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In the

Supreme Court of the United States <sup>23</sup>

TERRITORY OF GUAM,

PETITIONER,

v.

EDMUND J. OLSEN,

RESPONDENT.

No. 76-439

Washington, D. C.  
March 29, 1977

Pages 1 thru 44

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IN THE SUPREME COURT OF THE UNITED STATES

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TERRITORY OF GUAM, :  
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Petitioner, :  
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v. : No. 76-439  
:  
EDMUND J. OLSEN, :  
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Respondent. :  
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Washington, D. C.,

Tuesday, March 29, 1977.

The above-entitled matter came on for argument at  
2:02 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice  
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

CHARLES H. TROUTMAN, III, Esq., Attorney General of  
Guam, Agana, Guam; on behalf of the Petitioner.

HOWARD G. TRAPP, Esq., P. O. Box 3367, Agana, Guam;  
on behalf of the Respondent.

WALTER S. FERENZ, Esq., P. O. Box BF, Agana, Guam;  
on behalf of Guam Bar Association, Amicus Curiae.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-439, Territory of Guam v. Olsen.

Mr. Troutman, you may proceed.

ORAL ARGUMENT OF CHARLES H. TROUTMAN, III, ESQ.,

ON BEHALF OF THE PETITIONER

MR. TROUTMAN: Mr. Chief Justice, and may it please the Court:

The essence of this case is the ability of the Territory of Guam to determine for itself the type of court system it desires for its own local cases. The specific question presented in this case is whether section 22 of the Organic Act of Guam, which is 48 United States Code 1424, permits the Legislature of Guam to create an Appellate Division -- rather create a Supreme Court of Guam and transfer from the Appellate Division of the District Court to the Supreme Court of Guam all appeals from the lower courts of the territory.

A brief history of this legislation I believe is in order. First, in 1974, the 12th Guam Legislature decided that it was time to have the local court system, in its opinion anyhow, as autonomous as the rest of the government had become.

In 1950, the Organic Act created a civil government for the Territory of Guam and created at that time a legislature having legislative authority over all matters of local interest. A Governor of Guam was also created, who was an



appointed official, appointed by the President, answerable to the Interior Department, and section 22 of the Organic Act created a court system similar to but significantly different from that in the other territories, probably most similar to that of the old Arizona Territory.

Then there were certain significant amendments in 1951 and 1958, which I shall discuss later. And then in 1970, the Elective Governor Act was adopted, which gave Guam its first elected Governor, elected locally.

Then in 1974, the Legislature of Guam amended the local codes of Guam which had previously by the first Guam Legislature created the Appellate Division of the District Court, it amended these laws to provide for a Supreme Court of Guam and a Superior Court which was then the Superior Court being a court of local jurisdiction.

As soon as a case could go through the process of the then Superior Court, it came up for appeal before the Supreme Court. This was *Agana Bay v. Dillingham*. And as soon as the Supreme Court had received it, the Agana Bay Company petitioned to the District Court of Guam to issue a writ of prohibition declaring that the Supreme Court of Guam had no authority to hear appeals from any sort of lower court activity. The District Court of Guam then granted this writ which was thereupon appealed to the Ninth Circuit and on January 17, 1976, the Ninth Circuit, a panel of three judges,

reversed the District Court, saying that the Supreme Court under the Organic Act did have a right to exist and hear cases on appeal.

Meanwhile, the respondent in this case, Olsen, had been convicted in the Superior Court of various crimes, burglary, receiving stolen property and assault with a deadly weapon. He had appealed both to the Supreme Court and the District Court on the generally held belief at that time that no one knew which court would hear the appeal.

As soon as the Agana Bay decision came down, the District Court then reversed or rather denied the appeal in the Olsen case, saying that it had no jurisdiction. This denial was then appealed to the Ninth Circuit Court of Appeals and before the Ninth Circuit could act a petition for certiorari was filed by the respondents in this action, which was denied. Then the Ninth Circuit en banc, but without further briefs or argument, reversed the opinion in the Agana Bay case, declaring that the Supreme Court of Guam could not hear, had no jurisdiction to hear appeals because the Guam Legislature had no power to create one under the Organic Act.

QUESTION: Agana Bay and this case are two wholly separate cases, are they not?

MR. TROUTMAN: They are completely separate, Your Honor, except that the issue involved is the same.

QUESTION: Just as a matter of curiosity, is the

personnel of the new courts established in Guam confined to persons admitted to the bar in Guam? In other words, do judges have to be lawyers?

MR. TROUTMAN: Oh, yes, except for the police court, and that only for the incumbent. The current --

QUESTION: Just a grandfather clause?

MR. TROUTMAN: Yes, for the one judge. Actually, though, not for the bar of Guam, Your Honor, because the composition of the new court, of the Supreme Court of Guam, would have been almost identical to that of the Appellate Division of the District Court in that the Chief Justice was the only Justice appointed, and he was a member of the bar and had to be a member of the bar of Guam. But he would designate two other Associate Justices from among a group which would include a District Judge, with his consent, non-involved judges of the Superior Court or one of the judges of the high court in the Trust Territory with their consent, which is the same way that the Appellate Division is now constituted under the Organic Act of Guam, section 22(a), the second paragraph.

QUESTION: When the second paragraph refers then to three judges of the District Court of Guam, it is not talking about three federal district judges, I gather?

