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IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

FILED 

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<p>JOSEPHINE ULENGCHONG, <i>Appellant,</i> v. REPUBLIC OF PALAU, <i>Appellee.</i></p>	<p>SUPREME COURT OF THE REPUBLIC OF PALAU</p>
<p>CARMINE DERMODY,¹ <i>Appellant,</i> v. REPUBLIC OF PALAU, <i>Appellee.</i></p>	

Cite as: 2024 Palau 23
Criminal Appeal Nos. 24-001 & 24-002
Appeals from Criminal Case Nos. 23-031 & 23-025

Decided: August 8, 2024

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Counsel for Appellant Dermody	Johnson Toribiong
Counsel for Appellee	Tamara Hutzler

BEFORE: OLDIAIS NGIRAIKELAU, Chief Justice, presiding
FRED M. ISAACS, Associate Justice
DANIEL R. FOLEY, Associate Justice

Appeals from the Trial Division, the Honorable Kathleen M. Salii, Presiding Justice, and the Honorable Honora E. Remengesau Rudimch, Associate Justice, presiding.

¹ Although Appellant Dermody’s name is spelled as “Carmene” in her briefing, Appellee has clarified that the correct spelling is “Carmine” by providing Appellant’s passport. We have edited the caption to match Appellant’s legal identification.

OPINION

NGIRAIKELAU, Chief Justice:

[¶ 1] This appeal involves an issue of an act’s constitutional validity. The issue is whether the Special Prosecutor Act’s provision for the Interim Special Prosecutor position violates the Appointments Clause by not requiring presidential appointment and senatorial approval. The Trial Division determined that the Act is constitutional.

[¶ 2] For the reasons set forth below, we **AFFIRM**.

BACKGROUND

[¶ 3] On appeal are two cases filed by Appellant Carmine Dermody and Appellant Josephine Ulengchong against the Republic of Palau. The issue in both appeals is whether the Special Prosecutor Act’s (“the Act”) provision for the Interim Special Prosecutor (“ISP”) position violates Article VIII, Section 7(3) of the Constitution of the Republic of Palau (“Appointments Clause”) by not requiring appointment by the President with the advice and consent of the Senate.

[¶ 4] The Olbiil Era Kelulau (“OEK”) established the Office of the Special Prosecutor through the Act, requiring appointment by the President with the advice and consent of the Senate for the Special Prosecutor position. 2 PNC § 502(a). After failed attempts to keep that position filled, the OEK created the ISP position “to take on some of the essential duties of the Office of the Special Prosecutor” under specified conditions. *See id.* § 502(d); RPPL No. 9-24 (2014).

[¶ 5] Pursuant to the Act, the Attorney General may appoint an ISP “who will take office without the advice and consent of the Senate”:

- (1) if the President nominates a Special Prosecutor but the Special Prosecutor is not confirmed by the Senate and the President does not nominate a different person to become Special Prosecutor in the sixty (60) days following the failed confirmation; or

- (2) if the position of Special Prosecutor is vacant for a period of six (6) months regardless of whether the President nominated a person to become Special Prosecutor.

2 PNC § 502(d).

[¶ 6] The current ISP, who is prosecuting a case against each Appellant, was appointed by the Attorney General without Senate approval. Appellants argue that the current ISP's appointment under the Act violates the Appointments Clause because the ISP is a national officer whose position requires presidential appointment and senatorial approval.

[¶ 7] The trial court upheld the constitutionality of the Act, determining that the ISP is not a national officer and was properly appointed. Appellants Ulengchong and Dermody appeal that determination.

STANDARD OF REVIEW

[¶ 8] We review matters of law de novo, findings of fact for clear error, and exercises of discretion for abuse of that discretion. *Obechou Lineage v. Ngeruangel Lineage of Mochouang Clan*, 2024 Palau 2 ¶ 5.

[¶ 9] When determining whether a statute passes constitutional muster, every intendment is in favor of its validity, and a statute is presumed constitutionally valid unless it is clearly repugnant to the Constitution. *Republic of Palau v. Sisor*, 3 ROP Intrm. 376, 381 (Tr. Div. 1991). This presumption of constitutional validity is based on the principle of separation of powers. *Id.* The Court, however, retains the ultimate duty to determine the constitutionality of any law. *Remeliik v. Senate*, 1 ROP Intrm 1, 4–5 (Tr. Div. 1982).

DISCUSSION

[¶ 10] Appellants present a single issue on appeal: Whether the Act's provision for the ISP position violates the Appointments Clause by not requiring presidential appointment and senatorial approval. To determine this, we consider the OEK's intent in drafting the Act and whether the ISP is a national officer.

