

## **GOVERNANCE**



# Citizenship

Citizenship has traditionally referred to “a particular set of political practices involving specific public rights and duties with respect to a given political community.”<sup>54</sup> Citizenship involves the relationship between the individual and the state (country), and the concept can differ depending on different political traditions and its contextualized nature. In democratic systems, however, citizenship generally consists of three components: membership in a democratic political community; collective benefits and rights associated with this membership and participation in the community’s political, economic, and social processes. Some tasks of citizens in these democratic societies include voting, speaking out on political/social/economic issues, campaigning, protesting, running for office, and holding their elected leaders accountable in various ways. Expanding upon this importance of citizenship, Stephen H. Legomsky argues, “Citizenship has important legal consequences, both in domestic United States law and international law. Apart from its capacity to be transmitted, citizenship can affect one’s political rights, one’s tax and military obligations, and one’s eligibility for certain publicly funded programs, for certain government jobs, and for certain occupations.”<sup>55</sup>

Being a citizen of a country allows one access to the political and economic rights and privileges conferred by countries on their nationals. For example, in the United States, citizens are protected via the rights afforded in the Constitution. They also can travel with a US passport, become eligible for federal jobs, participate on a jury, obtain citizenship for minor children born abroad, and become an elected official. It is for this reason that citizenship can be described as the “right to have rights” within a country.

The third component of citizenship, “participation in the community’s political, economic, and social processes” is the basis of what has been colloquially discussed as “second-class citizenship.” It is this dissonance between historical understandings of citizenship and the denial of voting representation to the people of Guam in relation to the US political family that causes consternation here in Guam. The people of Guam are citizens of the United States in the aspects of holding US passports, being subject to

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54 Richard Bellamy, *Citizenship: A Very Short Introduction* (Oxford: Oxford University Press, 2008), 3.

55 Stephen H. Legomsky, *Immigration and Refugee Law and Policy* (Foundation Press, 2015), 3.

the US legal system, having individual rights, and other ways, with the important caveat that they do not participate in the democratic political processes of the country. As described by Leibowitz, in referring to the territories, “But the traditional functions of citizenship, political participation in the ruling government, setting certain boundaries and limitations on US action, establishing a clear role between the federal government and the local one and the federal government and the individual, and sharing fully the economic benefits of the union, was not found here.”<sup>56</sup> There are differences between a US citizen residing in one of the 50 states and a US citizen residing in Guam, an unincorporated territory. However, many of these differences may not be apparent in the day-to-day lives of citizens. Rather, the differences only become evident when citizens in Guam are impacted by the lack of rights and benefits afforded to their counterparts in the states. It is then that conflicts arise, discontent emerges, and the realization of “second class” status is felt.

This is important because many of the aspects of meaningful participation that Guam lacks is because it is a territory, and not a state. For example, Article II, Section I of the US Constitution covers the election of the executive: “Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the Congress.”<sup>57</sup> Furthermore, regarding voting representation in the United States, Article I, Section II, reads, “The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.”<sup>58</sup> Article I, Section III, reads, “The Senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.”<sup>59</sup> While the Seventeenth Amendment would eventually lead to popular vote for the Senate, the crucial point here is that the core functioning of the government of the United States was meant for states to participate in, and not territories.

## A Note on US Citizenship for Those Born in Guam

The primary routes to obtaining US citizenship are citizenship at birth and naturalization. Citizenship at birth is based on *jus soli*. Under *jus soli*, in most situations, a child born in the United States becomes a citizen of the United States. A source of this is the Fourteenth Amendment. The first sentence of the first section of the Fourteenth Amendment states, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.” There is also *jus sanguinis* (right of the blood) meaning that one can become a citizen of the United States if born to parents who are US citizens (although there are a lot of complexities and rules regarding this for US citizenship).

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56 Leibowitz, “Defining Status,” 622.

