

Agenda No. F-16
Pacific Territories Committee
September 1977
Summary

9/1/77

R E P O R T O F T H E C O M M I T T E E
O N P A C I F I C T E R R I T O R I E S

S U M M A R Y

The report of this Committee contains the following recommendations which require action by the Judicial Conference of the United States:

I. Guam.

A. That insofar as the views of the Judicial Conference may be solicited, the Committee should be empowered to recommend on behalf of the Conference that the present appellate route for local courts -- comprehending the appellate division of the district court, the United States Court of Appeals for the Ninth Circuit, and the Supreme Court of the United States -- currently is the most appropriate for review of decisions from Guam's local courts, and should be retained. (P. 2.)

B. That any statement on the judicial system for Guam in accordance with paragraph A above should recommend retention of diversity jurisdiction for the District Court of Guam. (P. 2.)

II. American Samoa

A. That the Committee should be empowered to endorse in principle, on behalf of the Judicial Conference (if the Congress and Samoans favor outside review), the draft legislation (Report Attachment A) which provides for appellate review by writ of certiorari to the Ninth Circuit of the decisions of the High Court of American Samoa, subject to the two enumerated jurisdictional limitations concerning matai titles and communally-owned land. (P. 4.)

B. That a further jurisdictional limitation which would exclude immigration matters from the class of appealable decisions in the draft legislation (Report Attachment A) involves questions of legislative policy which properly should be resolved by the Congress of the United States, and accordingly, that the Judicial Conference should express no opinion on this jurisdictional limitation. (P. 4.)

C. That the Judicial Conference should endorse the interim solution to the companionate review problem of the High Court of American Samoa, which calls for the use of federal judges to participate in the hearing of appeals in accordance with the recommendations in section IV below. (Pp. 4-5.)

III. Commonwealth of the Northern Mariana Islands

A. That the Committee should be empowered to endorse on behalf of the Judicial Conference the draft legislation (Report Attachment B) which provides for the establishment of the District Court of the Northern Mariana Islands and for the appointment of its judge and other officers, subject to clarification of the provision concerning coterminous expiration of the terms of dual appointments of officers of the court, and subject to the following further recommendations:

1. The legislation should make applicable to the District Court of the Northern Mariana Islands the rules heretofore or hereafter promulgated and made effective pursuant to sections 2072, 2075, and 2076 of Title 28, United States Code; and sections 3771 and 3772 of Title 18, United States Code; and the Federal Rules of Evidence, except insofar as otherwise provided in the covenant (Covenant to Establish the Northern Mariana Islands) with respect to the requirements of indictment by grand jury and trial by jury when the district court is exercising jurisdiction other than the jurisdiction of a district court of the United States.

2. The legislation should include a provision to establish a procedural framework to guide operation of the appellate division, analogous to that provided for the appellate division of the District Court of Guam.

3. The legislation should empower any judge temporarily assigned to the District Court of the Northern Mariana Islands (when there is no incumbent) by the Chief Justice or the Chief Judge of the Ninth Circuit to appoint on a temporary basis individuals to statutory offices.

4. The legislation should amend Article IV of the covenant to provide that review by the United States Court of Appeals of decisions of the appellate division will be by writ of certiorari in accordance with rules promulgated by the court of appeals.

5. The legislation should amend Article IV of the covenant to provide that only one judge of the appellate division of the district court will be a judge of a commonwealth court of record of the Northern Mariana Islands, which judge shall be, or shall have been at the time of his appointment to the court of record of the Northern Mariana Islands, a licensed attorney admitted to practice before the highest court of a state or territory who was in good standing at the time of his appointment. (Pp. 8-10.)

B. That the Committee should be empowered on behalf of the Judicial Conference to endorse the appointment of a judge, a clerk of court, a United States Attorney, and a United States Marshal for the District Court of the Northern Mariana Islands who shall hold office independent of appointment to the same office in another court, including specifically the District Court of Guam. (P. 11.)

IV. Truncated Trust Territory of the Pacific Islands

A. That the Judicial Conference should endorse, consistent with the needs of the courts of the United States and available manpower, the policy of encouraging judges and senior judges to assist whenever possible by sitting in local territorial courts to hear appeals, subject to the understanding that such assistance will be accomplished without additional expense to the federal judiciary. (P. 13.)