MR. TROUTMAN: No, Your Honor, there are no Article III courts applicable to Guam as original or appellate jurisdiction on the island. The only Article III court that is

involved in the Guam cases is the Ninth Circuit Court of Appeals.

QUESTION: So even the District Court of Guam is not an Article III court?

MR. TROUTMAN: No, Your Honor, that is a legislative court, created by the Organic Act of Guam in 1950.

QUESTION: And its decisions are appealable to the Ninth Circuit?

MR. TROUTMAN: That is correct, yes.

QUESTION: But not the Supreme Court of Guam?

MR. TROUTMAN: That is correct, because the Supreme Court did not exist --

QUESTION: Well, under this plan that you would support, there would be a good many federal questions that would end up with the Supreme Court of Guam subject to no federal review?

MR. TROUTMAN: Collateral questions. You see, the District Court of Guam, Your Honor, has exclusive jurisdiction over all cases which arise under the --

QUESTION: Well, that is arising under --

TROUTMAN: -- and, of course, income tax, but other issues, yes --

QUESTION: But only federal offenses would never be subject to federal review?

MR. TROUTMAN: Up to a point, Your Honor, not on



direct appeal. We believe --

QUESTION: How about a federal constitutional defense to a case in a Guam court?

MR. TROUTMAN: Well, in a criminal case, Your Honor, we would believe that it could be brought on a writ of habeas corpus in the District Court.

QUESTION: Well, what about a civil case?

MR. TROUTMAN: A civil case, that presents more of a problem.

QUESTION: That is a euphamism for it is not appealable to a federal court?

MR. TROUTMAN: Correct. At the time the Guam Legislature passed the Court Reorganization Act, they also passed a resolution requesting Congress to amend the Organic Act to provide --

QUESTION: Yes, but until that is done there would be no appeal?

MR. TROUTMAN: That is correct.

QUESTION: 1983 applies to Guam?

MR. TROUTMAN: Yes, it does completely.

I think we need to look at the --

QUESTION: May I just ask you --

MR. TROUTMAN: Certainly.

QUESTION: I gather that as this decision now stands, there is no such things as the Supreme Court of Guam?

MR. TROUTMAN: That is correct. And the appeals now pending --

QUESTION: Is this because the statute has been read to mean that there is no authority to create this court, there was no authority given with jurisdiction?

MR. TROUTMAN: No. The authority I would say would be that there is no authority to create this court.

QUESTION: But no authority to transfer any appellate jurisdiction?

MR. TROUTMAN: That is correct.

QUESTION: That is what you really mean?

MR. TROUTMAN: That is what I really mean. But the original decision actually in Agana Bay said that there was no authority to create the court.

QUESTION: Mr. Troutman, following up on Justice White's question, under your view of the Organic Act, would it have been possible to create a local court to try local matters and have no appellate review whatsoever of that court's decisions?

MR. TROUTMAN: Yes, Your Honor, it would be because the Organic Act states that, to begin with, the District Court of Guam shall have such appellate jurisdiction as the Legislature of Guam determines, so that if the Legislature of Guam didn't determine any jurisdiction, regardless of what else it created, if it didn't act to determine there was jurisdiction

in the District Court, then it wouldn't have any. This is sort of a question that we are facing with many cases right now, because the case below has said that the Legislature cannot transfer jurisdiction from the appellate division to a Supreme Court, yet what the Legislature has done is repeal any authorization of jurisdiction to the District Court and has not yet acted to replace it with anything.

QUESTION: So that if we merely hold that the Supreme Court of Guam is not properly constituted under the present state of the law, there would be a trial in a Guam court with no review of the federal question in any court?

MR. TROUTMAN: In any court, that is unfortunately the case, yes.

The Organic Act of Guam is quite different from the Act of the Virgin Islands and other territories. Most of the early western territories actually, except Arizona, provided a complete court system. They set up a Supreme Court, District Courts, Probate Courts, Justice of the Peace Courts. In Arizona, however, they set up a court which said -- they set up a District Court and such other inferior courts as the Legislature may or may not determine. In the Virgin Islands, the Legislature of the Virgin Islands today only has authority to create inferior courts and also has very limited authority to create exclusive jurisdiction in the courts that it does create. But on Guam the Congress has said no such thing. There

is no -- the judicial authority of Guam is vested in not only the District Court but in such court or courts as the Legislature may create. There is no word anywhere in the judiciary section of the Organic Act which would act to mention the word inferior court to otherwise limit the Legislature in the type of courts that it would create.

QUESTION: Mr. Attorney General, what if any effect on this case does the 1976 legislation, congressional legislation have?

MR. TROUTMAN: On the Guam Constitution?

QUESTION: Yes.

MR. TROUTMAN: Relatively limited, I believe, Your Honor, for several reasons. The first is that it applies only to a Guam Constitution which hasn't yet been written, and the constitutional convention will be called for later this year, June, and under the timetable Congress would not receive it until possibly early 1978. But presently approximately forty cases on appeal are awaiting decision on this case in the courts of Guam. So there are -- we are talking now about existing Guam, not as what it may be after the Guam Constitution has come about.

On the second part of that question, Your Honor, from the history of the 1976 legislation that passed, it would indicate that the reason for section 2(b)(7) regarding the courts was not so much that Congress was trying to interpret



the existing Organic Act but because they were at a quandary to know how to interpret the situation in light of this continuing litigation, because at that time, at the time that was inserted, the Ninth Circuit decision, en banc decision had come down but certiorari had not yet been granted, so they assumed that that decision was final and acted accordingly.

