by statute. *Charley v. Cornelius*, 5 FSM Intrm. 316, 318 (Kos. S. Ct. Tr. 1992).

When a defendant cites certain defenses, but makes no argument as to how they apply and their application is not self-evident, the court may decline to speculate as to how they apply. *Ponape Constr. Co. v. Pohnpei*, 6 FSM Intrm. 114, 119 (Pon. 1993).

When a party believes that error has occurred in a trial, its remedy is by way of appeal, not by commencing a second action. *Maruwa Shokai Guam, Inc. v. Pyung Hwa* 31, 6 FSM Intrm. 238, 240 (Pon. 1993).

Where a party at trial claims surprise, and the judge offers that party a chance to cure any prejudice this might have caused and they make the tactical choice to decline the opportunity it is a tactical choice the party must live with and is not a basis for reversal. *Nakamura v. Bank of Guam (II)*, 6 FSM Intrm. 345, 351-52 (App. 1994).

A court will not limit its review of the validity of a claim for relief to the arguments presented by the parties where the claim raises public policy concerns, and the defendant is a pro se litigant. *J.C. Tenorio Enterprises, Inc. v. Sado*, 6 FSM Intrm. 430, 432 (Pon. 1994).

When an FSM Rule of Civil Procedure is nearly identical to a U.S. Federal Rule of Civil Procedure and the FSM Rule has not previously been construed by the FSM Supreme Court it may look to the U.S. federal courts for guidance in interpreting the rule. *Senda v. Mid-Pacific Constr. Co.*, 6 FSM Intrm. 440, 444 (App. 1994).

Affidavits

An affidavit unsupported by factual detail is not sufficient to cast doubt on the proposition that a project manager of a joint venture, who is in charge of all activities of a corporate member of the joint venture within a state, is a managing or general agent of that corporation. *Luda v. Maeda Road Constr. Co.*, 2 FSM Intrm. 107, 110 (Pon. 1985).

There are varying degrees of familial relationships and Micronesian legislative bodies have consistently instructed the courts that not every family relationship requires disqualification. An affidavit, stating that an administrative decision-maker is a relative of a party, but not saying whether he is a near relative and failing to set out the degree of relationship, is insufficient to constitute a claim of statutory violation. *Heirs of Mongkeya v. Heirs of Mackwelung*, 3 FSM Intrm. 92, 100 (Kos. S. Ct. Tr. 1987).

An affidavit which merely sets out conclusions or beliefs of the affiant, but shows no specific factual basis therefor, is inadequate. *Ittu v. Charley*, 3 FSM Intrm. 188, 193 (Kos. S. Ct. Tr. 1987).

Consolidation

The moving party bears the burden of persuading the court that consolidation of cases is desirable. *Etscheit v. Mix*, 6 FSM Intrm. 248, 250 (Pon. 1993).

Deposition

Where the court set aside a default judgment upon the payment by defendant to plaintiff of airfare to attend the trial, no modification will be granted to require the defendant to pay the costs of the plaintiff's counsel to go to plaintiff's residence to take his deposition which is being noticed by the plaintiff, especially where there is no showing that plaintiff could not attend the trial, nor will the court decide before trial whether such deposition could be used at trial. *Morris v. Truk*, 3 FSM Intrm. 454, 456-57 (Truk 1988).

Where plaintiff initially appeared for deposition and thereafter missed several continued dates within a two week time span because of funerals at which he was required to officiate, the failure to appear on the rescheduled dates was substantially justified so as to make sanctions under FSM Civil Rule 37(d) inappropriate. *Nahnken of Nett v. United States (II)*, 6 FSM Intrm. 417, 419-20 (Pon. 1994).

Ordinarily the court will not grant motions for protective orders to substitute interrogatories for depositions in view of the recognized value and effectiveness of oral over written examinations. *Nahnken of Nett v. United States (II)*, 6 FSM Intrm. 417, 422 (Pon. 1994).

A defendant is entitled to examine a plaintiff in the jurisdiction where the plaintiff has chosen to file the lawsuit. A court may grant an exception to the rule requiring plaintiffs to submit to depositions in the jurisdiction where the suit is pending when a plaintiff makes a good faith application based on hardship. *McGillivray v. Bank of the FSM (II)*, 6 FSM Intrm. 486, 488 (Pon. 1994).

Discovery

It is normally for the trial court to fashion remedies and sanctions for failure of a party to comply with discovery requirements. The exercise of the trial court's discretion should not be disturbed by an appellate court absent a showing that the trial court's action has unfairly resulted in substantial hardship and prejudice to a party. *Engichy v. FSM*, 1 FSM Intrm. 532, 558 (App. 1984).

The burden of showing whether exceptional circumstances exist within the meaning of FSM Criminal Rule 15 is upon the defendant. To obtain a court order for taking of a deposition, the defendant must show that the witness is unavailable to attend the trial, that the testimony of the witness would be material and that such testimony would be in the interest of justice. *Wolfe v. FSM*, 2 FSM Intrm. 115, 122 (App. 1985).

Forced disclosure of arrangements for payment of attorney's fees intrudes, in some degree, upon the attorney-client relationship and can be an "annoyance" within the meaning of the FSM Civil Rule 26(c) provisions concerning protective orders. *Mailo v. Twum-Barimah*, 3 FSM Intrm. 179, 181 (Pon. 1987).

Unless the questioning party is able to show some basis for believing there may be a relationship between an attorney's fee and the subject matter of the pending action, objections to efforts to discover the attorney's fee arrangement may be upheld. *Mailo v. Twum-Barimah*, 3 FSM Intrm. 179, 181 (Pon. 1987).

Although Kosrae Evidence Rule 408 does not require the exclusion of factual evidence "otherwise discoverable" simply because it was presented during compromise negotiations, a statement made in a letter seeking to settle a dispute, which statement is clearly connected to and part of the settlement offer, is not otherwise discoverable. *Nena v. Kosrae*, 3 FSM Intrm. 502, 507 (Kos. S. Ct. Tr. 1988).

A request for admission as to the genuineness of a letter, excludable as evidence under Kosrae Evidence Rule 408 because it relates to settlement negotiations, is reasonably calculated to lead to evidence which could be admissible, and an objecting party may not obtain a protective order pursuant to Kosrae Civil Rule 26 to avoid responding to the request. *Nena v. Kosrae*, 3 FSM Intrm. 502, 507 (Kos. S. Ct. Tr. 1988).

It is normally for the trial court to fashion remedies and sanctions for failure of a party to comply with discovery requirements and the exercise of the trial court's discretion should not be disturbed by an appellate court absent a showing that the trial court's action has unfairly resulted in substantial hardship and prejudice to a party. *Bernardo v. FSM*, 4 FSM Intrm. 310, 313 (App. 1990).

An attorney who fails to make timely requests for enlargement of time to complete discovery beyond the deadline set by court order; who has someone other than the client sign answers to interrogatories; and who fails to serve the answers properly on opposing counsel while filing a proof of service with the court is sanctionable on the court's own motion. *Paul v. Hedson*, 6 FSM Intrm. 146, 148 (Pon. 1993).

The fashioning of remedies and sanctions for a party's failure to comply with discovery requirements is a matter within the trial court's discretion and should not be disturbed by an appellate court absent a showing that the trial court's action has unfairly resulted in substantial hardship and prejudice to a party. *Nakamura v. Bank of Guam (II)*, 6 FSM Intrm. 345, 349 (App. 1994).

While a defendant's motion to strike portions of a complaint as immaterial or impertinent is untimely if not filed before the defendant's answer a court, in its discretion, may still consider it because the court may, on its own initiative at any time, order stricken from any pleading

any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. *McGillivray v. Bank of the FSM* (I), 6 FSM Intrm. 404, 406 (Pon. 1994).

Because methods of discovery may be used in any sequence, and courts rarely order that a deposition not be taken at all and where there has been inexcusable delay in responding to interrogatories the court will not issue a protective order barring the taking of a deposition until after less burdensome means have been tried. Instead the court will set deadlines for compliance with the outstanding discovery requests. *McGillivray v. Bank of the FSM* (I), 6 FSM Intrm. 404, 408 (Pon. 1994).

Official duties or employment obligations do not of themselves constitute a valid basis for a party to obtain a blanket protective order against being deposed in a lawsuit. *Nahnken of Nett v. United States* (II), 6 FSM Intrm. 417, 422 (Pon. 1994).

Absent a showing of any of the factors listed in FSM Civil Rule 26(c), the court will not intrude at the deposition stage at the insistence of a party to declare what is relevant information that may be sought. *Nahnken of Nett v. United States* (II), 6 FSM Intrm. 417, 422 (Pon. 1994).

A trial judge has considerable discretion on the question of relevancy of discovery materials and his order should not be disturbed unless there has been an abuse of discretion or unless the action taken is improvident and affects the substantial rights of the parties. *McGillivray v. Bank of the FSM* (II), 6 FSM Intrm. 486, 489 (Pon. 1994).

Under FSM Civil Rule 26 evidence may be discovered even if it would inadmissible on relevancy grounds at trial, as long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence. However, the discovery of material to be used for impeachment purposes is generally not permissible unless the impeaching material is also relevant or material to the issues in the case. *McGillivray v. Bank of the FSM* (II), 6 FSM Intrm. 486, 490 (Pon. 1994).

Dismissal

Customary settlements do not require court dismissal of criminal proceedings if no exceptional circumstances are shown. *FSM v. Mudong*, 1 FSM Intrm. 135, 140 (Pon. 1982).

After prosecution has been initiated, the court may dismiss litigation if there is no probable cause to believe that a crime has been committed. *FSM v. Mudong*, 1 FSM Intrm. 135, 140 (Pon. 1982).

The prosecutor does not have authority to dismiss an existing prosecution on the basis of customary law but the court does have power to respond to a prosecutorial suggestion for dismissal because of customary considerations. *FSM v. Mudong*, 1 FSM Intrm. 135, 141 (Pon. 1982).

At common law, repeal of a criminal statute abated all criminal prosecutions which had not reached final disposition in the highest court authorized to review them. *In re Otokichy*, 1 FSM Intrm. 183, 189-90 n.4 (App. 1982).

Where there are significant issues of fact in a civil action, a motion to dismiss must be denied. *Lonno v. Trust Territory (III)*, 1 FSM Intrm. 279, 281 (Kos. 1983).

Where the plaintiff has been given reasonable notice of his trial and he and his attorney failed to appear to adduce evidence and prosecute the claim, his inactivity amounts to abandonment of his claim and it is subject to dismissal under FSM Civil Rule 41(b). *Etpison v. Perman*, 1 FSM Intrm. 405, 414 (Pon. 1984).

A motion under FSM Civil Rule 12(b) to dismiss for failure to state a claim upon which relief may be granted maybe upheld only if it appears to a certainty that no relief could be granted under any state of facts which could be proved in support of the claim. *Mailo v. Twum-Barimah*, 2 FSM Intrm. 265, 267 (Pon. 1986).

Civil proceedings typically can be concluded by the parties without court action or approval of any kind pursuant to Rule 41 of the FSM Supreme Court's Rules of Civil Procedure. *FSM v. Ocean Pearl*, 3 FSM Intrm. 87, 91 (Pon. 1987).

Although the prosecution has broad discretion in determining whether to initiate litigation, once that litigation is initiated in the FSM Supreme Court, the court also has responsibility for assuring that actions thereafter taken are in the public interest. Thus, criminal litigation can be dismissed only by obtaining leave of court. *FSM v. Ocean Pearl*, 3 FSM Intrm. 87, 91 (Pon. 1987).

Although it is reasonable to analyze settlement agreements in civil actions on the basis of contract principles alone, important public policy considerations attach to the settlement of criminal cases. *FSM v. Ocean Pearl*, 3 FSM Intrm. 87, 91 (Pon. 1987).

Dismissal of a claim for failure of the plaintiff to prosecute normally operates as an adjudication on the merits. *Ittu v. Charley*, 3 FSM Intrm. 188, 191 (Kos. S. Ct. Tr. 1987).

Where there is dismissal of an action, even though the dismissal is voluntary and without prejudice, the defendant is the prevailing party within the meaning of Rule 54(d) which provides for awards of costs to the prevailing party. *Mailo v. Twum-Barimah*, 3 FSM Intrm. 411, 413 (Pon. 1988).

When a party incurs considerable expense in preparation for trial and the other party seeks for dismissal, the court may specify the conditions under which dismissal will be allowed, but dismissal need not be accepted by a party who finds the conditions too onerous. *Mailo v. Twum-Barimah*, 3 FSM Intrm. 411, 414 (Pon. 1988).

Where a plaintiff seeks dismissal of her own complaint without prejudice under Rule 41(a)(2), it is generally thought that the court should at least require the plaintiff to pay the defendant's costs of the litigation as a condition to such dismissal and these costs may include travel expenses of plaintiff's attorney. *Mailo v. Twum-Barimah*, 3 FSM Intrm. 411, 415 (Pon. 1988).

A motion to dismiss for failure to state a claim for which relief can be granted brought under FSM Civil Rule 12(b)(6) will be granted only if it appears to a certainty that no relief can be granted under any state of facts which could be proven in support of the claim. In making its determination the court is to assume the allegations in the complaint to be true and give the

plaintiff the benefit of all reasonable inferences. FSM 5 Intrm. 389-398Jano v. King, 5 FSM Intrm. 388, 390 (Pon. 1992).

A motion under FSM Civil Rule 12(b) to dismiss for failure to state a claim may be granted only if it appears to a certainty that no relief could be granted under any state of facts which could be proven in support. Faw v. FSM, 6 FSM Intrm. 33, 36 (Yap 1993).

Where a court has dismissed a criminal case for lack of jurisdiction over the crimes for which the defendant was charged, the dismissal does not act as a discharge so as to preclude extradition on the charge. "Discharge" requires both personal and subject matter jurisdiction. In re Extradition of Jano, 6 FSM Intrm. 93, 107-08 (App. 1993).

Dismissal of actions for attorney misconduct is generally disfavored in light of the judicial preference for adjudication on the merits whenever possible so as to allow parties a reasonable opportunity to present their claims and defenses. Paul v. Hedson, 6 FSM Intrm. 146, 147 (Pon. 1993).

A motion to dismiss, unlike a pleading, must state with particularity the grounds for dismissal, be made before pleading, and be argued with clarity and relevance. In re Parcel No. 046-A-01, 6 FSM Intrm. 149, 152 (Pon. 1993).

The purpose of the rules addressing process and service of process in civil cases is to assure that a defendant receives sufficient notice of all causes of action that are filed against him and thus has a fair and adequate opportunity to defend. Where a plaintiff fails to properly serve a defendant, the court does not have jurisdiction over that defendant, and the case may not proceed, but will be dismissed without prejudice. Berman v. Santos, 6 FSM Intrm. 532, 534 (Pon. 1994).

Under the common law the death of a criminal appellant pending appeal abates the proceedings ab initio. not only the appeal but all proceedings from the inception of the prosecution, thus requiring the appellate court to dismiss the appeal, and remand the case to the trial court to vacate the judgment and dismiss the information. Palik v. Kosrae, 6 FSM Intrm. 362, 364 (App. 1994).

When a criminal defendant dies while his conviction is on appeal and where there was no discrete victim and where there are no collateral matters impinging upon the case requiring further court proceedings it is appropriate under the facts of the case to abate the proceedings ab initio and vacate the conviction. Palik v. Kosrae, 6 FSM Intrm. 362, 364 (App. 1994).

A motion to dismiss is not to be granted unless it appears to a certainty that the non-moving party is entitled to no relief under any state of facts which could be proved in support of the claim, and if on the motion to dismiss matters outside the pleading are presented to and not excluded by the court, the motion shall then be treated as one for summary judgment. FSM 6 Intrm. 365-393Etscheit v. Adams, 6 FSM Intrm. 365, 386 (Pon. 1994).

Filings

Telecommunication facsimiles are an unacceptable means of filing with the FSM Supreme Court. In re Marquez, 5 FSM Intrm. 381, 383 n.1 (Pon. 1992).

Fax transmissions cannot be received for filing. *Maruwa Shokai Guam, Inc. v. Pyung Hwa* 31, 6 FSM Intrm. 238, 240 (Pon. 1993).