B. That the Secretary of Interior, in accordance with paragraph A above, should be advised that the Judicial Conference will not object to a secretarial order permitting, on an experimental basis, any active or retired Article III or federal territorial judge appointed by the President to serve as a judge in the High Court of American Samoa and the High Court of the Trust Territory of the Pacific Islands. (P. 13.)

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W. M. M. M.*

REPORT OF THE COMMITTEE
ON PACIFIC TERRITORIES

TO THE CHIEF JUSTICE OF THE UNITED STATES, CHAIRMAN; AND
MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

Submitted herewith is the Report of the Committee on
Pacific Territories, Judicial Conference of the United
States.

The committee met on August 19, 1977, in San
Francisco, California. Present were Judge Ely, Retired
Judge Shriver, Charles H. Habernigg, and Judge Chambers,
Chairman. Judge Choy was unavoidably absent.

I. Guam

In light of the decision in Territory of Guam v. Olsen, 431 U.S. ____ (1977), the appellate division of the District Court of Guam continues to exercise appellate jurisdiction over the local Superior Court of Guam. Changes in the appellate route are possible, depending upon the article concerning the Judicial Branch of the territorial government to be drafted and incorporated in the anticipated Constitution of the Territory of Guam. Implementation, however, will be contingent upon the enactment of legislation by the Congress of the United

States concerning the interrelationship between Guam's local courts and the federal courts.

Insofar as the views of the Judicial Conference may be solicited, the committee requests that it be empowered to recommend on behalf of the Judicial Conference that the present appellate route for local courts -- comprehending the appellate division of the district court, the United States Court of Appeals for the Ninth Circuit, and the Supreme Court of the United States -- currently is the most appropriate for review of decisions from Guam's local courts, and should be retained.

Further, your committee recognizes that the arguments for extinguishing the diversity jurisdiction of district courts in the States are inapposite insofar as territorial district courts are concerned. Your committee recommends that it be empowered to include in any statement on the judicial system for Guam a recommendation that diversity jurisdiction should be retained for the District Court of Guam.

II. American Samoa

The judicial system in American Samoa currently provides for no outside review by an Article III federal court. The High Court of American Samoa consists of a Chief Justice and an Associate Justice. Both are appointed by the Secretary of Interior. When one sits as the trial judge in a particular case, the other sits as the appellate

judge in the event of an appeal.

The problems of this system are self-evident. The relationships between the justices at times (not now) have been of a nature such that it has been said that an attorney's best efforts on behalf of his client required that he lose a case at the trial stage to ensure ultimate victory for his client on appeal. More generally, the essential problem with the system was captured by Chief Justice O'Connor in his statement that no one can have confidence in the appellate decisions of the judicial system of American Samoa when the only two justices of the closed system who sit in review of each other share the same privy.

The existing system of companionate review is inconsistent with a judicial system in which the people of American Samoa can have confidence. Hearings conducted by your committee support the conclusion that there exists among the Samoans a majority in favor of an off-island appellate procedure. The voice of the people seems to suggest that outside review is inevitable.

Your committee has had the opportunity to review the draft legislation of the Delegate-at-Large from American Samoa. A copy is included as Attachment A. The draft legislation provides for appeal to the United States Court of Appeals for the Ninth Circuit by writ of certiorari. Exceptions from appellate review include cases involving

exclusively matai titles and cases involving exclusively title to communally-owned real property.

Your committee believes that the American Samoans are inclined to seek enactment of legislation to provide for outside appellate review. In light of its belief that action upon this legislation therefore is more than a possibility, your committee recommends that it be empowered to endorse in principle, on behalf of the Judicial Conference of the United States (if the Congress and the Samoans favor outside review), the draft legislation which provides for appellate review by writ of certiorari to the Ninth Circuit, subject to the two enumerated jurisdictional limitations.

As a consequence of its hearings in American Samoa and testimony received in the United States, your committee recognizes that there also is substantial support for a jurisdictional limitation which would exclude cases involving immigration matters from the class of appealable decisions. However, the divergence of opinion and the absence of a consensus indicate that this possible jurisdictional limitation involves questions of legislative policy which properly should be resolved by the Congress of the United States. Accordingly, it is recommended that the Judicial Conference should take no position on the question of a jurisdictional limitation which would exclude immigration cases from the off-island appellate jurisdiction.