57 Article II, Section I of the United States Constitution.

58 Article I, Section II of the United States Constitution.

59 Article I, Section III of the United States Constitution.

Regarding Guam, one question is “Do territories count as the ‘United States’ for the purposes of the first sentence of the Fourteenth Amendment?” The answer has been heavily debated in legal circles. One interpretation is that, unlike those born in the states, those born in the territories do not have birthright citizenship as a result of the application of the Fourteenth Amendment. Rather, those in the organized, unincorporated territories were granted citizenship at birth via statute of Congress. This means that the US Congress extended citizenship to those born in the organized, unincorporated territories by passing laws such as the Organic Act of 1950 in the case of Guam, for example.

A difference here is that the source of this citizenship at birth for the territories is through federal statute while the source of citizenship in a “state of the union” is the Constitution, leading to what some scholars call statutory citizens vs. constitutional citizens.

Those who are granted statutory US citizenship outside a state do not acquire the same rights of national citizenship or state citizenship under the US Constitution as citizens born or naturalized in one of the states. That is because the source of citizenship acquired outside a state is not the US Constitution, but federal statutory citizenship law adopted by Congress.

For example, Congress can attach terms and conditions that must be met to acquire and keep statutory US citizenship outside a state. Thus, a person granted US citizenship by federal statute based on birth outside the 50 states of the union to a US citizen parent can be required to reside in the US for a specified period before statutory citizenship granted at birth becomes permanent. Similarly, under the Balzac ruling, US citizenship granted due to birth in Puerto Rico or one of the smaller unincorporated territories does not secure citizenship rights under the Constitution.<sup>60</sup>

As John Vlahoplus argues, “denying birthright constitutional citizenship discriminates against those born in unincorporated territories. It leaves their nationality to the grace of Congress, which can impose conditions precedent and subsequent to their attaining and retaining of US nationality. It extends the racist foundation of the Insular Cases beyond their express holdings.”<sup>61</sup> As Lisa Marie Perez argues, the federal government has treated the citizenship status of those in the territories “as a matter of collective privilege rather than individual right.”<sup>62</sup> This distinction between constitutional citizenship and statutory citizenship could matter when it comes to the question of whether or not statutory citizens will lose their citizenship if Guam becomes an independent country or a freely associated state (in which citizenship is not kept).

There is no definitive answer as to whether existing US citizens will lose their US citizenship if there is a change to free association or independence, as the issue will be settled legally and politically.

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60 Howard Hills, *Citizens Without A State* (Laguna Beach: Pacific Noir Pulp Press, 2015), 48.

61 John Vlahoplus, “Other Lands and Other Skies: Birthright Citizenship and Self-Government in Unincorporated Territories,” *Williams & Mary Bill of Rights Journal*, 401 (2018): 404.

62 Lisa Marie Perez, “Citizenship Denied: The Insular Cases and the Fourteenth Amendment,” *Virginia Law Review*, 94 (2008): 1044.

Collectively revoking US citizenship from statutory citizens in Guam may be easier than if they were constitutional citizens. There have been instances in Puerto Rico which demonstrate the possible fragility of statutory citizenship. In 1998, the United States-Puerto Rico Political Status Act, a bill sponsored by Representative Don Young, of Alaska, was introduced with the intent of resolving Puerto Rico's political status. A caveat to the bill was that Congress would automatically revoke the statutory US citizenship of all Puerto Ricans residing in the island if Puerto Ricans chose independence.<sup>63</sup> The bill ultimately died, but this helps demonstrate that statutory citizenship may rest on a more fragile foundation than that of constitutional citizenship.<sup>64</sup> Furthermore, regarding Puerto Rico, "revocation of citizenship provisions have been incorporated in prior plebiscite bills, and the two congressional committees in charge of Puerto Rican affairs have repeatedly taken the position that Congress is not bound by any significant constitutional constraints in determining the citizenship status of Puerto Ricans."<sup>65</sup>