I think that the congressional intent, if you can find any in the original Organic Act, is not as respondents would urge, that Guam could not -- was barred completely from creating this type of court; Congress originally considered two versions of the Organic Act, two or three, in which they created in these proposals various forms of a court system similar to a state court system. In other words, they said this is the system and treated it more as a constitution.

However, they rejected all of these versions and came out with what is now 22(a) of the Organic Act, plus other parts which have since been amended. In fact, later, in 1951, when they realized how much appellate jurisdiction the legislature had given them, they were forced to amend the judiciary section so that appeals would go from the Appellate Division to the Ninth Circuit as was desired at that time, for the simple reason that before the 1951 amendment there was a limited right of appeal to the Ninth Circuit in matters, in felonies and in matters in excess of \$3,000. Everything below that was not appealable, but these were just the matters that were being

appealed to the Appellate Division of the District Court. So there was a desire that they not end there at that time.

Then in 1958 it was determined that with the increasing amount of appeals again, the former system of assigning judges to the District Court was simply unworkable, chiefly because of the distance, they were assigned by the Chief Justice of this Court and also they came from Article III courts of the United States. So it was amended to provide that designation of associate judges for this Appellate Division would be provided by the presiding judge of the Appellate Division from among judges able to sit on the District Court, namely judges who had been designated by either the Chief Justice or the Chief Judge of the Ninth Circuit, and also from judges in the high court of the Trust Territory, which incidentally has no judicial jurisdiction over Guam whatsoever.

It is also interesting for comparison to note the covenant of the Northern Marianas recently passed also, while there they did provide for the proper route to appeal to an Article III court, they did that because all of the parties were then knowledgeable that -- were then quite aware that the Northern Marianas would probably eventually be creating its own courts. But the language giving jurisdiction to its Appellate Division is very similar to that found in the Organic Act of Guam.

QUESTION: Is that in your brief? I believe it is in

your brief, isn't it?

MR. TROUTMAN: Yes, Your Honor, it is. It is on page 5 of the brief for the petitioners.

QUESTION: The language authorizing the creation of the courts is very similar --

MR. TROUTMAN: No, authorizing the Appellate Division. We are not here talking about the authority of Guam to create lower courts, in other words courts of general jurisdiction. But section 402(c) says the District Court, now referring to the Northern Marianas, the District Court will have such appellate jurisdiction as the Constitution or laws of the Northern Mariana Islands may provide. Then they go on to say when it sits as an Appellate Court, the District Court will consist of three judges, at least one of whom will be a judge of a court of record of the Northern Mariana Islands.

So the first sentence of this is very similar to that in the Organic Act of Guam, referring to appeals, where it says in section 22(a), talking about jurisdiction, the District Court, it says, shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the Legislature to other court or courts established by it, and shall have such appellate jurisdiction as the Legislature may determine.

QUESTION: It is that phrase that you say is written similar to -- will have such appellate jurisdiction as the

constitution or laws of the Northern Mariana Islands may provide?

MR. TROUTMAN: Yes, Your Honor.

QUESTION: You are making that comparison?

MR. TROUTMAN: I am, yes, that is the point of the comparison.

QUESTION: Mr. Troutman, may I ask one other question. The language you just read, the transfer of original jurisdiction language, that is broad enough to cover, as I would read it, at least I think, transfer of cases arising under federal law?

MR. TROUTMAN: No.

QUESTION: Would you agree with that?

MR. TROUTMAN: No, I would not, Your Honor, because prior to that statement, the full sentence reads, the District Court of Guam will have the jurisdiction of a District Court of the United States in all causes arising under the Constitution, treaties and laws of the United States, regardless of the sum or value of the matter in controversy, shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred.

QUESTION: I see.

MR. TROUTMAN: So that the only thing that can be transferred is other causes than what this --

QUESTION: I see.



QUESTION: What does that do to diversity cases?

MR. TROUTMAN: This, Your Honor, I cannot rightly say because this is currently in litigation at the present time.

QUESTION: Yes, because it is contradictory, isn't it, about diversity?

MR. TROUTMAN: Yes.

QUESTION: It would be. It can't both have the jurisdiction of a federal District Court and still be transferable to another court?

MR. TROUTMAN: That's correct.

QUESTION: You can read Tidewater Mutual.

MR. TROUTMAN: The issue I believe in diversity is that diversity basically is not a cause arising under the law of Guam. That is one argument.

QUESTION: I know, but it says the jurisdiction of the federal court.

MR. TROUTMAN: That's true. And actually at the present time the District Court of Guam has assumed that it does have diversity jurisdiction.

QUESTION: Well, then, diversity cases are not transferable out of --

MR. TROUTMAN: That is correct, they are not.

QUESTION: So even though another court says the local court system is set up, suiters have the choice then?

MR. TROUTMAN: Under the existing law, that is

correct.

QUESTION: I don't understand why a diversity case is not transferable. I understand your answer as to cases arising under federal law, but there is nothing in here about diversity cases not being transferable, is there?

MR. TROUTMAN: Well, that particular question has not been addressed in the Court Reorganization Act because its jurisdictional statement is that jurisdiction lies in the Superior Court in all cases arising under the laws of Guam. So actually there is a gap there of two types of cases which go to the District Court. One type I believe probably would be diversity, since Guam has no provisions itself for diversity per se, and also cases that probably arise under, say, another law but are heard on Guam. Litigation is going on in one of those at the present time, for instance, which arise under the laws of the Trust Territory, but the parties are found in Guam and the case is pursued there.