Trial courts have considerable discretion in ruling on motions for extension of filing deadlines. A court which has already extended a filing deadline does not abuse its discretion by refusing to grant successive extensions. *McGillivray v. Bank of the FSM (II)*, 6 FSM Intrm. 486, 488 (Pon. 1994).

Frivolous Actions

Although it is ultimately proved that plaintiff has no solid claim or theory against a defendant, plaintiff's action against that defendant is not vexatious or frivolous where 1) plaintiff reasonably believed at the outset of litigation that defendant might be liable, 2) a considerable amount of discovery was required to establish that defendant was not liable, 3) plaintiff did not stubbornly insist on defendant's liability in the face of defendant's motion for summary judgment, and 4) other defendants would presumably have named defendant in the case in any event, so that defendant would have incurred substantial attorney's fees regardless of plaintiff's actions. *Semens v. Continental Air Lines, Inc. (II)*, 2 FSM Intrm. 200, 209 (Pon. 1986).

Injunctions

FSM Civil Rule 65 providing for issuance of temporary restraining orders and preliminary injunctions pending final decisions by the court, is drawn from rule 65 of the United States Federal Rules of Civil Procedure, so decisions of the U.S. courts under that rule are a legitimate source of guidance as to the meaning of FSM Civil Rule 65. *Ponape Transfer & Storage v. Pohnpei State Public Lands Auth.*, 2 FSM Intrm. 272, 275 (Pon. 1986).

A prerequisite for granting of injunctive relief is that the party seeking protection must be faced with the threat of irreparable harm before conclusion of the litigation unless the injunction is granted, and if money damages or other relief upon conclusion of the litigation will fully compensate for the threatened interim action, then the preliminary injunction should be denied. *Ponape Transfer & Storage v. Pohnpei State Public Lands Auth.*, 2 FSM Intrm. 272, 276 (Pon. 1986).

In considering motions for temporary restraining order or for preliminary injunction, courts weigh the possibility of irreparable injury to the plaintiff, the balance of possible injuries between the parties, the movant's possibility of success on the merits, and the impact of any requested action upon the public interest. *Ponape Transfer & Storage v. Pohnpei State Public Lands Auth.*, 2 FSM Intrm. 272, 276-77 (Pon. 1986).

The fact that the party moving for preliminary injunction relief does not appear more likely than not to succeed on the merits is a factor weighing against granting of such relief but it is only one of four factors and is not necessarily determinative when the other factors point toward such relief. *Ponape Transfer & Storage v. Pohnpei State Public Lands Auth.*, 2 FSM Intrm. 272, 278 (Pon. 1986).

The trial court is required to exercise broad discretion and weigh carefully the interests of both sides in order to arrive at a fair and equitable result. *Ponape Transfer & Storage v. Federated Shipping Co.*, 3 FSM Intrm. 174, 177 (Pon. 1987).

Courts generally consider the likelihood of success on the merits of the party seeking injunctive relief, the possibility of irreparable injury as well as the balance of possible injuries or inconvenience to the parties which would flow from granting or denying the relief, and any impact upon the public interest. *Ponape Transfer & Storage v. Federated Shipping Co.*, 3 FSM Intrm. 174, 177 (Pon. 1987).

It is not appropriate to abstain from deciding a claim for injunctive relief where it is undisputed that the court has jurisdiction and where the interests of time can be of pressing importance. *Gimnang v. Yap*, 4 FSM Intrm. 212, 214 (Yap 1990).

Earthmoving regulations themselves represent a governmental determination as to the public interest, and the clear violation of such regulations may therefore be enjoined without a separate court assessment of the public interest and balancing of hardships between the parties. *Damarlane v. Pohnpei Transp. Auth.*, 4 FSM Intrm. 347, 349 (Pon. 1990).

Right to appeal an interlocutory order which affects an injunction is an exception to general rule that permits appeals only from final decisions. The exception reflects the importance of prompt action when injunctions are involved since the threat of irreparable harm is a prerequisite to injunctive relief. *Damarlane v. Pohnpei Transp. Auth.*, 5 FSM Intrm. 332, 334 (App. 1992).

To obtain a temporary restraining order there must be a clear showing that immediate and irreparable injury or loss or damage would occur otherwise. An injury is not irreparable if there is an adequate alternative remedy. *Kony v. Mori*, 6 FSM Intrm. 28, 29 (Chk. 1993).

A court may modify an injunction to preserve the status quo during the pendency of an appeal. *Ponape Enterprises Co. v. Luzama*, 6 FSM Intrm. 274, 276-77 (Pon. 1993).

In exercising its broad discretion in considering whether to grant a preliminary injunction the court looks to four factors: 1) the likelihood of success on the merits of the party seeking injunctive relief, 2) the possibility of irreparable injury to the moving party, 3) the balance of possible injuries or inconvenience to the parties which would flow from granting or denying the relief, and 4) any impact on the public interest. The object of a preliminary injunction is to preserve the status quo pending the litigation on the merits. *Ponape Enterprises Co. v. Bergen*, 6 FSM Intrm. 286, 288 (Pon. 1993).

A court may grant a preliminary injunction even if the moving party is not more likely than not to prevail, as long as the movant's position appears sufficiently sound to raise serious, nonfrivolous issues. *Ponape Enterprises Co. v. Bergen*, 6 FSM Intrm. 286, 289 (Pon. 1993).

An injunction allowing defendants in a trespass action to remain on the land, harvest their crops, but preventing them from destroying any trees or expanding their cultivations or further entrenching their positions will prevent irreparable harm to the plaintiffs, balance the interests of the parties, and serve the public interest by preserving the status quo while the litigation is pending. *Ponape Enterprises Co. v. Bergen*, 6 FSM Intrm. 286, 289-90 (Pon. 1993).

Where there is little likelihood of success on the merits, where economic loss does not represent irreparable harm, where balance of interests weighs against plaintiff, and where public interest favors regulation of alcohol sales, no preliminary injunctive relief will be

granted plaintiff ordering defendant state grant it an alcoholic beverage license which would not preserve the status quo pending litigation. *Simon v. Pohnpei*, 6 FSM Intrm. 314, 316-18 (Pon. 1994).

Where a stipulated preliminary injunction is void because of the judge's disqualification and because of the stipulated dismissal of the court case in which it was issued, factual questions must be resolved before deciding whether it is enforceable as an independent contract. *Etscheit v. Adams*, 6 FSM Intrm. 365, 391-92 (Pon. 1994).

Whether the lower court erred by issuing a preliminary injunction that did not require the return of funds obtained in violation of a TRO involves a trial court's exercise of discretion and is reviewed using an abuse of discretion standard. *Onopwi v. Aizawa*, 6 FSM Intrm. 537, 539 (Chk. S. Ct. App. 1994).

Injunctive relief is an equitable remedy for which a court must use a balance-of-hardship test with a flexible interplay among four factors. the likelihood of irreparable harm to plaintiff without an injunction; likelihood of harm to defendant with an injunction; plaintiff's likelihood of success on the merits; and the public interest. Striking a fair balance between two more important factors, likelihood of harm to competing sides, is largely a matter of the facts of each situation and is thus a matter peculiarly for the discretion of the trial judge. *Onopwi v. Aizawa*, 6 FSM Intrm. 537, 539 (Chk. S. Ct. App. 1994).

Intervention

Rules 19(a) and 24(a) of FSM Rules of Civil Procedure refer to similar "interests." Decisions under Rule 19(a) provide additional understanding of the meaning of "interest" in Rule 24(a). *Wainit v. Truk (I)*, 2 FSM Intrm. 81, 84 (Truk 1985).

The interest of the speaker of a state legislature in upholding validity of laws enacted by that legislature, and in obtaining funds for the legislature pursuant to the tax legislation challenged in litigation, is not the kind of interest which will support a right to intervene in the litigation pursuant to FSM Civil Rule 24(a) in order to enforce the legislation through cross-claims and counterclaims. *Wainit v. Truk (I)*, 2 FSM Intrm. 81, 85 (Truk 1985).

Under FSM Civil Rule 24(b), the interest needed for permissive intervention is not as great as that needed under FSM Civil Rule 24(a). *Wainit v. Truk (I)*, 2 FSM Intrm. 81, 85 (Truk 1985).

Where the speaker of a legislature seeks to intervene in order to deny the plaintiff's claim that legislation enacted by the legislature is invalid, his proposed denial, with the complaint, presents a single or common question of law within the meaning of FSM Civil Rule 24(b), and the intervention may be permitted so long it will not cause undue delay, or prejudice adjudication of the rights of the original parties. *Wainit v. Truk (I)*, 2 FSM Intrm. 81, 85 (Truk 1985).

Where one seeking to intervene under FSM Civil Rule 24(b) would not raise new and difficult issues through a proposed answer but would do so through proposed cross-claims and counterclaims, the court may properly limit the participation of the intervenor to defense against the plaintiff's claims. *Wainit v. Truk (I)*, 2 FSM Intrm. 81, 86 (Truk 1985).

Where a party on appeal challenges the intervention in the appeal of another party, and the issue on the merits is decided in favor of the challenging party, no harm is visited on the challenging party by allowing the intervention, and the court is not required to rule on the propriety of that intervention. *Innocenti v. Wainit*, 2 FSM Intrm. 173, 180 (App. 1986).

Either the husband or the wife may prosecute or defend a civil action in which one or both are parties, provided that he or she has informed his or her spouse of the representation. *O'Sonis v. Truk*, 3 FSM Intrm. 516, 518 (Truk S. Ct. Tr. 1988).

Joinder

It is appropriate to proceed separately in cases involving multiple juvenile defendants. *FSM v. Albert*, 1 FSM Intrm. 14, 17 (Pon. 1981).

An FSM Rule of Civil Procedure motion for misjoinder should not be granted where the claims against the joined parties arose out of the same occurrence and there are common questions of law and fact. *FSM Civ. R. 21. Manahane v. FSM*, 1 FSM Intrm. 161, 164 (Pon. 1982).

If severance is denied, the defendants' out of court statements ought to be redacted to eliminate in each references to other codefendants. Failure to do so may result in reversal of convictions in the interests of justice. After redaction, no prejudice will occur if the statements then give no reference to any codefendant. Redaction can normally be accomplished by the parties. Thus the court will not view the statement until after redaction. *Hartman v. FSM*, 6 FSM Intrm. 293, 301-02 & n.12 (App. 1993).

When more than two years had elapsed in pending litigation before filing of a motion for leave to file third party complaint under FSM Civil Rule 14(a), when a pre-trial order closing discovery had been filed and the existing parties had declared themselves ready for trial, when filing of the complaint would introduce new issues, when no reason for delay in filing the motion has been given, and when the opposing party reasonably objects on grounds that the delay will prejudice that party's rights, the motion to file a third party complaint should be denied. *Salik v. U Corp. (II)*, 3 FSM Intrm. 408, 410 (Pon. 1988).

A motion for joinder under FSM Civil Rule 19 will be denied where it appears that complete relief between the existing parties could be granted without the joinder and where there is no showing that the party sought to be joined claims an interest relating to the subject of the action. *Salik v. U Corp. (II)*, 3 FSM Intrm. 408, 410 (Pon. 1988).

Although there is a danger of prejudice in cases where a co-defendant's inculpatory statement is admitted into evidence, because the court is hesitant to limit the broad discretion afforded the trial judge by FSM Criminal Rule 14, and because many problems can be eliminated by redaction of the statement, the court will not adopt a perse rule of severance at this time. *Hartman v. FSM*, 5 FSM Intrm. 224, 230 (App. 1991).

A motion to add counterclaims and join new defendants will be denied where the new defendants and counterclaims are virtually identical to those in a separate pending action before the court and the moving party has failed to show that the relief sought by the opposing party is the same as that sought in an earlier decided case between the same parties. *Nahnken of Nett v. United States (II)*, 6 FSM Intrm. 417, 421-22 (Pon. 1994).

In some cases failure to join an indispensable party may subject a judgment to collateral attack, but failure to join a necessary party will not. A necessary party is one who has an identifiable interest in the action and should normally be made a party to the lawsuit, but whose interests are separable from the rest of the parties or whose presence cannot be obtained; whereas an indispensable party is one to whom any judgment, if effective, would necessarily affect his interest, or would, if his interest is eliminated, constitute unreasonable, inequitable, or impractical relief. *Nahnken of Nett v. United States (III)*, 6 FSM Intrm. 508, 517 (Pon. 1994).

The burden of joining absent parties rests with the party asserting their indispensability. *Nahnken of Nett v. United States (III)*, 6 FSM Intrm. 508, 518 (Pon. 1994).

Juvenile

The Nat'l Criminal Code places in the FSM Supreme Court exclusive jurisdiction over allegations of violations of the Code. No exception to that jurisdiction is provided for juveniles, so charges of crimes leveled against juveniles are governed by the Nat. l Criminal Code. *FSM v. Albert*, 1 FSM Intrm. 14, 15 (Pon. 1981).

To dismiss litigation against juvenile defendants for lack of jurisdiction would be contrary to the Nat. l Criminal Code despite the fact that Code makes no reference to charges against juveniles or to the Juvenile Code. *FSM v. Albert*, 1 FSM Intrm. 14, 15 (Pon. 1981).

The section of the Juvenile Code mandating that courts adopt flexible procedures in juvenile cases remains in effect; neither the Nat. l Criminal Code nor any other provision of law enacted by the Congress is at odds with it. 12 FSMC 1101. *FSM v. Albert*, 1 FSM Intrm. 14, 17 (Pon. 1981).

It is appropriate to proceed separately in cases involving multiple juvenile defendants. *FSM v. Albert*, 1 FSM Intrm. 14, 17 (Pon. 1981).

In the absence of any explanation in the legislative history or from the gov. t to justify a different interpretation, the only apparent reason for the deletion of the words "alleged to be found delinquent" from the Model Penal Code definition of official detention is that Congress wished to exclude detained juveniles from the nat. l prohibitions against escape. 11 FSMC 505(1). *In re Cantero*, 3 FSM Intrm. 481, 484 (Pon. 1988).

Juveniles alleged or found to be delinquent children are not under "official detention" within the meaning of 11 FSMC 505(1). *In re Cantero*, 3 FSM Intrm. 481, 484 (Pon. 1988).

Motions

Failure to file a memorandum in opposition to a motion is deemed a consent to the motion. *Actouka v. Etpison*, 1 FSM Intrm. 275, 276 (Pon. 1983).

Failure to file a memorandum of points and authorities with a motion constitutes a waiver of the motion. *Actouka v. Etpison*, 1 FSM Intrm. 275, 277 (Pon. 1983).

The failure of the nonmoving party's memorandum to set forth points and authorities constitutes a consent to the granting of the motion. FSM Civ. R. 6(d). *Enlet v. Truk*, 3 FSM Intrm. 459, 461 (Truk 1988).

A memorandum of points and authorities filed by a party opposing a motion must set forth the law upon which the party relies and his theory as to the application of that law to the facts of the case. *Enlet v. Truk*, 3 FSM Intrm. 459, 462 (Truk 1988).

Although failure to oppose a motion operates as a consent by opposing party to the granting of the motion, the court is not bound to grant motion simply because it is unopposed. For a motion to be granted, even if unopposed, it must be well grounded in law and fact, and not interposed for delay. *In re Parcel No. 046-A-01*, 6 FSM Intrm. 149, 153 (Pon. 1993).

Under the Rules of Civil Procedure a party opposing a motion has ten days to file a response. Six days may be added if service was by mail. The time period does not commence running from date of notice for hearing on the motion, but from the date of the motion itself. *Maruwa Shokai Guam, Inc. v. Pyung Hwa* 31, 6 FSM Intrm. 238, 240 (Pon. 1993).

Where there is no timely opposition filed after the service of a motion, the opposing party is considered to have consented to the motion. *Maruwa Shokai Guam, Inc. v. Pyung Hwa* 31, 6 FSM Intrm. 238, 240 (Pon. 1993).

While it is true that failure to file a timely opposition is deemed a consent to the granting of the motion, FSM Civ. R. 6(d), proper grounds for the granting of the motion must still exist before a court may grant it. *Senda v. Mid-Pacific Constr. Co.*, 6 FSM Intrm. 440, 442 (App. 1994).