That does not mean the citizen inhabitants of the unincorporated territories have no legal protections against a unilateral revocation of citizenship in the case of free association or independence. Some legal scholars argue that a Congressional unilateral revocation of citizenship in the territories may violate the Due Process Clause of the US Constitution. Alvarez Gonzalez argues that Congress is only authorized to "impose conditions subsequent for the retention of statutory citizenship at the time that citizenship is granted."<sup>66</sup> As Lisa Maria Perez argues, "an effort to justify the collective denaturalization of Puerto Ricans under the Due Process Clause would face great difficulty in establishing that they had reasonable notice of the fact that their citizenship was conferred subject to an implied condition of continued US sovereignty."<sup>67</sup> In the case of Young's Puerto Rico bill, the revocation of citizenship was used more as a political argument rather than a probable scenario, intended as a disincentive for the electorate to choose independence.

For Guam, the matter of citizenship under free association or independence would be the subject of negotiations. Unlike the FAS model, wherein the people were Trust Territory of the Pacific Islands citizens rather than US citizens at the time of negotiations, a Guam FAS or independence model would be conducted with US citizens. Again, this would be subject to negotiations, and could be influenced by the importance of maintaining US geo-strategic interests.

## Statehood

If Guam were to become integrated into the United States, US citizenship would continue for the people of the island. Since Guam would be a state, and no longer an unincorporated territory, there would

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63 H.R. 856, 105th Congress, 4(a)(B)(4) (1997).

64 Also, it should be mentioned that in many ways, Don Young, was using fear and intimidation tactics to sway the results of the Puerto Rico referendum.

65 Perez, "Citizenship Denied," 1033-1034.

66 Alvarez Gonzalez, *supra* note 25, at 314 (citing Cong. Research Serv., *Discretion of Congress Respecting Citizenship Status of Puerto Rico* (1989)).

67 Perez, "Citizenship Denied," 1074.

be no ambiguity regarding constitutional citizenship. As a state, Guam would constitutionally be considered the “United States” for the purposes of the Fourteenth Amendment and subsequently treated as such. Furthermore, as a state, US citizens in Guam will be able to exercise their full democratic participation via voting representation in the US House of Representatives and US Senate as well as have electors in the Electoral College. Overall, maintaining US citizenship is most secure in the case of statehood.

## Independence

If independence is the chosen political status of the island, US citizenship of people in the island would be subject to negotiation. This would include negotiations over whether those who are already US citizens would remain US citizens in the new political status. Overall, it is not guaranteed that existing US citizens would either keep or lose their citizenship in the case of independence. However, it is nearly guaranteed that *jus soli* American citizenship will be discontinued. To put it another way, the country of Guam will no longer be a place to produce new American citizens via birthright citizenship, with things less clear when it comes to *jus sanguinis* (or the acquisition of one’s US citizenship as a result of their parent’s US citizenship). This would be a political/legal process that will likely involve policy debates between Guam and the US government (subject to the political environment of the time).

The independent country of Guam will have to develop its own citizenship requirements, laws, passport, and benefits. Some issues that an independent country of Guam would have to address are: methods for citizenship acquisition; rules for the revocation of citizenship; the possibility of dual citizenship; compliance with international law regarding statelessness; and the rights and responsibilities of citizens and the protection of these rights and responsibilities.

## Citizenship Acquisition

There are various methods used to acquire citizenship in countries around the world, including:

- Citizenship by birth: Birth in the country automatically confers citizenship, regardless of the parents’ citizenship or status. Known as *jus soli*.
- Citizenship by descent: Passed on to a child under the condition that at least one of the child’s parents are a citizen of that country, regardless of the child’s actual country of birth. Known as *jus sanguinis*.
- Citizenship by naturalization: may include provisions such as a period of residence, renunciation of other citizenship, and/or familiarity with the language and customs of the country.
- Citizenship by marriage: A person can be entitled to become a naturalized citizen without fulfilling other naturalization requirements in their spouse’s country.
- Citizenship by registration: May acquire citizenship without meeting all naturalization

requirements, in many instances, this is reserved to those with blood ties to the country.<sup>68</sup>