We would further argue that the appeal to a District Court then to the Ninth Circuit Court of Appeals is not actually a matter of right that was established by the original Organic Act, since under the original Organic Act there was no right to appeal to the District Court to begin with. This right had to be made when it was made by the Legislature of Guam. This was done in the first Guam Legislature by really a court, a separate division is what they called it, an appellate division

of the District Court, but that was a creature of Guam and not of the Organic Act.

Our argument further is that the subsequent amendments do not in essence repeal or omit that right of Guam to change its original act in the first place. In other words, the second paragraph of section 22 of the Organic Act, where it starts "appeals to the District Court of Guam shall be heard and determined by an Appellate Division," and so forth, this does not state that appeals cannot be heard any place else, but merely provides the system that has developed that it should be heard, if and assuming the Guam Legislature continues the appeals to the Appellate Division.

Guam has progressed far in its ability to determine its own form of government within the Organic Act of Guam, and we are not arguing -- our whole argument here is that this is permitted within the Organic Act, as it presently exists.

In our view, the Organic Act of Guam represents maximum flexibility to Guam in determining the form of government for the territory in a much greater degree than has been provided by the Organic Acts of various other territories and possessions.

In the Florida case cited in our brief, *American Ocean Insurance v. 356 Bales of Cotton*, this Court back when Florida was a territory ruled that the Congress may give to a territory either the jurisdiction it wants to in a court system

or permit that territory to give either what is normally federal jurisdiction or local jurisdiction to a court of its choice.

QUESTION: What other territories has Congress given the jurisdiction which you claim was given here to Guam?

MR. TROUTMAN: None, Your Honor, because very specifically elsewhere, at least in recent history, it spells out how the courts are to operate. In the Virgin Islands, it is very specific that they state that local jurisdiction may not -- rather, it may create only inferior courts, and then it actually provides that jurisdiction of the -- rather, appeals may be taken -- rather, shall be taken from the lower courts created by the jurisdiction of the Virgin Islands to the District Court of the Virgin Islands. So that this is specifically stated.

In old Hawaii, when it was a territory, the Congress actually created a Supreme Court and permitted inferior courts to be created and created certain intermediate courts also. But there again they referred to inferior courts as the province of the Hawaii Legislature.

In Puerto Rico, under its Organic Act days, not under the common law, of course, there was a court system created again by the Organic Act but giving inferior powers to the Puerto Rican Legislature. So that actually we are arguing that the Guam Organic Act is different from that of other



jurisdictions, and this is why Guam claims its power. If we were operating under, say, the Virgin Islands, Hawaii or Arizona Organic Acts, there is no question that Guam could not do what it is presently doing.

QUESTION: And under those acts the authority is limited to creating non-appellate courts --

MR. TROUTMEAN: Yes, I would --

QUESTION: -- creating so-called inferior courts?

MR. TROUTMAN: That is correct, Your Honor, it is. It is either specifically limited to that or in some of the older ones the whole setup, the whole court system is established by Congress, leaving no --

QUESTION: No authority whatsoever?

MR. TROUTMAN: -- no authority whatsoever.

QUESTION: While I have interrupted you, may I ask --- you don't need to answer it now, but I wonder if you are going to address yourself to the impact upon this case, if any, of the newly authorized constitutional convention, the CONCON authorization?

MR. TROUTMAN: Yes, Your Honor, I don't believe that there is actually going to be that much impact at the moment. I think the reason for this is what will happen is covered adequately by the CONCON Act itself in that, number one, I cannot forecast what the CONCON will come up with. I really have no idea at this point. I presume it will come up with

something similar, but this is not -- I have no way of telling.

The history of that section 2(b)(7) indicates that the matter of the relationship of whatever court is created will be determined probably at the time that Congress approves the Guam Constitution and be part of the joint resolution. This was the intent by counsel at the time of the Senate amendment to that.

As to cases that are existing now, I don't foresee that it will have any effect whatsoever inasmuch as these cases, particularly criminal cases, are already in the appeal route under existing laws, and I don't see how the Guam CONCON Act will be able to reverse or change what is presently the law.

QUESTION: How would a case in the local courts get federal review? Is there any direct federal review?

MR. TROUTMAN: Under the existing law, Your Honor?

QUESTION: Yes.

MR. TROUTMAN: Under the existing law, the review is to the Appellate Division of the District Court which, being a part of the District Court, you have a right to appeal automatically to the Ninth Circuit Court. This is how this case came before this Court.

QUESTION: Under your view of the jurisdiction, how would one get to direct federal review?

MR. TROUTMAN: In the criminal case such as this, I imagine a criminal review would be by habeas corpus in the

District Court.

QUESTION: Well, that is not direct review, of course.

MR. TROUTMAN: No. Under the present time, Your Honor, there would be no direct review.

QUESTION: If you are correct?

MR. TROUTMAN: Yes, assuming our position.

QUESTION: I have one more question before you sit down. You indicated that consideration has been given to the problem of providing direct review from a decision of the Supreme Court of Guam. Is the thought that that review would be in the Ninth Circuit or in this Court, do you know?

MR. TROUTMAN: Your Honor, there is actually quite a bit of controversy on this point. The Chief Justice appointed a committee on the Pacific Territories which held hearings in Guam last August. It seems to me the view of the bar of Guam that they would like review to be to the Ninth Circuit since this would actually provide more direct, more number of appeals since the chances of getting a review to this Court are much less.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Mr. Trapp.