Motions may be served on other parties prior to being filed. *Setik v. FSM*, 6 FSM Intrm. 446, 448 (Chk. 1994).

A movant's inaction is insufficient to notify the court (or other parties) that a motion has been dropped. Only a notice of withdrawal of motion will do that. Otherwise a motion may be decided without hearing and without further request. *Setik v. FSM*, 6 FSM Intrm. 446, 448 (Chk. 1994).

A filed stipulation to extend time to respond to a motion will be treated as a motion for an enlargement of time, but will be denied when filed after the time respond has expired and no excusable neglect has been shown. *Elwise v. Bonneville Constr. Co.*, 6 FSM Intrm. 570, 572 (Pon. 1994).

A motion filed in a related criminal case for the release of a vessel, which is only a defendant in a civil forfeiture action, will be denied as not properly before the court. *FSM v. Wu Ya Si*, 6 FSM Intrm. 573, 574 (Pon. 1994).

A court may grant a motion nunc pro tunc to supply a record of an action previously done but omitted from the record through inadvertence or mistake, to have effect as of the former date. A motion nunc pro tunc cannot be used to supply an action omitted by the court. *Western Sales Trading Co. v. Ponape Federation of Coop. Ass'ns*, 6 FSM Intrm. 592, 593-94 (Pon. 1994).

Although failure to timely file opposition to a motion is deemed a consent to the motion, proper grounds for the granting of the motion must still exist before the court may grant it. *Bank of Guam v. Nukuto*, 6 FSM Intrm. 615, 616 (Chk. 1994).

Pleadings

When issues which were not raised in the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. *Edwin v. Kosrae*, 4 FSM Intrm. 292, 301 (Kos. S. Ct. Tr. 1990).

The pleading requirements of FSM Civil Rule 8(a) are to be interpreted liberally, and a complaint which states the grounds of jurisdiction and alleges facts sufficient to put the defendant on notice as to the nature and basis of the claim being made sufficiently complies with the rule. *Faw v. FSM*, 6 FSM Intrm. 33, 36-37 (Yap 1993).

Where a plaintiff files an amended complaint without leave of court and no motion for leave was ever filed the court may order the amended complaint stricken from the record. An entry of default based on such stricken amended complaint will be set aside. *Berman v. FSM Supreme Court*, 6 FSM Intrm. 109, 112-13 (Pon. 1993).

A party may not amend its pleadings after trial to include another issue unless it was tried by the express or implied consent of the parties. *Ponape Constr. Co. v. Pohnpei*, 6 FSM Intrm. 114, 120 (Pon. 1993).

When an issue not raised in the pleadings is raised at trial without objection by either party and evidence is admitted on the matter, the issue is to be considered tried by implied consent per FSM Civil Rule 15(b). *Wito Clan v. United Church of Christ*, 6 FSM Intrm. 129, 133 (App. 1993).

Where a wife is not a party to an action the court may strike references to harm to the wife from the complaint because the wife is not a party to the litigation and therefore damages for harm to her cannot be obtained as part of the action. It would be unfair to allow the plaintiff to seek damages for harms to his wife while maintaining that she is a non-party who is not subject to the pleading, discovery, and evidentiary rules that a party is bound by. *McGillivray v. Bank of the FSM (I)*, 6 FSM Intrm. 404, 407 (Pon. 1994).

Rule 9(b) requires that in allegations of fraud that the circumstances constituting the fraud shall be stated with particularity. The extent of the particularity is guided by FSM Civil Rule 8(a) which requires a short and plain statement of the claim. *Pohnpei v. Kailis*, 6 FSM Intrm. 460, 462 (Pon. 1994).

The rules allow for notice pleading and require a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief to which he deems himself entitled. The pleadings must give the opposing party fair notice of the nature and grounds for the claim, and a general indication of the type of litigation involved. *Apweteko v. Paneria*, 6 FSM Intrm. 554, 557 (Chk. S. Ct. App. 1994).

Pleadings may be amended as a matter of right anytime before a responsive pleading is served, with written consent of the adverse party, or by order of court, which should be liberally granted. Once the pleading is complete and all amendments have been filed the

matters raised by the pleadings normally form the issues to be determined at trial. *Apweteko v. Paneria*, 6 FSM Intrm. 554, 557 (Chk. S. Ct. App. 1994).

When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and any party may make a motion to amended the pleadings to conform to the evidence and issues tried by such consent. *Apweteko v. Paneria*, 6 FSM Intrm. 554, 557 (Chk. S. Ct. App. 1994).

If an unpled theory of recovery is fully tried by consent of the parties, the trial court may base its decision on that theory and may deem the pleadings amended accordingly, even though the theory was not set forth in the pleading or the pretrial order. *Apweteko v. Paneria*, 6 FSM Intrm. 554, 557 (Chk. S. Ct. App. 1994).

If no understanding by the parties appears in the record that evidence admitted at trial was aimed at an unpleaded issue, it is an abuse of discretion for a court to base its decision on issues not pled. An adverse party must have sufficient notice to properly prepare to oppose the claim. *Apweteko v. Paneria*, 6 FSM Intrm. 554, 557 (Chk. S. Ct. App. 1994).

A court commits reversible error by basing its decision on a theory of recovery that was not raised by the pleadings nor tried by consent or understanding of the parties. *Apweteko v. Paneria*, 6 FSM Intrm. 554, 558 (Chk. S. Ct. App. 1994).

A court has discretion to determine whether it is just to allow a party to serve additional, supplemental pleadings upon an opposing party based on happenings since the date of the pleading sought to be supplemented. *Damarlane v. Pohnpei State Court*, 6 FSM Intrm. 561, 563 (Pon. 1994).

Where a party has obtained all the relief he originally requested it is not just for a court to allow that party to supplement his pleadings to seek additional relief because he is dissatisfied with the relief he received. *Damarlane v. Pohnpei State Court*, 6 FSM Intrm. 561, 563 (Pon. 1994).

Res Judicata and Collateral Estoppel

Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in the that action. *Ittu v. Charley*, 3 FSM Intrm. 188, 190 (Kos. S. Ct. Tr. 1987).

Under common law *res judicata* principles, an order of dismissal with prejudice bars reassertion of the dismissed claim at a later date. *Ittu v. Charley*, 3 FSM Intrm. 188, 191 (Kos. S. Ct. Tr. 1987).

A judgment of a court having jurisdiction of the parties and of the subject matter operates as *res judicata*, in the absence of fraud or collusion, even if obtained upon a default. *Ittu v. Charley*, 3 FSM Intrm. 188, 191 (Kos. S. Ct. Tr. 1987).

The need for finality of judgment, which is the inspiration of the *res judicata* doctrine, exists within the FSM. *Ittu v. Charley*, 3 FSM Intrm. 188, 191 (Kos. S. Ct. Tr. 1987).

A FSM Supreme Court decision applying state law in a case before it is final and res judicata; but if in a subsequent case a state court decides the same issue differently, the state decision in that subsequent case is controlling precedent and the nat. l courts should apply the state court rule in future cases. *Edwards v. Pohnpei*, 3 FSM Intrm. 350, 360 n.22 (Pon. 1988).

Judgment entered pursuant to compromise and settlement is treated as a judgment on the merits barring any other action for the same cause. *Truk v. Robi*, 3 FSM Intrm. 556, 564 (Truk S. Ct. App. 1988).

A fundamental principle of the common law, traditionally referred to in common law jurisdictions as res judicata, is that once judgment has been issued and the appeal period has expired or the decision is affirmed on appeal, the parties are precluded from challenging that judgment or from litigating any issues that were or could have been raised in that action. *United Church of Christ v. Hamo*, 4 FSM Intrm. 95, 106 (App. 1989).

The FSM Supreme Court normally will refuse to review the correctness of an earlier Trust Territory High Court judgment, which has become final through affirmance on appeal or through lack of a timely appeal, and claims that the earlier judgment is ill-reasoned, unfair or even beyond the jurisdiction of the High Court typically will not be sufficient to escape the doctrine of res judicata. *United Church of Christ v. Hamo*, 4 FSM Intrm. 95, 107 (App. 1989).

The determination of jurisdiction itself normally qualifies for protection under the common law principle of res judicata, requiring a second court to presume that the court which issued the judgment did properly exercise its own jurisdiction, but plain usurpation of power by a court which wrongfully extends its jurisdiction beyond the scope of its authority, is outside of the doctrine and does not qualify for res judicata protection. *United Church of Christ v. Hamo*, 4 FSM Intrm. 95, 107-08 (App. 1989).

In light of the Trust Territory High Court's insistence on maintaining control over cases within the FSM in disregard of Secretarial Order 3039 and to the exclusion of the new constitutional courts, its characterizations of Joint Rule No. 1 as "simply a memorandum" and of the words "active trial" in Secretarial Order 3039 as merely "administrative guidance," its acceptance of appeals after it was precluded from doing so by Secretarial Order 3039, its decision of appeals after Secretarial Order 3039 was terminated and its continued remand of cases to the High Court trial division for further action even after November 3, 1986, there can be no doubt that for purposes of res judicata analysis, the High Court was a court lacking capacity to make an adequately informed determination of a question concerning its own jurisdiction. *United Church of Christ v. Hamo*, 4 FSM Intrm. 95, 118 (App. 1989).

Although final judgment in a case has been entered by the Trust Territory High Court, because any effort by a party to have the High Court consider its own jurisdiction would have been futile, it is procedurally fair to later afford the party an opportunity to question that jurisdiction. *United Church of Christ v. Hamo*, 4 FSM Intrm. 95, 118-19 (App. 1989).

Where TT High Court's exercise of jurisdiction was a manifest abuse of authority, allowing judgment of High Court to stand would undermine decision-making guidelines and policies reflected in judicial guidance clauses of nat. l and state constitutions and would thwart efforts of framers of Constitution to reallocate court jurisdiction within FSM by giving local

decision-makers control over disputes concerning ownership of land. *United Church of Christ v. Hamo*, 4 FSM Intrm. 95, 119 (App. 1989).

Decisions regarding *res judicata* and the transitional activities of the TT High Court typically should be made on basis of larger policy considerations rather than equities lying with or against a particular party. *United Church of Christ v. Hamo*, 4 FSM Intrm. 95, 120 (App. 1989).

Actions of TT High Court taken after establishment of functioning constitutional courts in FSM, and without good faith determination after a full and fair hearing as to whether the "active trial" exception permitted retention of the cases, were null and void, even though the parties failed to object, because the High Court was without jurisdiction to act and its conduct constituted usurpation of power. *United Church of Christ v. Hamo*, 4 FSM Intrm. 95, 122 (App. 1989).

A party is precluded from rearguing, under another theory of liability, a claim it has already pursued to a final adjudication. *Berman v. FSM Supreme Court*, 6 FSM Intrm. 109, 112 (Pon. 1993).

The doctrine of merger holds that a plaintiff cannot maintain an action on a claim or part of a claim for which he has already recovered a valid final judgment since the original claim becomes merged in the judgment and thereafter plaintiff's rights are upon the judgment, not the original claim. *Mid-Pacific Constr. Co. v. Semes (II)*, 6 FSM Intrm. 180, 184 & n. 2 (Pon. 1993).

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim under doctrine of collateral estoppel or issue preclusion, but in a judgment entered by confession, consent, or default none of the issues is actually litigated. *Mid-Pacific Constr. Co. v. Semes (II)*, 6 FSM Intrm. 180, 185 & n. 3 (Pon. 1993).

Res judicata does not apply when different land is involved than the previous case and only one of the parties is the same. *Dobich v. Kapriel*, 6 FSM Intrm. 199, 201 (Chk. S. Ct. Tr. 1993).

The doctrine of *res judicata* is recognized in the FSM. The primary reason for its value is repose. The general rule is that a final decision on the "merits" of a claim bars a subsequent action on that same claim or any part thereof, including issues which were not but could have been raised as part of the claim. A plaintiff must raise his entire "claim" in one proceeding. "Claim" is defined to cover all the claimant's rights against the particular defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. *Maruwa Shokai Guam, Inc. v. Pyung Hwa 31*, 6 FSM Intrm. 238, 241 (Pon. 1993).

A claim for damages not proven at trial is not renewable at some later point in a different proceeding since *res judicata* clearly applies to the failed claim. *Wito Clan v. United Church of Christ*, 6 FSM Intrm. 291, 292 (App. 1993).

A plaintiff who has previously litigated and lost his claim to a legal interest in a certain property is collaterally estopped from claiming damages as a result of loss of ownership or possession of land because under principle of collateral estoppel, a cause of action which could have been litigated in course of the original case between same parties is treated as litigated and decided with the former cause of action. *Nahnken of Nett v. United States (III)*, 6 FSM Intrm. 508, 516 (Pon. 1994).

In some cases failure to join an indispensable party may subject a judgment to collateral attack, but failure to join a necessary party will not. A necessary party is one who has an identifiable interest in the action and should normally be made a party to the lawsuit, but whose interests are separable from the rest of the parties or whose presence cannot be obtained; whereas an indispensable party is one to whom any judgment, if effective, would necessarily affect his interest, or would, if his interest is eliminated, constitute unreasonable, inequitable, or impractical relief. *Nahnken of Nett v. United States (III)*, 6 FSM Intrm. 508, 517 (Pon. 1994).

Where land is not public land and where Land Commission and TT High Court had jurisdiction to adjudicate land claims even over public lands because authorized adjudicatory body for public lands had not yet been created the TT High Court's land adjudication will have res judicata effect. *Nahnken of Nett v. United States (III)*, 6 FSM Intrm. 508, 518 (Pon. 1994).

Only truly exceptional cases warrant an exception to normal presumption of res judicata, and such exceptions are to be confined within narrow limits. Where there is no evidence a TT High Court judgment was obtained unfairly or worked a serious injustice an FSM court cannot grant relief from it. *Nahnken of Nett v. United States (III)*, 6 FSM Intrm. 508, 519 (Pon. 1994).

FSM courts are not bound to follow precedents or reasoning of TT High Court in deciding cases, but must respect resolution or outcome of a case as between parties and subject matter of particular action adjudicated absent constitutional defect or obvious injustice such as a plain usurpation of power. *Nahnken of Nett v. United States (III)*, 6 FSM Intrm. 508, 519-20 (Pon. 1994).

Where a party had imputed and actual notice of the dimensions of the land in dispute in a previous litigation the same party cannot later attack the judgment for either vagueness of description or lack of notice. *Nahnken of Nett v. United States (III)*, 6 FSM Intrm. 508, 520 (Pon. 1994).

A party who has litigated an action in his personal capacity cannot escape the application of collateral estoppel and relitigate the action simply by claiming to act in a different capacity. *Nahnken of Nett v. United States (III)*, 6 FSM Intrm. 508, 520 (Pon. 1994).

Courts stand ready to assist litigants with claims that are well-grounded in law and diligently brought. At the same time courts must strive to ensure that final judgments fairly rendered are upheld, so that all interested parties may know when an issue has been justly concluded.

Parties are entitled to rely on conclusiveness of prior decisions. *Nahnken of Nett v. United States (III)*, 6 FSM Intrm. 508, 529 (Pon. 1994).

For a matter to be considered adjudged so that doctrine of res judicata is applicable, there must be an existing, final judgment that has been decided on the merits without fraud or collusion by a court or tribunal of competent jurisdiction. The doctrine bars any further litigation of same issues between the same parties or anyone claiming under those parties. *Ungeni v. Fredrick*, 6 FSM Intrm. 529, 531 (Chk. S. Ct. App. 1994).

The decisions of the Land Commission are not final judgments for purposes of res judicata until after the time for appeal from a determination of ownership has expired without an appeal or after a properly taken appeal has been determined. Once the trial court granted a trial de novo on the question of ownership the Land Commission's determination of ownership ceased to exist for purposes of res judicata. *Ungeni v. Fredrick*, 6 FSM Intrm. 529, 531 (Chk. S. Ct. App. 1994).

Service

Determination of whether an individual is a managing or general agent for purposes of FSM Civil Rule 4(d)(3) is made on the basis of whether person served can fairly be expected to know what to do with the papers so that the organization will have notice of the filing of the action. A person of authority and responsibility in an organization's operation is a managing or general agent for purposes of the rule. *Luda v. Maeda Road Constr. Co.*, 2 FSM Intrm. 107, 109 (Pon. 1985).