Pending enactment of necessary legislation, your

committee believes that an interim solution is available which can be implemented by administrative action. As discussed more fully under Section V, infra, federal judges from the District Courts of Guam and the Northern Mariana Islands could be designated by the Secretary of Interior to sit as judges to hear appeals in the High Court of American Samoa. Occasionally, an active or retired mainland federal judge also could be designated to sit. Any designations by the Secretary would be accomplished without any additional expense to the federal judiciary. Travel costs would be paid by the Department of Interior or the territory. Adding these judges to the pool available to the Secretary, which currently includes only justices of the High Court of the Trust Territory, will make available the necessary manpower to avoid companionate review. Accordingly, your committee recommends that the Judicial Conference should endorse this interim solution, and express its approval of the designation of federal judges to sit in the High Court of American Samoa, to the extent that such designations are not inconsistent with the needs of federal courts and to the extent that manpower is available.

III. Commonwealth of the Northern Mariana Islands

Your committee is advised that the constitution drafted by the representatives of the people of the Northern Mariana Islands was submitted to the President on April 23, 1977, for approval by the government of the United States

pursuant to section 202 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, as approved by the Act of March 24, 1976, Pub. L. No. 94-241, 90 Stat. 263. Current plans of the executive branch call for a mid-September 1977 presidential proclamation approving the constitution and activating Article IV of the covenant effective on approximately April 9, 1978. Article IV concerns the judicial authority of the commonwealth and provides that the United States will establish a District Court for the Northern Mariana Islands.

J. J. [unclear]

Your committee has had the opportunity to review draft legislation prepared by the Department of Justice and the Department of Interior. A copy is included as Attachment B. The legislation provides for the establishment of the court and for the Presidential appointment of the United States Attorney, the United States Marshal, and the judge of the court, who would hold office for a term of years. Apparently as a consequence of a policy decision by the Department of Justice, the draft legislation includes a provision to define the term of an appointee to one of those offices in the event the appointee already holds the same office in another territorial district court or an Article III district court. Unfortunately, the provision is ambiguous and is subject to a possible interpretation which would proscribe reappointment for a new term of an

incumbent holding a dual appointment. The intent of the provision is to make the expiry of the second appointment coterminous with the termination of the first appointment in the other court.

The people of the Northern Mariana Islands have evinced a strong desire to have their own district court for their territory. They see the establishment of that court as an integral element of the process of their assimilation into the United States. Your committee is convinced that the judge appointed to the District Court of the Northern Mariana Islands will have a substantial workload. He will have litigation involving the construction of the constitution and the covenant. For at least the first five years after the constitution has been in effect, the constitution requires that the district court will hear exclusively all local litigation of any significance, excluding only actions involving land, civil actions in which the value of the matter in controversy is less than \$5,000, and criminal actions in which the maximum fine is less than \$5,000 and the maximum term of imprisonment is less than five years. Jurisdiction over these actions not to be heard by the district court will be vested in the Commonwealth Trial Court. Inasmuch as the constitution proscribes the establishment of a commonwealth appeals court until after the constitution has been in effect for five years, any appellate review which may be provided for in legislation enacted by the commonwealth

legislature must be had in the appellate division of the District Court of the Northern Mariana Islands.

Your committee recommends that it be empowered on behalf of the Judicial Conference to endorse the draft legislation, subject to clarification of the provision concerning coterminous expiration of the terms of dual appointments, and subject to the following further recommendations:

A. The legislation should make applicable to the District Court of the Northern Mariana Islands the rules heretofore or hereafter promulgated and made effective pursuant to sections 2072, 2075, and 2076 of Title 28, United States Code; and sections 3771 and 3772 of Title 18, United States Code; and the Federal Rules of Evidence, except insofar as otherwise provided in the covenant with respect to the requirements of indictment by grand jury and trial by jury when the district court is exercising jurisdiction other than the jurisdiction of a district court of the United States.

B. The legislation should include a provision to establish a procedural framework to guide the operation of the appellate division. The framework should be analogous to that provided for the appellate division of the District Court of Guam.

C. The legislation should empower any judge temporarily assigned to the District Court of the Northern

Mariana Islands (when there is no incumbent) by the Chief Justice or the Chief Judge of the Ninth Circuit to appoint on a temporary basis individuals to statutory offices. This provision will permit the establishment and operation of the court after the legislation is enacted and after Article IV of the covenant is activated, even if the commissioning of the first judge is delayed.