ORAL ARGUMENT OF HOWARD G. TRAPP, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. TRAPP: Mr. Chief Justice, and may it please the

Court:

Mr. Justice Stevens asked a question, the answer to which being given I was shocked to hear, because I believe his question was, what if the Ninth Circuit's decision is upheld and the Supreme Court of Guam remains stricken down, at the present time would there be any right of appeal in Guam at all, and I believe Gen. Troutman's answer was no. I submit that the answer to that question definitely is yes, because it is a common canon of statutory construction that if a statute is amended and if for some reason -- and if it is obvious that the intent is not to do away with the remedy that was given, for example such a case as this, there was no intention to do away with appeals altogether, but rather to direct appeals through a different route and to a different court, and if that repealer and substitute law were declared invalid, then of course the original law would spring back into being, and under section 55 of the Guam Court Reorganization Act, it says every reference in law, rule or regulation to the island court shall be read to mean the Superior Court of Guam, it means we would still have the old law with the change which would not be invalid, of changing the old island court name to the Superior Court, and then the law under the Ninth Circuit's latest decision would simply read that you can take appeals from the Superior Court of Guam to the Appellate Division of the District Court of Guam.

QUESTION: Mr. Trapp, let me just modify the question a little bit then. Supposing the question is whether the Organic Act would prevent the Guam Legislature from enacting two statutes. In the first statute they say we hereby withdraw all appellate jurisdiction from the District Court, and that goes into effect, and I guess they have the power to do that under the Organic Act. And then secondly, a year later, they pass the statute saying now appeals will be taken to the newly created Guam Supreme Court, and then we knocked out the second statute, I suppose then there would be no appeal?

MR. TRAPP: Well, in the first place, I think we have at least raising its head a possible constitutional question as to whether or not -- well, first a question of whether Congress intended to do away with appeals to an Article III court eventually on federal questions, and --

QUESTION: Well, is there anything in the language of the Organic Act that would prevent the Guam Legislature from withdrawing entirely the appellate jurisdiction of the existing District Court?

MR. TRAPP: I don't think that there is anything in the language of the Organic Act which prevents that, but I think we are not -- the government seems to take some comfort from the fact that there is no such language, but I think that they are not talking about the real world, they are not talking about the world that the Congress expected would obtain in



Guam and that is to say the world where invariably appeals in a certain number of instances are always allowed by the legislature.

QUESTION: Judge Kennedy read the word "determined," as I understand his opinion, to mean that there is at least some category of petit matters, small matters as to which there need be no appeal.

MR. TRAPP: Of course, and the language in the Organic Act does not say shall provide appeals in all cases, so determined means of course to make a rational decision of some sort to make distinctions between cases, those that may be appealed and those that may not be appealed.

QUESTION: You would say that means they can determine that there will be minor matters as to which there will be no appeal, but they could not determine that there will be no appeals at all?

MR. TRAPP: I am not saying that the language does not say that there cannot be no appeals at all. I am simply saying I can't believe that Congress ever anticipated that situation ever happening.

QUESTION: Certainly your construction is not what one would call the plain meaning of the language that Judge Stevens was asking about, is it?

MR. TRAPP: As to Congress not contemplating never doing away with all appeals?

QUESTION: No, I mean as to the part of section 22(a) on page two of the petitioner's brief which describes the original jurisdiction and says jurisdiction of the District Court -- and then says jurisdiction, appellate jurisdiction over which has not been transferred by the legislature to other courts or courts established by it and shall have such appellate jurisdiction as the legislature may determine. Now, that to me sounds like carte blanche. Why isn't it?

MR. TRAPP: Mr. Justice Rehnquist, are you asking me why couldn't they simply not ever provide for appeals?

QUESTION: Why not read the statute literally, and if one does read it literally it sounds to me to give virtually unlimited authority to the Guam Legislature in this particular matter.

MR. TRAPP: Oh, I must respectfully disagree. I think that if we analyze that language carefully, in the first place if we look at the first sentence, which says in what courts the judicial authority shall reside, but it doesn't say what courts can be created. Now, if you look at the second sentence, in the second sentence it says that original jurisdiction can be transferred, appellate jurisdiction can be determined, and I think we have to think of this in a chronological and rational way. There is no appellate jurisdiction unless first there is some original jurisdiction which has been transferred. So it seems to me that the plain language,

if we apply the plain language rule to this second sentence, what Congress is saying is, look, we are going to have a District Court of Guam, and that District Court of Guam is going to have all jurisdiction and, of course, there will be appeals to the Ninth Circuit, to an Article III court from that District Court of Guam.

Now, it may be that the Guam Legislature wants to set up its own courts of original jurisdiction. All right, they can do that. They can take this jurisdiction which is in the District Court of Guam and they can transfer it.

Well, what about appeals then? Well, in that event, then an appellate jurisdiction for the District Court can be determined and appeals can then go from these new courts of original jurisdiction but these cases will nevertheless go up through the District Court, which is a creature of statute, and -- or Congress, rather --

QUESTION: Even though the Guam Legislature determines that the District Court will not have appellate jurisdiction?

MR. TRAPP: Yes, but I don't think -- I can't believe that the Congress ever dreamt that the Guam Legislature would simply say, well, we are going to create courts of original jurisdiction but we will never have appeals from any of the more important types of cases.