The acts of hand-delivering a subpoena to a deponent, reading its relevant portions in English and translating it into Pohnpeian, informing the deponent of the date time and location of his appearance, and stating that the order was signed by the court satisfy the requirement of Rule 45(c) of the FSM Rules of Civil Procedure that reasonable attempts be made to explain the subpoena to the person to be served. *Alfons v. FSM*, 5 FSM Intrm. 402, 405 (App. 1992).

The purpose of the rules addressing process and service of process in civil cases is to assure that a defendant receives sufficient notice of all causes of action that are filed against him and thus has a fair and adequate opportunity to defend. Where a plaintiff fails to properly serve a defendant, the court does not have jurisdiction over that defendant, and the case may not proceed, but will be dismissed without prejudice. *Berman v. Santos*, 6 FSM Intrm. 532, 534 (Pon. 1994).

Where a state official was sued in his individual capacity and service of the complaint and summons was made on the governor's office and the state attorney general it is not good service because service upon an individual is made by delivery to the individual personally or by leaving copies at the individual's dwelling house or usual place of abode or of business or by delivery to an agent authorized to receive service of process. *Berman v. Santos*, 6 FSM Intrm. 532, 534 (Pon. 1994).

Although the civil rules do not provide for a specific method of service upon a state officer in his official capacity, service upon a state officer in his official capacity requires that he receive notice of the suit. *Berman v. Santos*, 6 FSM Intrm. 532, 534-35 & nn. 3, 4 (Pon. 1994).

Proof of service should be made to the court promptly and in any event within the time during which the person served must respond to the process. *Berman v. Santos*, 6 FSM Intrm. 532, 535 (Pon. 1994).

Summary Judgment

A motion for summary judgment under Rule 56 may be granted only if the moving party shows that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. *Manahane v. FSM*, 1 FSM Intrm. 161, 164 (Pon. 1982).

A party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of fact. *FSM v. Ponape Builders Constr. Inc.*, 2 FSM Intrm. 48, 52 (Pon. 1985).

Under Rule 56 of the FSM Rules of Civil Procedure, a summary judgment shall be rendered only if the pleadings, depositions, answers, interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to the material facts and that the moving party is entitled to a judgment as a matter of law. *FSM v. Ponape Builders Constr. Inc.*, 2 FSM Intrm. 48, 52 (Pon. 1985).

Rule 56 of FSM Rules of Civil Procedure is drawn from U.S. Federal court rules. The court therefore may look to interpretations of Rule 56 of the U.S. Federal Rules of Civil Procedure for guidance in seeking proper interpretations of the FSM rule. *FSM v. Ponape Builders Constr. Inc.*, 2 FSM Intrm. 48, 52 (Pon. 1985).

In considering a motion for summary judgment under Rule 56 of the FSM Rules of Civil Procedure, the facts and inferences to be drawn therefrom, must be viewed by the court in the light most favorable to the party opposing the motion for summary judgment. *FSM v. Ponape Builders Constr. Inc.*, 2 FSM Intrm. 48, 52 (Pon. 1985).

Where there is no genuine issue of any material fact and the plaintiffs are entitled to judgment as a matter of law, summary judgment may be granted. *Wainit v. Truk (II)*, 2 FSM Intrm. 86, 87 (Truk 1985).

Where the nonmoving party admits allegations contained in the motion for summary judgment and there is nothing in the nonmoving party's answer or its response to the motion that suggests any factual issue in dispute, the moving party is entitled to summary judgment on those uncontested allegations. *FSM Dev. Bank v. Rodriguez Corp.*, 2 FSM Intrm. 128, 130 (Pon. 1985).

When a party to a civil action seeks summary judgment on the question of liability, it must initiate the inquiry even as to affirmative defenses. The moving party has the burden of clearly establishing the lack of any triable issue of fact and this burden extends to affirmative defenses as well as to the moving party's own positive allegations. *FSM Dev. Bank v. Rodriguez Corp.*, 2 FSM Intrm. 128, 130 (Pon. 1985).

When a party moves for summary judgment on an affirmative defense, putting forward arguments and evidence indicating that there is no material fact at issue and that the defense is insufficient as a matter of law, the opposing party must produce some evidence to rebut the moving party's evidence or the moving party is entitled to partial summary judgment. *FSM Dev. Bank v. Rodriguez Corp.*, 2 FSM Intrm. 128, 130 (Pon. 1985).

Where the party moving for partial summary judgment has done nothing to show that a factual basis for the opposing party's affirmative defenses is lacking or that the defenses are

insufficient as a matter of law, the defenses remain at issue and the moving party is not entitled to partial summary judgment. *FSM Dev. Bank v. Rodriguez Corp.*, 2 FSM Intrm. 128, 131 (Pon. 1985).

Facts and inferences are to be viewed in the light most favorable to the party against whom summary judgment is sought and the motion may then be granted only if it is clear that there is no genuine issue of material fact and the moving party must prevail as a matter of law. *Bank of Guam v. Island Hardware, Inc.*, 2 FSM Intrm. 281, 284 (Pon. 1986).

A summary judgment may be granted for a state named as defendant in an act asserting that the state is liable for negligent preparation of a survey when it is clear from the pleadings and record that the state did not exist when the survey was prepared, and plaintiff offers no theory under which the state could be liable and the pleadings, depositions, answers, interrogations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Salik v. U Corp. (I)*, 3 FSM Intrm. 404, 407 (Pon. 1988).

Conflicting affidavits show that circumstances surrounding execution of a document allegedly reflecting plaintiffs acceptance of a settlement and her release of defendant and others from liability for death of her late husband are not sufficiently clear to permit summary judgment either as to the efficacy of that document or as to the application to plaintiff's claims of the statute of limitations found at 6 FSMC 503(2). *Sarapio v. Maeda Road Constr. Co.*, 3 FSM Intrm. 463, 465, (Pon. 1988).

Where the party moving for summary judgment makes out a prima facie case which, if uncontroverted at trial, would entitle it to a directed verdict on the issue, then the burden shifts to the nonmoving party to offer some competent evidence that could be admitted at trial showing that there is a genuine issue of material fact. *Federated Shipping Co. v. Ponape Transfer & Storage Co.*, 4 FSM Intrm. 3, 11 (Pon. 1989).

In considering a motion for summary judgment, the court is required to view facts and draw inferences in a light as favorable to the party against whom the judgment is sought as may reasonably be done and the motion may then only be granted if it is clear that there is no genuine issue of material fact and that the moving party must prevail as a matter of law. *Damarlane v. Pohnpei Transp. Auth.*, 5 FSM Intrm. 1, 3 (Pon. 1991).

Where nat'l gov't, in previous appearances and filings, stated that no valid earthmoving permit was in effect, burden is on nat'l gov't at a motion for summary judgment to establish that there was a valid delegation of permit granting authority by nat'l gov't to state officials. *Damarlane v. Pohnpei Transp. Auth.*, 5 FSM Intrm. 1, 7 (Pon. 1991).

Where a defendant has not filed a response to a motion for summary judgment within the ten days provided by FSM Civil Rule 6(d), the defendant is deemed to have consented to the granting of the motion and the court may decline to hear oral argument. *Actouka v. Kolonia Town*, 5 FSM Intrm. 121, 123 (Pon. 1991).

In a motion for summary judgment the moving party has the initial burden of showing that there are no triable issues of fact. Once the moving party has done this the burden then shifts to the nonmoving party to show that there is a triable issue. The nonmoving party must show

that there is enough evidence supporting his position to justify a decision upholding his claim by a reasonable trier of fact. *Alik v. Kosrae Hotel Corp.*, 5 FSM Intrm. 294, 295 (Kos. 1992).

A motion for summary judgment must be denied unless the court finds there is no genuine dispute as to material facts, viewing the facts in the light most favorable to the nonmoving party, and that the moving party is entitled to judgment as a matter of law. *Tosie v. Healy-Tibbets Builders, Inc.*, 5 FSM Intrm. 358, 360 (Kos. 1992).

Without supporting affidavits the non-moving party cannot rely on inferences culled from the record to raise inferences as to the existence of genuine issues of material fact unless the non-movant has shown affidavits are unavailable. *Maruwa Shokai (Guam), Inc. v. Pyung Hwa* 31, 6 FSM Intrm. 1, 4 (Pon. 1993).

Where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment must be granted. *Kihara Real Estate, Inc. v. Estate of Nanpei (I)*, 6 FSM Intrm. 48, 52 (Pon. 1993).

The burden of showing a lack of triable issues of fact belongs to the moving party. *Kihara Real Estate, Inc. v. Estate of Nanpei (I)*, 6 FSM Intrm. 48, 52 (Pon. 1993).

In determining whether triable issues exist, the court must view the facts presented and inferences made in the light most favorable to the party against whom summary judgment is sought. *Kihara Real Estate, Inc. v. Estate of Nanpei (I)*, 6 FSM Intrm. 48, 52 (Pon. 1993).

In a summary judgment motion plaintiff's burden of establishing the lack of any triable issue of fact extends to affirmative defenses as well as to plaintiff's own positive allegations. *Kihara Real Estate, Inc. v. Estate of Nanpei (I)*, 6 FSM Intrm. 48, 53 (Pon. 1993).

When a party's motion for summary judgment has been denied as a matter of law and it appears the nonmoving party is entitled to judgment as a matter of law the court may grant summary judgment to the nonmoving party in the absence of a cross motion for summary judgment if the original movant has had an adequate opportunity to show that there is a genuine issue and that his nonmoving opponent is not entitled to judgment as a matter of law. *Truk Continental Hotel, Inc. v. Chuuk*, 6 FSM Intrm. 310, 311 (Chk. 1994).

Normally a Rule 12(c) motion for judgment on the pleadings is granted or denied upon the entire complaint, and the rule does not provide for partial judgment as in Rule 56(d) summary judgment, but where the briefing was exhaustive, full argument made, and such a judgment promotes an expeditious disposition of matters placed before the court, partial judgment may be granted. *Damarlane v. United States*, 6 FSM Intrm. 357, 359 (Pon. 1994).

A motion for summary judgment may be granted only if it is clear that there is no genuine issue of material fact, viewing the facts, and any inferences therefrom, in the light most favorable to the party against whom summary judgment is sought, and that the moving party must prevail as a matter of law. When the only issues to be decided in a case are issues of law, summary judgment is appropriate. *Etscheit v. Adams*, 6 FSM Intrm. 365, 373 (Pon. 1994).

The issue of whether the rule of primogeniture that appeared on German standard form deeds applied to land not held under one of those deeds is a question of law that may be decided by

he court at the summary judgment stage even if the question is seen as a determination of foreign law. *Etscheit v. Adams*, 6 FSM Intrm. 365, 373 (Pon. 1994).

Where a party has not raised a material issue regarding the one factual question that might bear on the applicability of the rule of primogeniture, it is appropriate for the court to decide the rule's applicability at the summary judgment stage. *Etscheit v. Adams*, 6 FSM Intrm. 365, 374 (Pon. 1994).

A motion to dismiss is not to be granted unless it appears to a certainty that the non-moving party is entitled to no relief under any state of facts which could be proved in support of the claim, and if on the motion to dismiss matters outside the pleading are presented to and not excluded by the court, the motion shall then be treated as one for summary judgment. *Etscheit v. Adams*, 6 FSM Intrm. 365, 386 (Pon. 1994).

Where both the plaintiffs and defendant claim that the other party is liable and dispute the amounts, viewing the plaintiffs' motion for summary judgment in the light most favorable to the defendant, genuine issues of triable material fact remain precluding summary judgment. *House of Travel v. Neth*, 6 FSM Intrm. 402, 403 (Pon. 1994).

A defendant's mere denial that the calendar was used for advertising purposes does not "set forth specific facts to show that [this] is a genuine issue for trial" as an adverse party must do when faced with a motion for summary judgment. *Nethon v. Mobil Oil Micronesia, Inc.*, 6 FSM Intrm. 451, 459 (Chk. 1994).

A court must deny a motion for summary judgment unless it finds there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The court must view the facts presented and inferences made in the light most favorable to the nonmoving party. The burden of showing a lack of triable issues of fact belongs to the moving party. *Adams v. Etscheit*, 6 FSM Intrm. 580, 582 (App. 1994).

Where the facts lead to differing reasonable inferences, thus establishing a genuine issue of fact, summary judgment is not available. *Adams v. Etscheit*, 6 FSM Intrm. 580, 583 (App. 1994).

Because conditions precedent are disfavored at law and require plain and unambiguous language to establish, when differing inferences create an issue of fact, summary judgment that a condition precedent exists is inappropriate. *Adams v. Etscheit*, 6 FSM Intrm. 580, 584 (App. 1994).

Whether a proposed boundary line on a map is insufficiently definite and certain to be located on the ground is a material fact genuinely at issue, precluding summary judgment. *Adams v. Etscheit*, 6 FSM Intrm. 580, 584 (App. 1994).

Where resolution of legal questions raised by a summary judgment motion will not perceptibly shorten trial, and a determination at trial of fact issues may eliminate need for deciding legal questions which the motion raises, a court may exercise its discretion to reserve judgment on the motion until after trial. This exercise of discretion is even more appropriate where legal issues raised involve constitutional adjudication because unnecessary constitutional adjudication is to be avoided. *Pohnpei v. Kailis*, 6 FSM Intrm. 619, 620 (Pon. 1994).

Venue

In litigation brought by a mother seeking child support payments from the father, the court will not grant the defendant-father's motion to change the venue to the FSM state in which he now resides from the FSM state in which: 1) the mother initiated the litigation; 2) the couple was married and resided together; 3) their children were born and have always lived; and 4) the mother still resides. *Pernet v. Aflague*, 4 FSM Intrm. 222, 224 (Pon. 1990).

(d) govern the transfer of cases between state and national courts;

(e) govern the admission to practice and discipline of attorneys and the retirement of judges; and

Case annotations: Purpose of Rule 4.2 of Model Rules of Professional Conduct as it applies to organizations is not to pull a veil of partial confidentiality around facts, or even people who have knowledge of matter in litigation by virtue of their close relationship with a party, but to protect against intrusions by other attorneys upon an existing attorney-client relationship. *Panuelo v. Pohnpei (II)*, 2 FSM Intrm. 225, 232 (Pon. 1986).

Prohibition in Rule 4.2 of Model Rules of Professional Conduct against communications with a client organization represented by another attorney applies only to communications with an individual whose interests at the time of the proposed communication are so linked and aligned with the organization that one may be considered the alter ego of the other concerning the matter in representation. *Panuelo v. Pohnpei (II)*, 2 FSM Intrm. 225, 232 (Pon. 1986).

The comment to Rule 4.2 of the Model Rules of Professional Conduct was written with the understanding or assumption that it could only affect people who, at the time of the proposed communication, have a working relationship with the organization. *Panuelo v. Pohnpei (II)*, 2 FSM Intrm. 225, 233 (Pon. 1986).

An attorney's professional activities are individually subject to regulation by the judiciary, not by the administrators of the Foreign Investment Act. *Michelsen v. FSM*, 3 FSM Intrm. 416, 427 (Pon. 1988).

The Truk Attorney General represents the gov't in legal actions and is given the statutory authority pursuant to TSL 5-32 to conduct and control the proceedings on behalf of the gov't and, in absence of explicit legislative or constitutional expression to the contrary, possesses complete dominion over litigation including power to settle the case in which he properly appears in the interest of the state. *Truk v. Robi*, 3 FSM Intrm. 556, 561-63 (Truk S. Ct. App. 1988).

Truk State Bar Rule 13(a), which adopts the Code of Professional Responsibility, prevents conflicts of interest and appearances of impropriety by requiring that members of the state bar conduct themselves in a manner consistent with the American Bar Association's Code of Professional Responsibility. *Nakayama v. Truk*, 3 FSM Intrm. 565, 570 (Truk S. Ct. Tr. 1987).

An attorney holding public office should avoid all conduct which might lead the layman to conclude that the attorney is utilizing his former public position to further his subsequent

professional success in private practice. *Nakayama v. Truk*, 3 FSM Intrm. 565, 572 (Truk S. Ct. Tr. 1987).