D. The legislation should amend Article IV of the covenant to provide that review by the United States Court of Appeals of decisions of the appellate division will be by writ of certiorari in accordance with rules promulgated by the court of appeals. Your committee feels that appeal by writ of certiorari is necessary to eliminate review, in the discretion of the court of appeals, in cases not involving substantial questions or sums of money, including cases where the cost of the appeal to the parties would be disproportionately large in relation to the matter in controversy. Even with appeal by writ of certiorari, applicants for the writ already will have been afforded one appeal as of right in the appellate division of the District Court of the Northern Mariana Islands. The types of cases to which this procedure would apply are defined by the limited grant of jurisdiction to the Commonwealth Trial Court, which will obtain for at least the first five years after the constitution is in operation.

E. The legislation should amend Article IV of the covenant to provide that only one judge of the appellate

division of the district court will be a judge of a commonwealth court of record of the Northern Mariana Islands, which judge shall be, or shall have been at the time of his appointment to the court of record of the Northern Mariana Islands, a licensed attorney admitted to practice before the highest court of a state or territory who was in good standing at the time of his appointment. Your committee believes this change is necessary to ensure that only licensed attorneys will serve as judges in the appellate division, and to limit to one-third of the panel the representation from the local courts of the Northern Mariana Islands. Your committee believes this representational limitation to be essential in light of the fact that further review under the committee's recommendations to the court of appeals will be by writ of certiorari. This limitation will ensure the appearance of impartiality on the part of the appellate division.

Your committee believes that sufficient work will be generated to occupy the time of the judge of the District Court of the Northern Mariana Islands full-time. Your committee believes that the workload of the District Court of Guam after the Olsen decision also will continue to occupy the judge of that court on a full-time basis. Accordingly, your committee recommends that it be empowered on behalf of the Judicial Conference to endorse the appointment of a judge, a clerk of court, a United States Attorney, and a United States Marshal for the District Court of the

Northern Mariana Islands who shall hold office independent of appointment to the same office in another court, including specifically the District Court of Guam. Your committee believes that a dual appointment to an office of the District Court of the Northern Mariana Islands and to the same office of the District Court of Guam would be inconsistent with the efficient and expeditious administration of justice in those territories.

IV. Judicial Union of the Territories in Absence of Political Union

One alternative explored by your committee was the possibility of judicial union among the territories and the trust territory of the United States in the Pacific area. This judicial union would have provided for the establishment of an appellate court to hear appeals from all local territorial courts, even in the absence of political union for these territories.

Your committee has determined that there is no support of consequence for judicial union of any of the territories and the trust territory. The customs of each territory are too diverse, and there is too much water between them. Accordingly, your committee would recommend against consideration of judicial union for the territories and the trust territory of the Pacific.

V. "Truncated" Trust Territory of the Pacific Islands

The High Court of the Trust Territory of the Pacific

Islands will continue to function as the judicial branch of the government of the Trust Territory after the separation of the Northern Mariana Islands. The High Court will retain jurisdiction over cases already filed which originate in the Northern Mariana Islands and will adjudicate them regardless of the stage of separation from the Trust Territory. It is anticipated that the conditions existing in the Trust Territory may require that the High Court will remain on Saipan in the commonwealth, with the blessing of the government of the Northern Mariana Islands.

The existing situation does not admit of any recommendations concerning appeals from the High Court of the Trust Territory now. The political situation is volatile, with at least some groups desirous of complete independence from the United States.

However, your committee believes that the Secretary of Interior may request the "loan" of federal Article III judges and federal territorial judges to sit in the High Court of the Trust Territory. Chief Justice Burnett of the present court indicated at the August 19 meeting that the services of a federal judge would be especially helpful in adjudicating a backlog of appeals in his court.

The Secretary of Interior has been of assistance to the District Court of Guam in the past by permitting the assignment of judges of the High Court of the Trust Territory to the District Court of Guam, thus enabling the

convening of the appellate division and providing judicial manpower when the district judge is disqualified or when the district judge position is vacant. Your committee recommends that the Judicial Conference should endorse, consistent with the needs of the courts of the United States and available manpower, the policy of encouraging judges and senior judges to assist whenever possible by sitting in the local territorial courts to hear appeals. Your committee feels that the workload could be divided among several senior judges, with the added assistance of circuit and district judges if available. Your committee believes that the work would consume in the aggregate no more than one-half of the time of a full-time judge. Further, the services of these judges could be made available at no additional expense to the federal judiciary, since all travel costs will be paid by the Department of Interior and the territories. To this end, the Secretary of Interior should be advised that the Judicial Conference will not object to a secretarial order permitting any active or retired Article III or federal territorial judge appointed by the President to serve as a judge in the High Court of American Samoa and the High Court of the Trust Territory of the Pacific Islands.