QUESTION: But you have appeal to the Supreme Court

of Guam.

MR. TRAPP: We have an appeal to the Supreme Court of Guam now, but there is nothing in the language to suggest that that was ever contemplated by the Congress or that Congress ever gave any express authority to indicate to the Guam Legislature that it simply wanted to let go of the Guam judicial system.

QUESTION: Well, aren't you saying that when the Congress said shall have appellate jurisdiction as the Legislature may determine, they were saying that they will have some appellate jurisdiction?

MR. TRAPP: That the District Court would have some appellate jurisdiction, that is all they are saying.

QUESTION: That is what I thought you were saying.

MR. TRAPP: Yes, and that is all we are saying.

QUESTION: In other words, it isn't a grant of power as under Article III of the federal Constitution to the Congress of the United States, is that what you are saying?

MR. TRAPP: Not at all. Not at all.

QUESTION: Well, there is some dispute over what is the scope of the congressional power as to Article III that has never been finally resolved?

MR. TRAPP: That's right.

QUESTION: Mr. Trapp, help me out: What is this Appellate Division of the District Court?

MR. TRAPP: Well, Mr. Justice Marshall, what the Appellate Division is is this: Originally the Organic Act as we have just discussed said you could transfer original jurisdiction, that the legislature could determine what appellate jurisdiction the District Court of Guam would have. Now, the legislature --

QUESTION: No, physically what is the Appellate Division?

MR. TRAPP: All right. The legislature --

QUESTION: Is it made up of three judges or what?

MR. TRAPP: It is three judges, and the way it happens to come about to be three judges is that a year after the Organic Act was enacted, the Guam Legislature decided to determine appellate jurisdiction in the District Court and in doing that it passed Public Law 17 which set up an Appellate Division within the District Court and it provided that there would be three judges, not just the judge appointed by the President of the United States as the judge of the territorial District Court of Guam, but two other judges originally to be designated to sit in temporary status by the Chief Justice of the United States.

Now, this was on the books for some years when the Congress apparently decided to recognize what the Guam Legislature had done and enacted an amendment to the Organic Act which I submit to this Court shows that the Congress only



intended for the District Court of Guam to have appellate jurisdiction because if the Guam Legislature had the power to simply create appellate courts, then you could say, well, by creating appellate division it created the appellate court. But the Congress felt it was necessary to go a step further and legitimize what they had done with further legislation, even though what they had done was formalizing the procedure within the framework of the appellate jurisdiction which Congress had expressly given to the Guam Legislature, that is to say the jurisdiction to determine what appellate jurisdiction that appellate court would have.

QUESTION: Are the other two judges territorial judges?

MR. TRAPP: No.

QUESTION: What slot do they fit in?

MR. TRAPP: They are now, they might be judges out of the Trust Territory, the high court of the Trust Territory of the Pacific Islands. They might be United States District Court judges from an actual United States district.

QUESTION: You mean within the Ninth Circuit?

MR. TRAPP: Within the Ninth Circuit or conceivably I suppose --

QUESTION: Or outside?

MR. TRAPP: -- conceivably even outside, I believe.

QUESTION: In what tribunal is vested the traditional

probate jurisdiction such as we have in the states?

MR. TRAPP: The Superior Court, probate, domestic relations matters -- when you say traditional, now everything local has been transferred, which for many years the probate jurisdiction was in what was called the Island Court of Guam, which is really no more than the predecessor of the Superior Court, which is the Island Court with an enlarged scope of jurisdiction.

I might say that this is a very unusual thing that Gen. Troutman is attributing to the Congress to say that in effect the Guam Legislature can make the very highest tribunal in Guam the highest appellate court, that is to say, for example, that the Guam Supreme Court is the plaything of the legislature. I think it would be very unusual to have a system of government where the legislature could simply at any moment abolish the Guam Supreme Court, change its jurisdiction, effectively fire the judges and have all new judges appointed, for whatever political reason they might think fit. And Guam does have a record of -- the Guam Legislature does have a record, and I am presently a Senator of that Legislature, but I wasn't a part of this scheme a few years ago whereby they would switch the appointing power back and forth between the Governor and the Legislature, depending upon who was in power, and how it suited them.

So if the Guam Supreme Court is to be upheld, I think

that I can pretty well guarantee to this Court that it will very definitely be the placing of the Legislature. The Constitutional Convention Act definitely has a great deal of effect upon this present case because the language is different by far than what we find in the present Organic Act. It is the first time we find express authority to establish a "system of local courts," and I don't think we are reading too much into that language "system of local courts" to think of higher and lower courts. This is the first time we find that express language. Congress didn't use it before. If Congress wished to delegate to the Guam Legislature in 1950 authority to establish a system of local courts, one might think that they would have said so. They have said so for the first time in the Constitutional Convention Act.

Also we can see that Congress agrees that this matter is certainly not put to rest, Congress has not yet let go of the local judiciary, and this is definitely evidenced by the Constitutional Convention Act where Congress says that sometime in the future the Congress is still going to regulate the federal and local relationship.

QUESTION: Well, in that sense Congress hasn't let go of the federal courts either, has it?

MR. TRAPP: No, it hasn't, but it is suggested right now that Congress has already regulated that federal and local relationship by simply saying to Guam -- and this is the

petitioner's position -- saying to Guam, well, go ahead, set up whatever system you want. But Congress says that that relationship still has to be regulated.