Since Congress did not give any consideration to, or make any mention of, the services enumerated in art. XIII, § 1 of the FSM Constitution in enacting the Foreign Investment Act, 32 FSMC 201-232, the avoidance of potential conflict with the Constitution calls for the conclusion that Congress did not intend the Foreign Investment Act to apply to noncitizen attorneys or to any other persons who provide services of the kind described in art. XIII, § 1 of the Constitution. *Carlos v. FSM*, 4 FSM Intrm. 17, 30 (App. 1989).

Counsel for a party in a civil action may not be appointed to prosecute the opposing party for criminal contempt for violating an order in that action because the primary focus of the private attorney is likely to be not on the public interest, but instead upon obtaining for his or her client the benefits of the court's order. *Damarlane v. Pohnpei Transp. Auth.*, 5 FSM Intrm. 62, 67 (Pon. 1991).

By statute the practice of law is specifically included in businesses engaged in by noncitizens requiring a foreign investment permit. 32 FSMC 203. *Michelsen v. FSM*, 5 FSM Intrm. 249, 254 (App. 1991).

Constitution mandates that Chief Justice by rule may govern admission to practice of attorneys, but rule which differentiates between FSM citizens and noncitizens inherently relates to regulation of immigration and foreign relations which are powers expressly delegated to other two branches of gov't. *Berman v. Pohnpei*, 5 FSM Intrm. 303, 305 (Pon. 1992).

Without a rational valid basis for rule limiting number of times an alien may take the bar exam it will be held unconstitutional even if it would be constitutional if the regulation were made by Congress or the President. *Berman v. FSM Supreme Court (I)*, 5 FSM Intrm. 364, 367 (Pon. 1992).

The parties, not their attorneys, have ultimate responsibility to determine the purposes to be served by legal representation. Thus, clients always have the right, if acting in good faith, to agree to settle their own case, with or without the consultation or approval of counsel, even when their attorneys have failed to settle. *Iriarte v. Micronesian Developers, Inc.*, 6 FSM Intrm. 332, 334 & n.1 (Pon. 1994).

Counsel's own dissatisfaction with settlement agreement reached by his clients without counsel's consultation or approval does not take precedence over clients' rights to settle their claims themselves. *Iriarte v. Micronesian Developers, Inc.*, 6 FSM Intrm. 332, 334-35 (Pon. 1994).

A judge cannot adopt a procedure not provided for by the rules because the Constitution grants the Chief Justice, and Congress, the power to establish rules of procedure. *FSM v. M.T. HL Achiever (II)*, 7 FSM Intrm. 256, 258 (Chk. 1995).

Admission to Practice

The normal TT High Court authorization to practice before it is unlimited as to time and covers entire Trust Territory. Limited or provisional TT High Court authorization to practice

law is not sufficient High Court "certification" to qualify an applicant for admission to practice under Rule I(A) of FSM Supreme Court's Rules for Admission. In re Robert, 1 FSM Intrm. 4, 4-5 (Pon. 1981).

The grandfather clause of Rule I of FSM Supreme Court's Rules for Admission permits licensed or existing practitioners before the Trust Territory courts to continue in their same capacity by shielding them from the necessity of complying with the new licensing standards. FSM 1 Intrm. 004-013 In re Robert, 1 FSM Intrm. 4, 7 (Pon. 1981).

In seeking authorization to practice before the FSM Supreme Court, if the High Court's authorization of the applicant to practice before it is not an unreserved certification the applicant does not fulfill the requirements under the FSM Supreme Court's Rule for Admission I(A), and must fulfill the conditions required of new applicants. In re Robert, 1 FSM Intrm. 4, 11-13 (Pon. 1981).

In absence of express appellate division permission to appear without supervision of an attorney, the court will require all appellate level briefs and other documents to be signed by an attorney authorized to practice before the FSM Supreme Court. Any appellate submission not so signed will be rejected. Alaphonso v. FSM, 1 FSM Intrm. 209, 230 n.13 (App. 1982).

Only attorneys admitted to practice before the FSM Supreme Court or trial counselors supervised by an attorney admitted to practice may appear before the FSM Supreme Court on appeals from state court cases. Kephas v. Kosrae, 3 FSM Intrm. 248, 252 (App. 1987).

Admission to appear for a particular case, pursuant to Rule 4(A) of the Rules for Admission to Practice, is liberally granted. Truk Transp. Co. v. Trans Pacific Import Ltd., 3 FSM 440, 443 (Truk 1988).

Where an attorney seeks to have another attorney disqualified on the grounds that such other attorney was not admitted to the state bar, and the attorney seeking the disqualification should have known that the other attorney was within an exception to that rule, the motion to disqualify is without merit and shall be denied. Nakayama v. Truk, 3 FSM Intrm. 565, 568-69 (Truk S. Ct. Tr. 1987).

In a nation constitutionally committed to attempt to provide legal services for its citizens, the mere fact that an attorney had previously sued the state, without any suggestion that actions taken were frivolous, vexatious, or for purposes of harassment, cannot be viewed as reasonable grounds for denying the attorney the opportunity to practice law in that state. Carlos v. FSM, 4 FSM Intrm. 17, 24 (App. 1989).

The Constitution places control over admission of attorneys to practice before the nat. l courts, and regulation of the professional conduct of the attorneys, in the Chief Justice, as the chief administrator of the nat. l judiciary. Carlos v. FSM, 4 FSM Intrm. 17, 27 (App. 1989).

The decision whether to permit an attorney, not licensed within the FSM, to practice before the FSM Supreme Court, in a particular case falls within the sound discretion of the trial judge. In re Chikamoto, 4 FSM Intrm. 245, 248 (Pon. 1990).

FSM Admission Rule IV(A) does not provide a means for a nonresident attorney, who has not been licensed to practice before the court and who has no reasonable prospect of being

licensed in the near future, nonetheless to be permitted to practice before the court on a continuing basis. *In re Chikamoto*, 4 FSM Intrm. 245, 249 (Pon. 1990).

Congress and the President respectively have the power to regulate immigration and conduct foreign affairs while the Chief Justice may make rules governing the admission of attorneys. Therefore a rule of admission that treats aliens unequally, promulgated by the Chief Justice, implicates powers expressly delegated to other branches. *Berman v. FSM Supreme Court (I)*, 5 FSM Intrm. 364, 366 (Pon. 1992).

FSM Admission Rule III presumes that an arrangement of reciprocity must already exist between the FSM Court and another jurisdiction, in order for the rule to apply. When no such arrangement exists, it must first be created before Rule III can be applied. *In re McCaffrey*, 6 FSM Intrm. 20, 21 (Pon. 1993).

The fact that the Pohnpei Supreme Court admits attorneys of FSM Bar does not alone create a formal arrangement of reciprocity. The arrangement must be formal, neither implied nor constructive. *In re McCaffrey*, 6 FSM Intrm. 20, 22 (Pon. 1993).

Language of FSM Admission Rule III contemplates that formal arrangements between FSM Supreme Court and other jurisdictions must exist before an attorney from another jurisdiction may apply for admission to FSM Supreme Court on basis of reciprocity. *McCaffrey v. FSM Supreme Court*, 6 FSM Intrm. 279, 281-82 (App. 1993).

FSM Admission Rule III is directed at attorneys residing outside of FSM in other Pacific jurisdictions. *McCaffrey v. FSM Supreme Court*, 6 FSM Intrm. 279, 282 (App. 1993).

Motions to appear are not granted as a matter of course and each application must be carefully reviewed for compliance with the Rules of Admission. *Pohnpei v. M/V Zhong Yuan Yu #606*, 6 FSM Intrm. 464, 466 (Pon. 1994).

The FSM Supreme Court's Chief Justice's constitutional powers to make rules governing the attorney discipline and admission to practice is limited to the nat. l courts. He is not authorized to govern admission to practice in state courts. *Berman v. Santos*, 7 FSM Intrm. 231, 236 (Pon. 1995).

Attorney Discipline and Sanctions

A counsel's decision to take steps which may cause him to be late for a scheduled court hearing, coupled with his failure to advise the court and opposing counsel of the possibility that he might be late to the hearing, may, when followed by failure to appear at the scheduled time, constitute an intentional obstruction of the administration of justice within the meaning of § 119(a) of the Judiciary Act, and may be contempt of court. 4 FSMC 119(a). *In re Robert*, 1 FSM Intrm. 18, 20 (Pon. 1981).

The summary contempt power may be invoked even after some delay if it was necessary for a transcript to be prepared to substantiate the contempt charge, or where the contemner is an attorney and immediate contempt proceedings may result in a mistrial. *In re Iriarte (II)*, 1 FSM Intrm. 255, 261 (Pon. 1983).

Denial to a defendant of the right to assert a statute of limitations defense by way of punishment for tardiness in filing its answer is inappropriate. *Lonno v. Trust Territory (III)*, 1 FSM Intrm. 279, 280 (Kos. 1983).

In new nation in which courts have not yet established a comprehensive jurisprudence, where an issue is one of first impression and of fundamental importance to the new nation, the court should not lightly impose sanctions upon an official who pushes such an issue to a final court decision, and should make some allowance for wishful optimism in an appeal. *Innocenti v. Wainit*, 2 FSM Intrm. 173, 188 (App. 1986).

The Constitution places control over admission of attorneys to practice before the nat. l courts, and regulation of the professional conduct of the attorneys, in the Chief Justice, as the chief administrator of the nat. l judiciary. *Carlos v. FSM*, 4 FSM Intrm. 17, 27 (App. 1989).

Courts have inherent power, and an obligation, to monitor the conduct of counsel and to enforce compliance with procedural rules. *Leeruw v. Yap*, 4 FSM Intrm. 145, 150 (Yap 1989).

Under Rule 3.7 of Model Rules of Professional Conduct, when a party's counsel believes opposing party's attorney should be required to testify as to information which may be prejudicial to the opposing party, it is appropriate for counsel for the first party to move to disqualify opposing counsel from further representation of the opposing party, but this is not only procedure which may be followed and counsel who fails to file such a motion may not be sanctioned for his failure in absence of harm to the opposing party or a showing of bad faith. *Bank of Guam v. Sets*, 5 FSM Intrm. 29, 30 (Pon. 1991).

Where record lacked any identifiable order directing a particular counsel to appear before court, insofar as court's expectation was that "somebody" from Office of the Public Defender appear, no affirmative duty to appear existed, nor did any intentional obstruction of administration of justice occur to support lower court's finding of contempt against counsel. *In re Powell*, 5 FSM Intrm. 114, 117 (App. 1991).

Where the information desired from another party's lawyer as a witness was material and necessary and unobtainable elsewhere and the party desiring it had not acted in bad faith in the late service of a subpoena, a motion for sanctions may be denied at the court's discretion. *In re Island Hardware, Inc.*, 5 FSM Intrm. 170, 174-75 (App. 1991).

Certification of extraditability is an adversarial proceeding. An advocate in an adversarial proceeding is expected to be zealous. *In re Extradition of Jano*, 6 FSM Intrm. 26, 27 (App. 1993).

Dismissal of actions for attorney misconduct is generally disfavored in light of judicial preference for adjudication on merits whenever possible so as to allow parties a reasonable opportunity to present their claims and defenses. *Paul v. Hedson*, 6 FSM Intrm. 146, 147 (Pon. 1993).

Court may sanction an attorney by its inherent authority to enforce compliance with procedural rules whenever it is apparent that attorney has failed to abide by such rules without good cause. *Paul v. Hedson*, 6 FSM Intrm. 146, 148 (Pon. 1993).

An attorney who fails to make timely requests for enlargement of time to complete discovery beyond the deadline set by court order; who has someone other than the client sign answers to interrogatories; and who fails to serve the answers properly on opposing counsel while filing a proof of service with the court is sanctionable on the court's own motion. *Paul v. Hedson*, 6 FSM Intrm. 146, 148 (Pon. 1993).

In light of court's policy for adjudicating matters on the merits the court may sanction counsel for initial noncompliance with the procedural rules rather than dismissing his client's case. *Nakamura v. Bank of Guam (I)*, 6 FSM Intrm. 224, 229 (App. 1993).

An attorney shall be sanctioned under FSM Civil Rule 11 when it is apparent to the court that counsel had no arguable basis in fact or law in bringing a motion or pleading. *Berman v. Kolonia Town*, 6 FSM Intrm. 242, 245-46 (Pon. 1993).

A motion will be regarded as frivolous (and sanctionable) if at the time of filing it offered no reasonable possibility of relief. *Berman v. Kolonia Town*, 6 FSM Intrm. 242, 246 (Pon. 1993).

Although language of FSM Civil Rule 11 directs that the court shall impose sanctions on an attorney when a violation of the rule has been shown, the nature and amount of penalty is left to the court's discretion. *Berman v. Kolonia Town*, 6 FSM Intrm. 242, 247 (Pon. 1993).

Rule 11 mandates a reasonable inquiry by the attorney as to whether the pleading or motion is well grounded in fact and warranted either by current law, or, alternatively, by a good faith argument that that is what the law ought to be. A bad faith argument, although still sanctionable, is thus not the only action sanctionable under this provision. A purely frivolous, good faith argument is also sanctionable. *Berman v. Kolonia Town*, 6 FSM Intrm. 433, 435 (App. 1994).

The purpose of Rule 11 is to deter baseless filings. *Berman v. Kolonia Town*, 6 FSM Intrm. 433, 436 (App. 1994).

Appeals of Rule 11 sanctions are reviewed under an abuse of discretion standard. *Berman v. Kolonia Town*, 6 FSM Intrm. 433, 436 (App. 1994).

It is an abuse of discretion to deem a motion frivolous and sanctionable when it was a case of first impression in this jurisdiction, no contrary authority can be cited from another jurisdiction, and no authority was cited by the trial court, and where the appellant made a good faith argument for the extension of existing law. *Berman v. Kolonia Town*, 6 FSM Intrm. 433, 436-37 (App. 1994).

An argument, although plainly incorrect, may be insufficiently frivolous as to warrant sanctions under FSM Civil Rule 11. *Berman v. Santos*, 7 FSM Intrm. 231, 241 (Pon. 1995).

A attorney disciplinary proceeding in state court for violations of state disciplinary rules may not be removed to the FSM Supreme Court. *Berman v. Santos*, 7 FSM Intrm. 231, 241 (Pon. 1995).

Disqualification of Counsel

Under Rule 1.11 of Truk State Code of Professional Responsibility, a lawyer may not represent a private client in connection with a matter in which the lawyer participated "personally and substantially" as a public officer or employee, unless the appropriate gov. t agency consents after consultation. *Nakayama v. Truk*, 3 FSM Intrm. 565, 570 (Truk S. Ct. Tr. 1987).

For purposes of Rule 1.11, an attorney who, as a gov. t attorney, signs his name to a lease agreement, approving the lease "as to form," is personally and substantially involved. *Nakayama v. Truk*, 3 FSM Intrm. 565, 571 (Truk S. Ct. Tr. 1987).

Where a member of the office of the public defender has a conflict of interest, based upon his familial relationship with the victim of the crime of which the defendant is accused, but where he is under no traditional obligation to cause harm to the defendant and has done nothing to make other members of the office feel that they are under any such obligation, and where there is no showing that the conflict would have any actual tendency to diminish the zeal of any other members of the office, the conflict of the first counsel is not imputed to the other members of the office. *FSM v. Edgar*, 4 FSM Intrm. 249, 251 (Pon. 1990).

Although trial court may grant a public defender's motion to withdraw as counsel pursuant to FSM Model Rule of Professional Conduct 1.7(b) because public defender adopted the son of the victim's nephew, the trial court may deny the same public defender's motion to relieve the entire staff of the Public Defender's Office pursuant to Model Rule 1.10(a) because public defender's conflict was personal and not imputed to Public Defender staff. *Office of Public Defender v. Trial Division*, 4 FSM Intrm. 252, 254 (App. 1990).

The imputed disqualification provision of Rule 1.10(a) of the FSM Model Rules of Professional Conduct is not a per se rule and where the other attorneys associated with the attorney who seeks disqualification are able to give full loyalty to the client it is proper for the court to find that the disqualifying condition is not imputed to others. *Office of the Public Defender v. FSM Supreme Court*, 4 FSM Intrm. 307, 309 (App. 1990).