VI. Third South Pacific Judicial Conference

Your committee reports that four of its five members attended the Third South Pacific Judicial Conference, held in Port Moresby, Papua New Guinea, on April 19-23, 1977.

A summary of the proceedings is included as Attachment C.

Your committee believes that attendance of a delegation from the United States at future South Pacific Judicial Conferences is important, and hopes in due time to secure a representative of the Supreme Court of the United States to attend.

Walter Ely
Paul D. Shriver
Richard H. Chambers, Chairman

Herbert Y. C. Choy
Charles H. Habernigg

Members of the Committee

Attachment A

A BILL

To provide for appellate review of decisions of the High Court of American Samoa.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the "High Court of American Samoa Appeals Act."

Sec. 2(a). Chapter 83 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"1295. Cases in the High Court of American Samoa

"(a) Final judgments, decrees, or decisions rendered by the High Court of American Samoa which are not reviewable by another division of that court may be reviewed by the United States Court of Appeals for the Ninth Circuit by writ of certiorari granted upon petition of any party: Provided, that the jurisdiction granted by this subsection shall not extend to cases or controversies which involve exclusively:

"(1) matai titles,

"(2) communally-owned real property, or

"(3) both (1) and (2).

"(b) The United States Court of Appeals for the Ninth Circuit shall have the same jurisdiction of appeals from interlocutory orders of the High Court of American Samoa in accordance with section 1292 of this title as if the High Court of American Samoa were a district court of the United States: Provided, that the jurisdiction granted by this subsection shall not extend to cases or controversies which involve exclusively:

"(1) matai titles,

"(2) communally-owned real property, or

"(3) both (1) and (2).

"(c) The United States Court of Appeals for the Ninth Circuit shall promulgate necessary rules to carry out this section, and shall have the power to affirm, modify, vacate, set aside, or reverse the judgment appealed from, and may remand the cause and direct the entry of such appropriate judgment or order, or require such further proceedings to be had as may be just in the circumstances."

(b). The analysis of chapter 83 of title 28, United States Code, is amended by adding at the end thereof the following:

"1295. Cases in the High Court of American Samoa".

Attachment B

Section 1.--Section 401 of the Covenant to establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, approved by Section 1 of the Joint Resolution of March 2^d, 1976, Public Law 94-241, 90 Stat. 266, is hereby amended to read as follows:

"Section 401(a).--There is hereby established for and within the Northern Mariana Islands a court of record to be known as the 'District Court for the Northern Mariana Islands.' The Northern Mariana Islands shall constitute a part of the same judicial circuit of the United States as Guam.

(b)

(1) The President shall, by and with the advice and consent of the Senate, appoint a judge for the District Court for the Northern Mariana Islands who shall hold office for the term of eight years and until his successor is chosen and qualified, unless sooner removed by the President for cause. The judge

shall receive a salary payable by the United States which shall be at the rate prescribed for judges of the United States district courts.

(2) The Chief Judge of the Ninth Judicial Circuit of the United States may assign a judge of a court of record of the Northern Mariana Islands or a judge of the High Court of the Trust Territory of the Pacific Islands or a circuit or district judge of the Ninth Circuit, or the Chief Justice of the United States may assign any other United States circuit or district judge with the consent of the judge so assigned and of the chief judge of his circuit to serve temporarily as a judge in the District Court for the Northern Mariana Islands whenever it is made to appear that such an assignment is necessary for the proper dispatch of the business of the court.

(3) The President shall appoint, by and with the advice and consent of the Senate, a United States attorney and United States marshal for the Northern

Mariana Islands to whose offices the provisions of chapters 31 and 33 of title 28, United States Code, shall apply.

(4) If the President appoints a judge for the District Court for the Northern Mariana Islands or a United States attorney or a United States marshal for the Northern Mariana Islands who at that time is serving in the same capacity in another district, the appointment shall be for the unexpired term of such judge or officer.

(c) The provisions of chapters 43 and 49 of title 28, United States Code, shall apply to the District Court for the Northern Mariana Islands."

Section 2.--Section 402 and 403 of said Covenant are amended by substituting the word "shall" for the word "will" wherever it appears.

Section 3.--This amendatory statute shall come into force upon its approval or at the time proclaimed by the President

at which the Constitution of the Northern Mariana Islands shall become effective, whichever is the later date.