Now, again in the Agana Bay case, decided by the Ninth Circuit, the majority said there is nothing to indicate that Guam is incapable of establishing and operating its own Appellate Court. Well, I take exception to that, if I may, and I think it is a consideration.

Gen. Troutman has said that a judge or justice of the -- rather, a justice of the Superior Court must be a lawyer. Well, if that is so, it must be in legislation that has come about I believe since the Court Reorganization Act. I am not sure that is so. If he has authority for that, I would stand corrected. That was not my understanding.

But in any event, if a lawyer is appointed to the Supreme Court of Guam, that lawyer need only have been admitted to practice six months before his appointment.

QUESTION: Well, one need not be a lawyer to be appointed to this Court, as you probably know.

MR. TRAPP: That might be so, but when the Congress originally considered setting up a Supreme Court of Guam and keeping in mind that the appointing power to this Court is vested in the President of the United States, as opposed to the advice and consent of the Senate --

QUESTION: Subject to the advice and consent of the

MR. TRAPP: Yes. In Guam what we are talking about is allowing the Guam Legislature, sometimes they do it themselves, in allowing the Governor, sometimes he does it with the advice and consent of the Guam Legislature, depending upon what the Legislature wants to do with it at the time, to in effect bring about a situation where justices will be appointed who really have very low or no qualifications.

QUESTION: Mr. Trapp, I just wonder, should we make a presumption one way or another as to whether Guam is capable of self government, which presumption should we make, that it is or that it is not?

MR. TRAPP: I think we should make the presumption that it is capable of self government but, on the other hand, we have a situation where I would agree one hundred percent with the underlying notion of the petitioner's case that Guam should be entitled to self-determination, self-determination of the legislature, let the people of Guam, let them elect their own representatives to make their laws; self-determination in the executive, let us elect our own executive officer, after all, we have to live with him day-to-day and he has very broad powers.

But when we get to the judiciary, and who is actually concerned about the judiciary, the people of Guam? I suggest not the people of Guam, really, generally, but litigants, people who find themselves before the courts. And I suggest



that really what we need is not self-determination necessarily. What we need is learning, what we need is experience, and what we need is impartiality, and I can tell you from my experience in practicing in Guam for sixteen and a half years that if we have a system where the chief justice sits on these cases and share offices and office space with the trial judges, where two of the trial judges along with the chief justice will sit in judgment on their peers, as the way it has worked so far, where you have a very small and tight-knit community of a hundred and some-odd thousand, you are not going to get impartiality.

QUESTION: That is the way the Appellate Division of the District Court works. Don't they sit in a panel of three reviewing the decisions of one of the three?

MR. TRAPP: It does work that way sometimes but only when they are unable to get a United States District Court judge. Almost invariably they get a judge from the Trust Territory and they get a United States District Court judge from Hawaii or the mainland.

QUESTION: But the procedure permits that to happen in the District Court --

MR. TRAPP: Yes, it does.

QUESTION: -- the very procedure you are criticizing in the other court.

MR. TRAPP: Yes, it does, but the Guam Supreme Court

if you have impartiality, if you lack impartiality in the Appellate Division of the District Court, you still get another bite of the apple and that is you get off to the Ninth Circuit.

QUESTION: Is any of this in the record?

MR. TRAPP: As to the representations I am making to the Court?

QUESTION: Yes.

MR. TRAPP: No. It is not because --

QUESTION: Well, how can I take your word against the people of Guam who spoke through their Legislature, including you? Right? How can I do that?

MR. TRAPP: I don't think it is necessary because I think what I am really saying is none of us is here today to decide whether Guam is ready for the step, the ultimate question in this case, because there is no evidence taken at the trial court level on this point. The only question of course is one of statutory construction.

QUESTION: And there is nothing in the statute that prevents it, nothing, not one word that I could find.

MR. TRAPP: Mr. Justice Marshall, the problem is that there is nothing in the statute which authorizes it and it is a uniform rule that a territorial legislature cannot do what it is not authorized by the Congress, because only what the Congress --

QUESTION: Where do you get that from? They are given broad authorization. The language of my Brother Rehnquist was awful broad.

MR. TRAPP: Well, I suggest to you that you simply say that the Guam Legislature can determine what appellate jurisdiction, the District Court will have, is not broad authorization to go off and create other courts. I submit to you that it is a suggestion by the Congress that that would be the limit of the power that the legislature would have to create an appellate situation.

QUESTION: What specifically in the Constitution gives us authority to tell Guam that they can't do it? I thought the Constitution gave Congress that right. I didn't think it gave us the right.

MR. TRAPP: Well, what we are here today to do is to try to decide whether Congress has done that or not. The Constitution tells Congress that it has plenary powers over the territories, it has complete control of the territories, and because of that, a number of courts have held, that the territories have only such power as is expressly delegated by the Congress to the territories.

QUESTION: Well, if there is any doubt, who should it be in favor of?

MR. TRAPP: Oh, it should definitely be in favor of the Congress, the Congress retaining its powers, because the

delegation has to be an express one.

QUESTION: Well, who speaks for the people of Guam?

MR. TRAPP: Today before this Court I suppose that the Attorney General is speaking for the people of Guam, but --

QUESTION: Well, what legal argument do you give us that says he is wrong other than your argument that they will go wild down there, whatever you want to say?

MR. TRAPP: Well, the legal argument I give you, Mr. Justice Marshall, is the argument that I made when I first brought this up in the Agana Bay case, without getting into all these other questions that we are involved in today. I simply asked the District Court to read that statute, and it is the statute itself that is the basis of our argument, and a careful reading of it I submit to you does not give the Guam Legislature the authority to transfer that jurisdiction or to create other appellate courts.