Under Rule 3.7 of the Model Rules of Professional Conduct, when a party's counsel believes the opposing party's attorney should be required to testify as to information which may be prejudicial to the opposing party, it is appropriate for counsel for the first party to move to disqualify opposing counsel from further representation of the opposing party, but this is not the only procedure which may be followed and counsel who fails to file such a motion may not be sanctioned for his failure in absence of harm to the opposing party or a showing of bad faith. *Bank of Guam v. Sets*, 5 FSM Intrm. 29, 30 (Pon. 1991).

Prior representation of another party to contractual negotiations is not in and off itself sufficient to create a conflict of interest which would invalidate the negotiated contract unless it can be shown such representation was directly adverse to the other client or materially limited the interests of the present client. *Billimon v. Chuuk*, 5 FSM Intrm. 130, 135 (Chk. S. Ct. Tr. 1991).

The FSM Attorney General's Office is not disqualified in an internat. l extradition case where the accused is the plaintiff in a civil suit against one of its members because the Attorney General's office has no discretion in the matter. It did not initiate nor can it influence the course of the prosecution abroad, and the discretion of whether to extradite a citizen does not

repose in the Attorney General's Office. In re Extradition of Jano, 6 FSM Intrm. 12, 13-14 (App. 1993).

The rules, MRPC 1.10, for vicarious disqualification of attorneys in the same law firm do not apply to gov. t lawyers who are governed by MRPC 1.11(c). MRPC 1.11 does not impute the disqualification of one member of a gov. t office to the other members. In re Extradition of Jano, 6 FSM Intrm. 26, 27 (App. 1993).

An attorney is not disqualified from representing multiple parties against a defendant on the grounds that he did not join as defendants former employees of some of the plaintiffs who would be liable if the defendant is liable. Pohnpei v. Kailis, 6 FSM Intrm. 460, 462-63 (Pon. 1994).

Fees

There is no established market for legal services in Kosrae which could be used to determine a reasonable hourly rate for attorneys in civil rights cases. Tolenoa v. Alokoa, 2 FSM Intrm. 247, 254 (Kos. 1986).

Because social and economic situation in FSM is radically different from that of U.S., rates for attorney's fees set by U.S. courts in connection with civil rights actions there are of little persuasive value for a court seeking to set an appropriate attorney's fee award in civil rights litigation within FSM. Tolenoa v. Alokoa, 2 FSM Intrm. 247, 255 (Kos. 1986).

Attorney's fee awards to prevailing parties in civil rights litigation should be sufficiently high at a minimum to avoid discouraging attorneys from taking such cases and should enable an attorney who believes that a civil rights violation has occurred to bring a civil rights case without great financial sacrifice. Tolenoa v. Alokoa, 2 FSM Intrm. 247, 255 (Kos. 1986).

Despite the fact that some of the arguments made by plaintiff in successful civil rights litigation were rejected by the court, time devoted by counsel to these issues may be included in the civil rights legislation attorney's fee award to the plaintiff where all of the plaintiff's claims in the case involved a common core of related legal theories. Tolenoa v. Alokoa, 2 FSM Intrm. 247, 259 (Kos. 1986).

Where an action is brought pursuant to 11 FSMC 701(3), allowing civil liability against any person who deprives another of his constitutional rights, the court may award reasonable attorney's fees to the prevailing party based on the customary fee in the locality in which the case is tried. Tolenoa v. Kosrae, 3 FSM Intrm. 167, 173 (App. 1987).

In an action brought under 11 FSMC 701(1) forbidding any person from depriving another of his civil rights, where it is shown that the attorney for the prevailing party customarily charges attorney's fees of \$100.00 per hour for legal services in the community in which the case is brought, and when this is at or near the hourly fee rate charged by other attorneys in the locality, the court may award the prevailing party an attorney's fee based upon the \$100.00 hourly rate. Tolenoa v. Kosrae, 3 FSM Intrm. 167, 173 (App. 1987).

Forced disclosure of arrangements for payment of attorney's fees intrudes, in some degree, upon the attorney-client relationship and can be an "annoyance" within the meaning of the

FSM Civil Rule 26(c) provisions concerning protective orders. *Mailo v. Twum-Barimah*, 3 FSM Intrm. 179, 181 (Pon. 1987).

Unless the questioning party is able to show some basis for believing there may be a relationship between an attorney's fee and the subject matter of the pending action, objections to efforts to discover the attorney's fee arrangement may be upheld. *Mailo v. Twum-Barimah*, 3 FSM Intrm. 179, 181 (Pon. 1987).

Information concerning the source of funds for payment of attorney's fees of a particular party normally is not privileged information. *Mailo v. Twum-Barimah*, 3 FSM Intrm. 179, 181 (Pon. 1987).

As a general rule, attorney's fees will be awarded as an element of costs only if it is shown that such fees were traceable to unreasonable or vexatious actions of the opposing party, but where the basic litigation flows from a reasonable difference of interpretation of a lease, the court is disinclined to attempt to sort out or isolate particular aspects of one claim or another of the parties and to earmark attorney's fees awards for those specific aspects. *Salik v. U Corp.*, 4 FSM Intrm. 48, 49-50 (Pon. 1989).

The clerk's office only has authority to grant default judgments for a sum certain or for a sum which can by computation be made certain. Any award of attorney's fees must be based upon a judicial finding and thus is not for a sum certain and cannot be granted by the clerk. *Bank of the FSM v. Bartolome*, 4 FSM Intrm. 182, 184 (Pon. 1990).

Any award of attorney's fees must be based upon a showing, and a judicial finding, that the amount of the fees is reasonable. *Bank of the FSM v. Bartolome*, 4 FSM Intrm. 182, 184 (Pon. 1990).

It is especially important for the court to scrutinize carefully and strictly construe contractual provisions which relate to the payment of attorney's fees. *Bank of the FSM v. Bartolome*, 4 FSM Intrm. 182, 185 (Pon. 1990).

FSM Supreme Court will consider an unambiguous provision in a promissory note for payment of reasonable attorney's fees in debt collection cases as valid in FSM. *Bank of Hawaii v. Jack*, 4 FSM Intrm. 216, 219 (Pon. 1990).

Because agreements in promissory notes for payment of attorney's fees are essentially indemnity clauses, they will be given effect only to the extent that expenses and losses are actually incurred, as demonstrated by detailed supporting documentation showing the date, work done, and amount of time spent on each service for which a claim for compensation is made. *Bank of Hawaii v. Jack*, 4 FSM Intrm. 216, 219 (Pon. 1990).

Provisions in promissory notes for the payment of attorney's fees will be enforced only to the extent that the fees demanded are reasonable. *Bank of Hawaii v. Jack*, 4 FSM Intrm. 216, 219 (Pon. 1990).

It is necessary for each creditor to establish that attorney's fees to be charged to a debtor pursuant to an agreement in a promissory note are reasonable in relation to the amount of the debt as well as to the services rendered. *Bank of Hawaii v. Jack*, 4 FSM Intrm. 216, 220 (Pon. 1990).

Where attorney's fees claimed pursuant to a contractual provision are excessive or otherwise unreasonable, it is within the equitable and discretionary power of the court to reduce or even deny the award, despite the contractual provision. *Bank of Hawaii v. Jack*, 4 FSM Intrm. 216, 220 (Pon. 1990).

Except in unusual circumstances, amount awarded pursuant to a stipulation for payment of attorney's fees in debt collection cases in FSM will be limited to a reasonable amount not in excess of 15% of the outstanding principal and interest. *Bank of Hawaii v. Jack*, 4 FSM Intrm. 216, 221 (Pon. 1990).

The gov't does not pay twice when it violates someone's civil rights and then is forced to pay attorney's fees. It pays only once as a violator of civil rights. Its role as a provider of public services is distinct from its role as a defendant in a civil case. Thus an award of costs and reasonable attorney's fees should be made to a publicly funded legal services organization whose client prevailed in a civil rights action. *Plais v. Panuelo*, 5 FSM Intrm. 319, 321 (Pon. 1992).

11 FSMC 701(3) is comprehensive and contains no suggestion that publicly funded legal services are outside the clause or should be treated differently than other legal services. *Plais v. Panuelo*, 5 FSM Intrm. 319, 320-21 (Pon. 1992).

Where a debtor/account receivable to an insolvent corporation is liable to the corporation's creditors the debtor cannot challenge the arrangement for attorney's fees made between the creditors, counsel, and the court for collection of the insolvent corporation's accounts receivable. *Creditors of Mid-Pac Constr. Co. v. Senda*, 6 FSM Intrm. 140, 142 (Pon. 1993).

A taxpayer who owes social security taxes to the gov't as employer contributions under the FSM Social Security Act is liable for reasonable attorney's fees if the tax delinquency is referred to an attorney for collection; however, the court may exercise discretion in determining the reasonableness of the fees assessed in light of the particular circumstances of the case. *FSM Social Sec. Admin. v. Mallarme*, 6 FSM Intrm. 230, 232 (Pon. 1993).

Among factors which court may consider in determining amount of attorney's fees recoverable in an action brought under 53 FSMC 605 is nature of violation, degree of cooperation by taxpayer, and extent to which Social Security Admin. prevails on its claims. *FSM Social Sec. Admin. v. Mallarme*, 6 FSM Intrm. 230, 232-33 (Pon. 1993).

In collection cases, creditors must establish that attorney's fees to be charged are reasonable in relation to the amount of debt as well as to services rendered. Generally, plaintiff's attorney's fees in a debt collection case, barring bad faith on defendant's part, will be limited to a reasonable amount not to exceed 15% of outstanding principal and interest. *J.C. Tenorio Enterprises, Inc. v. Sado*, 6 FSM Intrm. 430, 432 (Pon. 1994).

An FSM court may reduce the amount of attorney's fees provided for under a foreign judgment, where that judgment is unenforceable as against public policy to the extent that the attorney fees in excess of 15% of debt are repugnant to fundamental notions of what is decent and just in the FSM. *J.C. Tenorio Enterprises, Inc. v. Sado*, 6 FSM Intrm. 430, 432 (Pon. 1994).

In the absence of statutory authority there is a general presumption against attorney's fees awards, and they should not be awarded as standard practice. *Bank of Guam v. Nukuto*, 6 FSM Intrm. 615, 617 (Chk. 1994).

Where the defendant has breached her fiduciary duty, and converted to her own personal use funds of others, has made no claim of right to any of the funds or offered any defense, and blame thus lies wholly with the defendant, the plaintiff will be allowed to recover its attorney's fees in order to make the victim whole. This is a narrowly drawn exception to the general rule parties will bear their own attorney's fees. *Bank of Guam v. Nukuto*, 6 FSM Intrm. 615, 617-18 (Chk. 1994).

(f) otherwise provide for the administration of the national judiciary. Judicial rules may be amended by statute.

Case annotations: The FSM Supreme Court has broad rule-making powers under the Constitution. FSM Const., art. XI, § 9. *FSM v. Albert*, 1 FSM Intrm. 14, 17 (Pon. 1981).

In order for a Congressional statute to give the court valid authority in those areas which the Constitution grants the Chief Justice rule-making powers the Chief Justice does not first have to promulgate a rule before Congress may legislate on the same subject. *Hartman v. FSM*, 6 FSM Intrm. 293, 297 (App. 1993).

FSM Supreme Court is immune from an award of damages, pursuant to 11 FSMC 701(3), arising from performance by Chief Justice of his constitutionally granted rule-making powers. *Berman v. FSM Supreme Court (II)*, 5 FSM Intrm. 371, 374 (Pon. 1992).

The Chief Justice, in making rules, is performing a legislative function and is immune from an action for damages. *Berman v. FSM Supreme Court (II)*, 5 FSM Intrm. 371, 374 (Pon. 1992).

The grant of immunity to the Chief Justice while performing his rule-making authority is to protect the independence of one exercising a constitutionally granted legislative power. *Berman v. FSM Supreme Court (II)*, 5 FSM Intrm. 371, 374 (Pon. 1992).

A chief justice's actions in reviewing an attorney's application for admission is a judicial function that is entitled to absolute immunity from suit for damages. *Berman v. Santos*, 7 FSM Intrm. 231, 240 (Pon. 1995).

Section 10. The Congress shall contribute to the financial support of state judicial systems and may provide other assistance.

Section 11. Court decisions shall be consistent with this Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia. In rendering a decision, a court shall consult and apply sources of the Federated States of Micronesia.

Editor's note: Art. XI, § 11 was amended by Constitutional Convention Committee Proposal No. 90-19, SD1, CD1 which became effective on July 2, 1991. A copy of this amendment follows this Constitution.

The original language of art. XI, § 11 was as follows:

"Section 11. Court decisions shall be consistent with this Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia."

Case annotations prior to the effective date of the constitutional amendment interpret art. XI, § 11 as originally worded.

Case annotations: FSM Supreme Court must remain sensitive to unique circumstances of the FSM and may not slavishly follow interpretations of similar language by United States, Trust Territory, or other tribunals in different contexts. *Lonno v. Trust Territory (I)*, 1 FSM Intrm. 53, 69 n.11 (Kos. 1982).

Because FSM Constitution has drawn upon numerous concepts established in U.S. Constitution, interpretations of U.S. Constitution, as of 1978 when Constitution was ratified by plebiscite, are pertinent to determining meaning of particular provisions in FSM Constitution. To the extent that the FSM clearly patterned upon the U.S. Constitution, the reasonable expectation of the framers would be that the words of the FSM Constitution would have substantially the effect those same words had been given in the U.S. Constitution as of the times that the convention was acting, or when the ratifying vote occurred. *Lonno v. Trust Territory (I)*, 1 FSM Intrm. 53, 69-70 (Kos. 1982).

Decisions of courts of the Trust Territory may be useful source of guidance in determining meaning of particular provisions within Constitution. The framers were working against background of legal concepts recognized and applied by TT High Court and may have been guided by those interpretations in selecting or rejecting certain provisions. *Lonno v. Trust Territory (I)*, 1 FSM Intrm. 53, 71 (Kos. 1982).

FSM Supreme Court may look to law of other nations, especially other nations of Pacific community, to determine whether approaches employed there may prove useful in determining meaning of particular provisions within Constitution. *Lonno v. Trust Territory (I)*, 1 FSM Intrm. 53, 71 (Kos. 1982).

Analysis of Constitution must start with words of constitutional provision. If these words are clear and permit only one possible result, the court should go no further. *FSM v. Tipen*, 1 FSM Intrm. 79, 82 (Pon. 1982).

Where words of a constitutional provision are not conclusive as to its meaning, next step in determining intent of framers is to review Journal of the Micronesian Con Con to locate any discussion in convention about the provision. *FSM v. Tipen*, 1 FSM Intrm. 79, 82 (Pon. 1982).

If doubt as to meaning of constitutional provision still remains after careful consideration of language and constitutional history, the court should proceed to other sources for assistance. These include interpretations of similar language in U.S. Constitution, decisions of TT High Court, generally held notions of basic justice within internat. l community, and consideration of law of other nations, especially others within the Pacific community. *FSM v. Tipen*, 1 FSM Intrm. 79, 83 (Pon. 1982).

In interpreting the Declaration of Rights courts should emphasize and carefully consider U.S. Supreme Court interpretations of the U.S. Constitution. *FSM v. Tipen*, 1 FSM Intrm. 79, 85 (Pon. 1982).

Provisions in Constitution's Declaration of Rights are to a substantial degree patterned upon comparable provisions in U.S. Constitution; the FSM Supreme Court should consider carefully decisions of U.S. courts interpreting U.S. counterparts. *Tosie v. Tosie*, 1 FSM Intrm. 149, 154 (Kos. 1982).

FSM Constitution is supreme law and decisions of FSM Supreme Court must be consistent with it. *Truk v. Hartman*, 1 FSM Intrm. 174, 176-77 (Truk 1982).

FSM Supreme Court can and should consider decisions and reasoning of U.S. courts and other jurisdictions, including the TT courts, in arriving at its own decisions. It is not, however, bound by those decisions and must not fall into the error of adopting reasoning of those decisions without independently considering suitability of that reasoning for FSM. *Alaphonso v. FSM*, 1 FSM Intrm. 209, 212-13 (App. 1982).