[¶ 11] The OEK created the ISP position due to trouble filling the permanent position of the Special Prosecutor. *See* 2 PNC § 502(d); RPPL No. 9-24. In creating the ISP position, the OEK provided that the Attorney General may appoint an ISP and the ISP takes office without Senate approval. Appellants argue that this provision violates the Appointments Clause because the ISP is a national officer requiring presidential appointment and senatorial approval.

[¶ 12] Pursuant to the Appointments Clause, “[t]he President shall have all the inherent powers and duties of a national chief executive, including, but not limited to . . . appoint ambassadors and other national officers with the advice and consent of the Senate.” ROP Const. art. VIII, § 7(3). Appellants assert that the Special Prosecutor and ISP are both national officers because they have the same powers.² If this argument prevails, the Act’s provision for the ISP position must be stricken as unconstitutional because it requires appointment by the Attorney General rather than by the President and does not require Senate approval.

[¶ 13] Although the Special Prosecutor and ISP enjoy similar powers and some independence, Appellants’ argument fails to rebut the presumption of constitutional validity. *See Sisor*, 3 ROP Intrm. at 383–84 (requiring the party contesting constitutional validity to rebut the presumption in favor of constitutionality and prove unconstitutionality by clear and convincing evidence). The Act’s requirements show that the OEK did not intend for the ISP to be a national officer because: (1) the ISP position is occasional; (2) the ISP position is temporary; and (3) the ISP is appointed, supervised, and subject to removal by the Attorney General.

[¶ 14] The ISP position is occasional because it can only be filled when the Special Prosecutor position is vacant for at least six months or if the President appoints a candidate who is not confirmed within sixty days. 2 PNC § 502(d). When the Special Prosecutor position is filled, there can be no ISP. Moreover,

² Appellants also point to *Republic of Palau v. Sisor*, 4 ROP Intrm. 152 (1994) and *Republic of Palau v. Sisor*, 3 ROP Intrm. 376 (Tr. Div. 1991) to support their argument. However, their reliance on *Sisor* is misplaced. *Sisor* considered whether the appointment of a temporary Special Prosecutor was unconstitutional, however, the facts there were contrary to those here, and those cases were decided before the provision for the ISP position was enacted.

the ISP position is temporary as it is capped at two years. The position may also dissolve sooner due to resignation, termination for cause, or appointment of a Special Prosecutor. *Id.* § 502(f).

[¶ 15] Lastly, the ISP is appointed, supervised, and subject to removal by the Attorney General.³ The Attorney General may appoint an ISP when an appointment for the Special Prosecutor is rejected by the Senate or when the Special Prosecutor position is otherwise vacant for a period of six months. *Id.* § 502(d). The Attorney General supervises the ISP, who must submit quarterly reports on expenditures, complaint statistics, matters investigated and prosecuted, and any other requested information. *Id.* § 507(a)–(c). The Attorney General may meet with the ISP to discuss these reports and recommend changes to improve operations. *Id.* § 507(d)–(e). The Attorney General, moreover, may remove the ISP for cause. *Id.* § 502(f)(3). Therefore, the ISP is not a national officer because the position is occasional, temporary, and supervised by another executive office.

[¶ 16] This conclusion aligns with analogous U.S. case law on the subject. The U.S. Supreme Court considered a similar issue and held that a merchant appraiser was not an officer within the meaning of the U.S. Appointments Clause because his position was “without tenure, duration, continuing emolument, or continuous duties,” and he acted “only occasionally and temporarily.” *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890). Although we are not bound by this case law, we may adopt its rationale. *Republic of Palau v. Carreon*, 19 ROP 66, 74 (2012) (“On Constitutional matters, we may look to analogous United States law for guidance. However, we are ‘not bound to mechanically embrace United States case law’ and may freely ‘adopt the rationale set forth if we find it persuasive.’”). We find this rationale persuasive and adopt it here.

[¶ 17] The ISP is not a national officer under the Appointments Clause. Accordingly, the ISP position does not require appointment by the President

³ The ISP reports to the Attorney General, who in turn reports to the Minister of Justice, who reports to the President. In contrast, the Special Prosecutor reports directly to the President. 2 PNC § 503(b)

with advice and consent of the Senate, and the Act's provision for the ISP position is constitutionally valid.

CONCLUSION

[¶ 18] For the foregoing reasons, we **AFFIRM** the Trial Division's decision.


SO ORDERED, this 8th day of August 2024.



OLDIAIS NGIRAIKELAU
Chief Justice, presiding



FRED M. ISAACS
Associate Justice



DANIEL R. FOLEY
Associate Justice