MR. CHIEF JUSTICE BURGER: I think you are using your colleague's time now.

MR. TRAPP: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Ferenz.

ORAL ARGUMENT OF WALTER S. FERENZ, ESQ.,

ON BEHALF OF THE GUAM BAR ASSOCIATION, AMICUS CURIAE

MR. FERENZ: Mr. Chief Justice, and may it please the Court:

I welcome the opportunity to carry on the discussion

previously had with Mr. Trapp. When the question was first raised here, I was equally shocked as Mr. Trapp, that there would be no right of appeal in Guam, were this Court to affirm and strike down the Supreme Court of Guam. And I quite agree with Mr. Trapp's views on the subject matter of that very point.

To answer Mr. Justice Marshall, I would say this, that the Article IV, section 3 provision of the Constitution which grants plenary power to the Congress to control the Territory of Guam is the authority that this Court needs. I suggest, and it has never been before this Court or any other court so far as I know, that if Congress were to expressly grant to Guam the right to contain its own appeals, that that might be construed as an invalid delegation by Congress of its plenary powers.

QUESTION: Do you mean if Congress were to authorize Guam to have appeals to the Supreme Court of Guam and no further appeals to any Article III court, or did I misunderstand you?

MR. FERENZ: No. I suggest that that is an argument that could be scholarly made.

QUESTION: How would you reconcile that with the cases which you have cited in your brief on page 35 where appeals from territorial courts in the western states in the early days to this Court were limited to \$2,000 or \$3,000 in



amount? In other words, if your controversy was not more than \$2,000 and you were appealing from the Supreme Court of Washington, you could not get to an Article III court.

MR. FERENZ: The only thing that I can answer that is that those provisions may have been invalid under that argument. To develop the argument, let us review the elective governor bill of Guam. Before the elective governor bill, the Governor of Guam was appointed by the President, and at that time the laws of Guam were subject to annulment by Congress after one year or within a one-year period. Now, since the elective governor bill has been in effect, Congress has expressly said we reserve the right to annul any law of Guam. In effect, they have given Guam something but they have taken it back.

So when we are talking about self-determination for Guam, we are really not talking about self-determination in the true political sense. Guam is an unincorporated --

QUESTION: Do you think Congress could nullify this very statute?

MR. FERENZ: That's correct. The statement is very clear and very precise.

Now, Guam was set up in the traditional sense of three equal branches of government, and if we are to say that the Guam judiciary is without the control of Congress, that is Congress says you may create your own judiciary and we have no

control over it, but we recognize that we have to control the laws of Guam in the executive branch, then I say that we do not have an equal division of our branches of government.

QUESTION: But that is for Congress to decide and determine.

MR. FERENZ: That's correct. And I think by virtue of the elected governor provision may have determined that self-determination for Guam is still a limited concept.

QUESTION: Doesn't that just mean that no matter how we decide this case, tomorrow Congress could change that decision, whichever way we go?

MR. FERENZ: Exactly, and I intended to conclude my remarks by suggesting to the Court that the most reasonable thing to do is to leave matters status quo, that is as the Ninth Circuit determined it. We will have a court system that has proven itself over the past, the Ninth Circuit has played an important part in the laws of Guam and its progress.

QUESTION: But there is a question of what is the status quo here. The Ninth Circuit upset the status quo.

MR. FERENZ: By status quo, I mean before the Court Reorganization Act. What I am saying is if the Court were to affirm, we would have an orderly process for litigants to take appeals in important cases to the Ninth Circuit, and Congress will have an opportunity as it stated before in the CONCON Act or in some other later time to seriously consider the basis

for Guam's judiciary and self-determination.

QUESTION: How far is it geographically from Guam to the west coast of the United States?

MR. FERENZ: Well, it is about 9,000 miles -- to the west coast?

QUESTION: Yes.

MR. FERENZ: Six thousand miles.

QUESTION: Excuse me. The west coast of the United States is Hawaii.

QUESTION: I am talking about the Ninth Circuit Court of Appeals, which generally --

MR. FERENZ: It is about 6,000 miles, about 14 hours.

QUESTION: About 6,000 miles. How many lawyers are there in Guam?

MR. FERENZ: About fifty lawyers in private practice plus government attorneys.

QUESTION: And the total population again, a hundred and some-odd --

MR. FERENZ: 100,000 roughly. But bear in mind that the Ninth Circuit sits every year in Hawaii and they have sat once in Guam, and we understand the indications are that they will go back.

QUESTION: Now I would think they would.

MR. FERENZ: In conclusion, I can't add any more, but I think this Court is taking a proper step in reviewing the

matter and should take it to Congress. I have said in the amicus brief that I feel that the language that has been used is unfortunate. It really hasn't clarified anything for us.

I agree with Justice Rehnquist. When I first read the statute, when my brother at the bar first took his attack at it, I was wondering why he was taking it. It just seemed to me to be so self-evident. But if you reread it and consider it with the legislative material that we have at the beginning of Guam's organic history, then it becomes clear to me that we don't have a mandate from Congress that Guam could do what it wants.

QUESTION: Perhaps no one over on the other side of the avenue here read it before they enacted this statute.

MR. FERENZ: I think that is entirely possible.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 3:04 o'clock p.m., the above-entitled case was submitted.]

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