As provisions set forth in Constitution's Declaration of Rights are based on counterparts in U.S. Constitution, it is appropriate to review decisions of U.S. courts, especially those in effect when the Constitution was approved and ratified, to determine the content of words employed therein. *In re Iriarte (I)*, 1 FSM Intrm. 239, 249 (Pon. 1983).

Framers of FSM Constitution drew upon U.S. Constitution and it may be presumed that phrases so borrowed were intended to have same meaning given to them by U.S. Supreme Court. *Jonas v. FSM*, 1 FSM Intrm. 322, 327 n. 1 (App. 1983).

An analysis of constitutional grants of power must start with the constitutional language itself. *Suldan v. FSM (II)*, 1 FSM Intrm. 339, 342 (Pon. 1983).

Similarities of FSM and U.S. Constitutions mandate that FSM Supreme Court, in attempting to determine its role under FSM Constitution, will give serious consideration to U.S. constitutional analysis at time of Micronesian Con Con. *Suldan v. FSM (II)*, 1 FSM Intrm. 339, 345 (Pon. 1983).

If the words of the Constitution are ambiguous or doubtful, it is our duty to seek out the intention of the framers. *Suldan v. FSM (II)*, 1 FSM Intrm. 339, 348 (Pon. 1983).

By using U.S. Constitution as blueprint, the framers created a presumption that they were adopting such a fundamental American Constitutional principle as judicial review, found to be inherent in the language and very idea of the U.S. Constitution. *Suldan v. FSM (II)*, 1 FSM Intrm. 339, 348 (Pon. 1983).

A legitimate method for determining the meaning of a constitution is to trace the language to its source. Where language in the FSM Constitution and the U.S. Constitution is similar, it is appropriate to look to interpretations by U.S. courts, especially those in existence at time of Micronesian Con Con, as guide to intended meaning of words employed in FSM Constitution. *Ponape Chamber of Commerce v. Nett*, 1 FSM Intrm. 389, 394 (Pon. 1984).

FSM Supreme Court may look to decisions under U.S. Constitution for guidance in determining the scope of jurisdiction since jurisdictional language of FSM Constitution is similar to that of U.S.. *Etpison v. Perman*, 1 FSM Intrm. 405, 414 (Pon. 1984).

United States constitutional law at time of Micronesian Con Con furnishes guidance as to intended scope of FSM Constitution's double jeopardy clause. *Laion v. FSM*, 1 FSM Intrm. 503, 523 (App. 1984).

1 FSMC 203, with its sweeping mandate that the Restatements and other common law rules as applied in U.S. be the "rules of decision," would lure the courts in a direction other than that illuminated by the Constitution's Judicial Guidance Provisions, FSM Const. art. XI, § 11, which identifies as the guiding star, not the Restatement or decisions of U.S. courts concerning common law, but the fundamental principle that decisions must be "consistent" with the "Constitution, Micronesian custom and tradition, and the social and geographical configuration of Micronesia." *Rauzi v. FSM*, 2 FSM Intrm. 8, 14 (Pon. 1985).

Under FSM Constitution's Judicial Guidance Provision, FSM Const. art. XI, § 11, FSM Supreme Court decisions are to be consistent with "social and geographical configuration of Micronesia." *Ray v. Electrical Contracting Corp.*, 2 FSM Intrm. 21, 26 (App. 1985).

Where framers of FSM Constitution have borrowed phrases from U.S. Constitution for guidance, it may be presumed that those phrases were intended to have same meaning given to them by U.S. Supreme Court. *Tammow v. FSM*, 2 FSM Intrm. 53, 56-57 (App. 1985).

Interpretative efforts for a clause in the FSM Constitution which has no counterpart in the U.S. Constitution must begin with recognition that such a clause presumably reflects a conscious effort by framers to select a road other than that paved by the U.S. Constitution. The original focus must be on the language of the clause. If the language is inconclusive the tentative conclusion may be tested against the journals of the Micronesian Con Con and historical background against which the clause was adopted. *Tammow v. FSM*, 2 FSM Intrm. 53, 57 (App. 1985).

Interpretations of the FSM Constitution which strip constitutional clauses of substance and effect run against the norms of constitutional interpretation and are greatly disfavored. *Tammow v. FSM*, 2 FSM Intrm. 53, 57 (App. 1985).

Departure from the form of the U.S. Constitution reveals an intention by the framers of the FSM Constitution to depart from the substance as well, so far as major crimes are concerned. *Tammow v. FSM*, 2 FSM Intrm. 53, 58 (App. 1985).

General principles gleaned from entire constitution and constitutional history may not be employed to defeat clear meaning of individual constitutional clause. *Tammow v. FSM*, 2 FSM Intrm. 53, 59 (App. 1985).

Interpretations which strip clauses of substance and effect run against the norms of interpretation and are greatly disfavored. *FSM v. George*, 2 FSM Intrm. 88, 94 (Kos. 1985).

Though words used in art. XI, § 6 of FSM Constitution, including case or dispute requirements, are based on similar case and controversy provisions in art. III of U.S. Constitution, courts within FSM are not to consider themselves bound by details and minute

points of decisions of U.S. courts attempting to ferret out the precise meaning of art. III. *Aisek v. FSM Foreign Investment Bd.*, 2 FSM Intrm. 95, 98 (Pon. 1985).

Many provisions of this Constitution are derived from the U.S. Constitution and the framers intended that interpretation of the words adopted would be influenced by U.S. decisions in existence when this Constitution was adopted in October 1975 and ratified on July 12, 1978. Yet the framers also surely intended that courts here would not place undue importance on decisions of U.S. courts but would employ words and concepts used in U.S. Constitution to develop jurisprudence appropriate and applicable to circumstances of FSM. *Aisek v. FSM Foreign Investment Bd.*, 2 FSM Intrm. 95, 98 (Pon. 1985).

The Judicial Guidance Clause of FSM Constitution cautions against simply adopting previous interpretations of other jurisdictions without careful analysis of its application to circumstances of the FSM. *Luda v. Maeda Road Construction Co, Ltd.*, 2 FSM Intrm. 107, 112 (Pon. 1985).

Constitutional interpretation must start and end with the words of the provision when the words themselves plainly and unmistakably provide the answer to the issue posed. The court may not look to constitutional history nor to U.S. interpretations of similar constitutional language in this circumstance. *Ponape Federation of Coop. Ass'ns v. FSM*, 2 FSM Intrm. 124, 127 (Pon. 1985).

Common law decisions of United States are an appropriate source of guidance for this Court for contract and tort issues unresolved by statutes, decisions of constitutional courts here, or custom and tradition within the FSM. Review of decisions of courts of U.S., and any other jurisdictions, must proceed however against background of "pertinent aspects of Micronesian society and culture." *Semens v. Continental Air Lines, Inc.(I)*, 2 FSM Intrm. 131, 140 (Pon. 1985).

Where business activities which gave rise to the lawsuit are not of a local or traditional nature, and the work setting and the work itself are of a markedly nonlocal, internat. l character, the Court need not conduct an intense search for applicable customary laws and traditional rules when none have been brought to its attention by the parties. *Semens v. Continental Air Lines, Inc.(I)*, 2 FSM Intrm. 131, 140 (Pon. 1985).

Even where the parties have not asserted that any principle of custom or tradition applies, the Court has an obligation of its own to consider custom and tradition. *Semens v. Continental Air Lines, Inc.(I)*, 2 FSM Intrm. 131, 140 (Pon. 1985).

A message of the Judicial Guidance Clause is that a court, when interpreting a contract, may not simply assume that reasonably intelligent Micronesians will perceive the same meaning as would reasonably intelligent Americans. Courts may not blind themselves to pertinent aspects of Micronesian society, such as less facility in the English language, less exposure to business concepts, and paucity of legal resources, which might cause a reasonably intelligent Micronesian to perceive a meaning differently than would a person from some other nation. *Semens v. Continental Air Lines, Inc.(I)*, 2 FSM Intrm. 131, 149 (Pon. 1985).

Customary and traditional practices within a state should be considered in determining whether the people of that state would expect their state gov. t to be immune from court action. *Panuelo v. Pohnpei(I)*, 2 FSM Intrm. 150, 159 (Pon. 1986).

Whether interference with the efforts of a non-FSM citizen engaged in business within the FSM is an abuse of process is not an issue which may be resolved by reference to traditional or customary principles. *Mailo v. Twum-Barimah*, 2 FSM Intrm. 265, 268 (Pon. 1986).

Courts may look to Journals of the Micronesian Constitutional Convention for assistance in determining the meaning of constitutional language that does not provide an unmistakable answer. The Journals provide no conclusion as to whether promises of leniency by police should be regarded as having compelled a defendant to give statements and other evidence but shows that art. IV, § 7 protection against self-incrimination was based upon fifth amendment to the U.S. Constitution. Therefore courts within the FSM may look to U.S. decisions to assist in determining meaning of art. IV, § 7. *FSM v. Jonathan*, 2 FSM Intrm. 189, 193-94 (Kos. 1986).

Differences in the language employed in parallel provisions of the FSM and U.S. Constitutions presumably reflect a conscious effort by the framers of the FSM Constitution to select a road other than that paved by the U.S. Constitution. *FSM Dev. Bank v. Estate of Nanpei*, 2 FSM Intrm. 217, 219 n. 1 (Pon. 1986).

Because the Declaration of Rights is patterned after provisions of the U.S. Constitution, and U.S. cases were relied on to guide the constitutional convention, U.S. authority may be consulted to understand the meaning. *Afituk v. FSM*, 2 FSM Intrm. 260, 263 (Truk 1986).

The Court must try to apply the Court Rules of Civil Procedure in a way that is consistent with local customary practice. *Hadley v. Board of Trustees*, 3 FSM Intrm. 15, 16 (Pon. S. Ct. Tr. 1985).

Judicial decisions, including interpretations of rules of civil procedure, should be consistent with the Constitution and with the Pohnpeian concept of justice. *Hadley v. Board of Trustees*, 3 FSM Intrm. 15, 16 (Pon. S. Ct. Tr. 1985).

Common law decisions of the United States are an appropriate source of guidance for the FSM Supreme court for contract issues unresolved by statutes, decisions of constitutional courts or custom and tradition within the FSM. *FSM v. Ocean Pearl*, 3 FSM Intrm. 87, 90-91 (Pon. 1987).

An agreement between the FSM Nat. I Government and operators of a U.S. fishing vessel in an attempt to terminate court proceedings, is not the kind of matter that historically came within principles of custom and tradition. *FSM v. Ocean Pearl*, 3 FSM Intrm. 87, 91 (Pon. 1987).

In determining whether constitutional language is amenable to only one possible interpretation, courts should consider the words in the light of history and the accepted meaning of those words prior to and at the time the Constitution was written. *Federated Shipping Co. v. Ponape Transfer & Storage (III)*, 3 FSM Intrm. 256, 258 (Pon. 1987).

Exact scope of admiralty jurisdiction is not defined in the FSM Constitution or legislative history, but U.S. Constitution has a similar provision, so it is reasonable to expect that words in both Constitutions have similar meaning and effect. *Weilbacher v. Kosrae*, 3 FSM Intrm. 320, 323 (Kos. S. Ct. Tr. 1988).

In interpreting the Constitution, each provision should be interpreted against the background of all other provisions in the Constitution, and an effort should be made to reconcile all provisions so that none is deprived of meaning. *Bank of Guam v. Semes*, 3 FSM Intrm. 370, 378 (Pon. 1988).

The judicial guidance clause, FSM Const. art. XI, § 11, is intended to insure, among other things, that this court will not simply accept decisions of the TT High Court without independent analysis. *FSM v. Oliver*, 3 FSM Intrm. 469, 478 (Pon. 1988).

Courts should interpret the nat. l Constitution in such a manner that each provision is given effect. *Carlos v. FSM*, 4 FSM Intrm. 17, 29 (App. 1989).

Because the jurisdiction provisions of the FSM Constitution are substantially similar to those of the United States but the words themselves provide no definite interpretation and no party has pointed either to constitutional history or to other matters, such as custom or tradition, calling for a particular interpretation or for departure from the accepted meaning in the U.S., it is appropriate to look to U.S. precedents for possible guidance in determining what the framers intended in adopting the provisions that now appear in the Constitution. *Ponape Transfer & Storage, Inc. v. Federated Shipping Co.*, 4 FSM Intrm. 37, 41 (Pon. 1989).

Where the language of the FSM Constitution has been borrowed from the U.S. Constitution, the court may look to leading U.S. cases for guidance in interpreting that language, especially where the meaning is not self-evident from the words themselves; in particular, U.S. constitutional law at the time of adoption of the FSM Constitution can have special relevance in determining the meaning of similar constitutional language here. *Paul v. Celestine*, 4 FSM Intrm. 205, 208 (App. 1990).

The judicial guidance clause prohibits a sentencing court from giving special effect to customary beatings administered to the defendant, unless the court finds that such recognition would be consistent with the protections guaranteed to individuals in the Declaration of Rights. *Tammed v. FSM*, 4 FSM Intrm. 266, 284 (App. 1990).

Analysis of Constitutional issues must begin with the words of the Constitution. *Constitutional Convention 1990 v. President*, 4 FSM Intrm. 320, 325 (App. 1990).

Consideration of the general plan of the Constitution and the institutions created thereunder may be helpful in determining the proper interpretation of specific language within the FSM Constitution. *Constitutional Convention 1990 v. President*, 4 FSM Intrm. 320, 326 (App. 1990).

When the meaning of the words in the FSM Constitution are not self-evident and it is apparent the words have been drawn from or are patterned upon language in the Constitution of the U.S. or of some other jurisdiction, the Supreme Court of the FSM may look to decisions of courts in that other jurisdiction for assistance in discerning the appropriate meaning of the words in the FSM Constitution. *Federal Business Dev. Bank v. S.S. Thorfinn*, 4 FSM Intrm. 367, 371 (App. 1990).

The decisions of United States courts are not binding upon the FSM Supreme Court as to the meaning of the FSM Constitution even when the words of the FSM Constitution plainly are

based upon comparable language in the U.S. Constitution, and the FSM Supreme Court will not accept a U.S. interpretation which 1) was shaped by historical factors not relevant to the FSM; 2) was widely and persuasively criticized by commentators in the U.S.; and 3) was not specifically recognized or even alluded to by the framers of the FSM Constitution. *Federal Business Dev. Bank v. S.S. Thorfinn*, 4 FSM Intrm. 367, 371 (App. 1990).

The judicial guidance clause, art. XI, § 11 of the Constitution, requires that in searching for legal principles to serve the FSM, courts must first look to sources of law and circumstances here within the FSM rather than begin with a review of cases decided by other courts." *Etscheit v. Santos*, 5 FSM Intrm. 35, 38 (App. 1991).

The judicial guidance clause implies a requirement that courts consult the values of the people in finding principles of law for this new nation, and the fact that all state legislatures in the FSM, and the Congress, have enacted Judiciary Acts adopting the Code of Judicial Conduct as the standard for judicial officials and authorizing departures from those standards only to impose tighter standards, suggests that courts should rely heavily on those standards in locating minimal due process protections against biased decision-making in judicial proceedings within the FSM. *Etscheit v. Santos*, 5 FSM Intrm. 35, 38-39 (App. 1991).

In interpreting the provision against cruel and unusual punishment in the FSM Constitution, the court should consider the values and realities of Micronesia, but against a background of the law concerning cruel and unusual punishment and internat. l standards concerning human rights. *Plais v. Panuelo*, 5 FSM Intrm. 179, 196-97 (Pon. 1991).

State and nat'l legislation may be useful as a means of ascertaining Micronesian values in rendering decisions pursuant to the judicial guidance clause, particularly when more than one legislative body in the FSM has independently adopted similar law. *Tosie v. Healy-Tibbets Builders, Inc.*, 5 FSM Intrm. 358, 361 (Kos. 1992).

Art. XI, § 11 of the FSM Constitution mandates that the court look first to Micronesian sources of law which includes the FSM Code and rules of the court in reaching decisions. *Alfons v. FSM*, 5 FSM Intrm. 402, 404-05 (App. 1992).

Constitutional analysis always starts with the words of the Constitution. Where the wording is inconclusive and where the wording is unique to the FSM Constitution, then the court should look to the journals of the Constitutional Convention and the historical background at the time the clause was adopted for guidance. But when there is a conflict with the language of the Constitution, then the actual wording of the Constitution prevails. *Nena v. Kosrae*, 5 FSM Intrm. 417, 422 (Kos. S. Ct. Tr. 1990).

Extradition is founded upon treaties between sovereign nations involving mutual agreements and commitments. There is no counterpart in Micronesia custom and tradition that is applicable. *In re Extradition of Jano*, 6 FSM Intrm. 23, 25 (App. 1993).

Determining the relevancy of custom in carrying out the mandate of art. XI, § 11 of the FSM Constitution must proceed on a case-by-case basis. *Wito Clan v. United Church of Christ*, 6 FSM Intrm. 129, 132 (App. 1993).

Where entitlement to customary relief has been proven and the means to execute such a remedy are within the trial court's authority and discretion, the trial court should as a matter of

equity and constitutional duty grant the relief. *Wito Clan v. United Church of Christ*, 6 FSM Intrm. 129, 133 (App. 1993).

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).

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).

A litigant, in order to make arguments based on the legislative history of the constitutional provision, must first show the ambiguity in the constitutional provision. Only if the constitutional language is unclear or ambiguous can a court proceed to consult the constitutional convention journals and the historical background. *Nena v. Kosrae (III)*, 6 FSM Intrm. 564, 568 (App. 1994).

Where distinctions exist between the FSM Constitution and the U.S. Constitution or other foreign authorities, court must not hesitate to depart from foreign precedent and develop its own body of law. *Pohnpei v. MV Hai Hsiang #36 (I)*, 6 FSM Intrm. 594, 600 (Pon. 1994).

Analysis of constitutional issues must begin with the words of the Constitution, and where the framers of the FSM Constitution drew upon the U.S. Constitution it may be presumed that phrases so borrowed were intended to have the same meaning given to them by the Supreme Court of the U.S. *Luzama v. Pohnpei Enterprises Co.*, 7 FSM Intrm. 40, 45 (App. 1995).

A committee report that refers to language that is not in the Constitution and that accompanied a committee proposal that was killed by the Con Con cannot be relied upon to discover the real intent of the framers. At best it can only be used to show what was not their intent. *Luzama v. Pohnpei Enterprises Co.*, 7 FSM Intrm. 40, 47 (App. 1995).

ARTICLE XII

Finance

Section 1.

(a) Public money raised or received by the national government shall be deposited in a General Fund or special funds within the National Treasury. Money may not be withdrawn from the General Fund or special funds except by law.

(b) Foreign financial assistance received by the national government shall be deposited in a Foreign Assistance Fund. Except where a particular distribution is required by the terms or special nature of the assistance, each state shall receive a share equal to the share of the national government and to the share of every other state.

Section 2.

(a) The President shall submit an annual budget to Congress at a time prescribed by statute. The budget shall contain a complete plan of proposed expenditures, anticipated revenues, and other money available to the national government for the next fiscal year,

together with additional information that Congress may require. The Congress may alter the budget in any respect.

(b) No appropriation bills, except those recommended by the President for immediate passage, or to cover the operating expenses of Congress, may be passed on final reading until the bill appropriating money for the budget has been enacted.

(c) The President may item veto an appropriation in any bill passed by Congress, and the procedure in such case shall be the same as for disapproval of an entire bill by the President.

Section 3.

(a) The Public Auditor is appointed by the President with the advice and consent of Congress. He serves for a term of 4 years and until a successor is confirmed.

(b) The Public Auditor shall inspect and audit accounts in every branch, department, agency or statutory authority of the national government and in other public legal entities or nonprofit organizations receiving public funds from the national government. Additional duties may be prescribed by statute.

(c) The Public Auditor shall be independent of administrative control except that he shall report at least once a year to Congress. His salary may not be reduced during his term of office.

(d) The Congress may remove the Public Auditor from office for cause by 2/3 vote. In that event the Chief Justice shall appoint an acting Public Auditor until a successor is confirmed.

ARTICLE XIII

General Provisions

Section 1. The national government of the Federated States of Micronesia recognizes the right of the people to education, health care, and legal services and shall take every step reasonable and necessary to provide these services.

Case annotations: Professional Services Clause

The Constitution vests the nat'l gov't with power to act concerning health care and may place some affirmative health care obligations on it. *Manahane v. FSM*, 1 FSM Intrm. 161, 172 (Pon. 1982).

Primary responsibility, perhaps even sole responsibility, for affirmative implementation of the Professional Services Clause, FSM Const. art. XIII, § 1, must lie with Congress. *Carlos v. FSM*, 4 FSM Intrm. 17, 29 (App. 1989).

The Professional Services Clause of the Constitution demands that when any part of the nat'l gov't contemplates action that may be anticipated to affect the availability of education, health care or legal services, the nat'l officials involved must consider the right of the people to such services and make a reasonable effort to take "every step reasonable and necessary" to avoid

unnecessarily reducing the availability of the services. *Carlos v. FSM*, 4 FSM Intrm. 17, 30 (App. 1989).

Since Congress did not give any consideration to, or make any mention of, the services enumerated in art. XIII, § 1 of the FSM Constitution in enacting the Foreign Investment Act, 32 FSMC 201-232, the avoidance of potential conflict with the Constitution calls for the conclusion that Congress did not intend the Foreign Investment Act to apply to noncitizen attorneys or to any other persons who provide services of the kind described in art. XIII, § 1 of the Constitution. *Carlos v. FSM*, 4 FSM Intrm. 17, 30 (App. 1989).

Since the Constitution's Professional Services Clause is a promise that the nat'l gov't will take every step "reasonable and necessary" to provide health care to its citizens, a court should not lightly accept a contention that 6 FSMC 702(4), which creates a \$20,000 ceiling of governmental liability, shields the gov't against a claim that FSM gov't negligence prevented a person from receiving necessary health care. *Leeruw v. FSM*, 4 FSM Intrm. 350, 362 (Yap 1990).

When considering a foreign investment permit application the Secretary of Resources and Development must consider "the extent to which the activity will contribute to the constitutional policy of making education, health care, and legal services available to the people of the Federated States of Micronesia." 32 FSMC 210(8). *Michelsen v. FSM*, 5 FSM Intrm. 249, 254 (App. 1991).

Since the denial of the application resulted in a decrease in the availability of legal services in Yap and since the Secretary did not properly weigh the extent to which the application would contribute to the constitutional policy of making legal services available to the of the FSM, the denial of the foreign investment permit to practice law in Yap was unwarranted by the facts in the record and therefore unlawful. *Michelsen v. FSM*, 5 FSM Intrm. 249, 256 (App. 1991).

Art. XIII, § 1 is a general provision that recognizes the right of the people to education, health care, and legal services. It does not act as an exclusive duty to ensure the availability of attorney services in the FSM, and it does not prohibit a state from administering its own bar. *Berman v. Santos*, 7 FSM Intrm. 231, 237 (Pon. 1995).

Section 2. Radioactive, toxic chemical, or other harmful substances may not be tested, stored, used, or disposed of within the jurisdiction of the Federated States of Micronesia without the express approval of the national government of the Federated States of Micronesia.

Section 3. It is the solemn obligation of the national and state governments to uphold the provisions of this Constitution and to advance the principles of unity upon which this Constitution is founded.

Section 4. A noncitizen, or a corporation not wholly owned by citizens, may not acquire title to land or waters in Micronesia.

Section 5. A lease agreement for the use of land for an indefinite term by a noncitizen, a corporation not wholly owned by citizens, or any government is prohibited.

Editor's note: Art. XIII, § 5 was amended by Constitutional Convention Committee Proposal No. 90-23, CD1, SD1 which became effective on July 2, 1991. A copy of this amendment follows this Constitution.

The original language of art. XIII, § 5 was as follows:

"Section 5. An agreement for the use of land for an indefinite term is prohibited. An existing agreement becomes void 5 years after the effective date of this Constitution. Within that time, a new agreement shall be concluded between the parties. When the national government is a party, it shall initiate negotiations."

Case annotations prior to the effective date of the constitutional amendment interpret art. XIII, § 5 as originally worded.

Case annotations: Indefinite Land Use Agreements

Read in the light of its legislative history, art. XIII, § 5 of the FSM Constitution was intended to cover leases, not easements, and therefore an easement that is indefinite in term does not violate this constitutional section. *Melander v. Kosrae*, 3 FSM Intrm. 324, 330 (Kos. S. Ct. Tr. 1988).

The FSM Constitution terminated all existing indefinite term land use agreements five years after the effective date of the Constitution. After that date, without a new lease agreement the occupier becomes a trespasser on the land. *Billimon v. Chuuk*, 5 FSM Intrm. 130, 132 (Chk. S. Ct. Tr. 1991).

Easements are not indefinite land use agreements prohibited by the Constitution because "indefinite land use agreement" is a term of art referring to Trust Territory leases for an indefinite term. *Nena v. Kosrae*, 5 FSM Intrm. 417, 423 (Kos. S. Ct. Tr. 1990).

Land granted for "for so long as it is used for missionary purposes," is not a constitutionally prohibited indefinite land use agreement because the length of the term of the land use will continue, with all certainty, as long as a court determines that the land is still being used for missionary purposes. The term is definite, because its termination can be determined with certainty. *Dobich v. Kapriel*, 6 FSM Intrm. 199, 202 (Chk. S. Ct. Tr. 1993).

The Constitutional prohibition against indefinite land use agreements does not apply to an agreement where none of the parties are a non-citizen, a corporation not wholly owned by citizens, or a gov't. *Dobich v. Kapriel*, 6 FSM Intrm. 199, 202 (Chk. S. Ct. Tr. 1993).

An easement for a road is not an indefinite land use agreement prohibited by the Constitution because it is perpetual. It is not indefinite in that it is effective into perpetuity. *Nena v. Kosrae (I)*, 6 FSM Intrm. 251, 254 (App. 1993).

An easement may be created for a permanent duration, or, as it is sometimes stated, in fee, which will ordinarily continue in operation and be enforceable forever. The grant of a permanent easement is for as definite a term as the grant of a fee simple estate. Both are permanent and not for a definite term. *Nena v. Kosrae (II)*, 6 FSM Intrm. 437, 439 (App. 1994).

A grant of a permanent or perpetual easement is definite in the same sense that a grant of a fee simple estate is definite . it is a permanent transfer of an interest in land. *Nena v. Kosrae (III)*, 6 FSM Intrm. 564, 568 (App. 1994).

Section 6. The national government of the Federated States of Micronesia shall seek renegotiation of any agreement for the use of land to which the Government of the United States of America is a party.

Section 7. On assuming office, all public officials shall take an oath to uphold, promote, and support the laws and the Constitution as prescribed by statute.

ARTICLE XIV

Amendments

Section 1. An amendment to this Constitution may be proposed by a constitutional convention, popular initiative, or Congress in a manner provided by law. A proposed amendment shall become a part of the Constitution when approved by 3/4 of the votes cast on that amendment in each of 3/4 of the states. If conflicting constitutional amendments submitted to the voters at the same election are approved, the amendment receiving the highest number of affirmative votes shall prevail to the extent of such conflict.

Section 2. At least every 10 years, Congress shall submit to the voters the question: "Shall there be a convention to revise or amend the Constitution?". If a majority of ballots cast upon the question is in the affirmative, delegates to the convention shall be chosen no later than the next regular election, unless Congress provides for the selection of delegates earlier at a special election.

Case annotations: The Nat'l Constitutional Convention is given broad authority to revise the very foundation of gov't, and every institution and office of gov't may come within its reach. *Constitutional Convention 1990 v. President*, 4 FSM Intrm. 320, 326 (App. 1990).

The nature of a constitutional convention as authorized by the FSM Constitution, with direct control of people over the identity of convention delegates, and ultimate acceptance of the products of the convention's efforts, and the fact that the framers view a constitutional convention as a standard and preferred amendment mechanism, preclude congressional control over the convention's decision-making. *Constitutional Convention 1990 v. President*, 4 FSM Intrm. 320, 327 (App. 1990).

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

ARTICLE XV

Transition

Section 1. A statute of the Trust Territory continues in effect except to the extent it is inconsistent with this Constitution, or is amended or repealed. A writ, action, suit, proceeding, civil or criminal liability, prosecution, judgment, sentence, order, decree, appeal, cause of action, defense, contract, claim, demand, title, or right continues unaffected except as modified in accordance with the provisions of this Constitution.

Case annotations: Under art. XV, § 1 of the Constitution, a provision of the TT Code is repealed by a subsequent statutory provision enacted by the Congress only if the statutory provisions in question are inconsistent or in conflict. Even if certain provisions are repealed, other provisions of that same statute may remain intact if the statute, without the deleted provision, is self-sustaining and capable of separate enforcement. *FSM v. Boaz (II)*, 1 *FSM Intrm.* 28,29 (Pon. 1981).

Transition Clause of FSM Constitution effectively adopts statutes of the TT, including the Weapons Control Act, and serves as the original enactment of a body of law, criminal as well as civil, for the new constitutional gov't. Further action by *FSM Congress* is not necessary to establish that violations of the Weapons Control Act are prohibited within the FSM. *Joker v. FSM*, 2 *FSM Intrm.* 38 , 43 (App. 1985).

Trust Territory statutes applicable to the states became part of the state's laws, regardless of whether they were published in the FSM Code. Such holdover TT laws become laws of the states until superseded. *Pohnpei v. Mack*, 3 *FSM Intrm.* 45 , 55 (Pon. S. Ct. Tr. 1987).

All Trust Territory statutes that were applicable to the State of Pohnpei prior to Pub. L. No. 2-48 and immediately before November 8, 1984, the effective date of the Pohnpei State Constitution, and which have not been amended, superseded, or repealed, are laws of the State of Pohnpei. § 3 of S.L. 3L-33-84 made those TT statutes into laws of the State of Pohnpei, and that includes Title 15 of the TT Code. *Pohnpei v. Mack*, 3 *FSM Intrm.* 45 , 55 (Pon. S. Ct. Tr. 1987).

The fact that Congress included a particular law in the FSM Code does not indicate conclusively whether the law is to be applied by this court as part of nat. l law, for some parts of the Code were intended to apply only to the TT High Court in its transitional role until state courts were established. *Edwards v. Pohnpei*, 3 *FSM Intrm.* 350 , 356 (Pon. 1988).

Section 2. A right, obligation, liability, or contract of the Government of the Trust Territory is assumed by the Federated States of Micronesia except to the extent it directly affects or benefits a government of a District not ratifying this Constitution.

Section 3. An interest in property held by the Government of the Trust Territory is transferred to the Federated States of Micronesia for retention or distribution in accordance with this Constitution.

Section 4. A local government and its agencies may continue to exist even though its charter or powers are inconsistent with this Constitution. To promote an orderly transition to the provisions of this Constitution, and until state governments are established, Congress shall provide for the resolution of inconsistencies between local government charters and powers,

and this Constitution. This provision ceases to be effective 5 years after the effective date of this Constitution.

Section 5. The Congress may provide for a smooth and orderly transition to government under this Constitution.

Case annotations: Former exclusive jurisdiction of TT High Court over lawsuits against the TT gov't has been delegated to the constitutional gov'ts covered by Secretarial Order 3039. Within the FSM, the allocation of this former exclusive High Court jurisdiction between the FSM Supreme Court and the various state courts will be determined on the basis of jurisdictional provisions within the Constitution and laws of the FSM and its respective states. *Lonno v. Trust Territory (I)*, 1 FSM Intrm. 53 ,68 (Kos. 1982).

Section 6. In the first congressional election, congressional districts are apportioned among the states as follows: Kusaie - 1; Marianas - 2; Marshalls - 4; Palau - 2; Ponape - 3; Truk - 5; Yap - 1. If Kusaie is not a state at the time of the first election, 4 members shall be elected on the basis of population in Ponape.

ARTICLE XVI

Effective Date

Section 1. This Constitution takes effect 1 year after ratification unless the Congress of Micronesia by joint resolution specifies an earlier date. If a provision of this Constitution is held to be in fundamental conflict with the United Nations Charter or the Trusteeship Agreement between the United States of America and the United Nations, the provision does not become effective until the date of termination of the Trusteeship Agreement.