### ***Status Example: Europe (with a concentration on the European Union)***

At birth: The majority of countries in Europe offer the acquisition of citizenship at birth through *jus sanguinis*. Countries in the EU do not offer automatic and *unconditional* citizenship to children born in their territories to foreign citizens. Yet, a few EU countries offer conditional *jus soli* citizenship with the most common condition being that the child's parents should have resided in the country for a certain period of time before the child's birth.<sup>69</sup> Furthermore, seven EU countries allow for children of foreign citizens to acquire citizenship at birth if one of their parents also was born in the country, in what is known as double *jus soli*.

After birth: In addition to naturalization (with a period of residence being the primary ground), some EU countries such as Hungary have simpler naturalization processes for those meeting certain eligibility requirements. In Hungary, there is a process for acquiring citizenship named "simplified naturalization," which is tied to the Hungarian language. One of the requirements for going through the Hungarian simplified naturalization procedure is to "understand and communicate in Hungarian language on a sufficient level, to be able to present the application for naturalization independently without external assistance, and to answer the questions asked by the officer independently, in short sentences."<sup>70</sup> One is only eligible for the simplified naturalization process if their parents and/or other ancestors were Hungarian citizens. One difference between regular naturalization and simplified naturalization in the Hungarian example is that those eligible for simplified naturalization do not have to have sufficient means of subsistence or "place of abode" in Hungary. Guam may consider something similar for a naturalization process.

### ***Status Example: Israel***

Considering that there are more indigenous Chamorus living outside of Guam than there are living within, the government of the country of Guam may or may not consider policies that take diaspora into account. While Israel has citizenship acquisition policies based on *jus soli* and *jus sanguinis*, they also have acquisition via the "Law of Return." The Law of Return "grants every Jew, wherever he may be, the right to come to Israel as an *oleh* (a Jew immigrating to Israel) and become an Israeli citizen."<sup>71</sup> The Israeli Constitution defines a Jew as a person who was born of a Jewish mother or has converted to Judaism and is not a member of another religion. It has also been extended to include the child and grandchild of a

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68 "Citizenship Laws of the World," United States Office of Personnel Management, March 2001, 4-5.

69 Maria Margarita Mentzelopoulou and Costica Dumbrava, "Acquisition and loss of citizenship in EU Member States: Key Trends and Issues," European Parliamentary Research Service, July 2018, accessed at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625116/EPRS\\_BRI\(2018\)625116\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625116/EPRS_BRI(2018)625116_EN.pdf).

70 Embassy of Hungary Washington, "Simplified Naturalization", accessed at <https://washington.mfa.gov.hu/eng/page/simplified-naturalization>.

71 Israel Ministry of Foreign Affairs, "Acquisition of Israeli Nationality," January 2010, accessed at <https://www.mfa.gov.il/mfa/aboutisrael/state/pages/acquisition%20of%20israeli%20nationality.aspx>.



Jew, the spouse of a child of a Jew and the spouse of the grandchild of a Jew. This was done to ensure unity of families. However, an *oleh's* certificate can be denied to persons who: engage in activity directed against the Jewish people; may endanger public health or the security of the state; and have a criminal past, likely to endanger public welfare. According to David Ben-Gurion, Israel's first Prime Minister, "The Law of Return is one of the State of Israel's basic laws. It encompasses the central mission of our country<sup>72</sup>, the ingathering of exiles. This law determines that it is not the state which accords the Jews of the Diaspora the right to settle here, but that this right belongs to every Jew by virtue of the fact that he is Jewish."<sup>73</sup> As a result of this sentiment, Israel also has citizenship laws when it comes to dual citizenship. "The 1952 citizenship law explicitly permits the possession of more than one citizenship. The toleration of dual citizenship is aimed at encouraging *Olim* (Jewish immigrants) to become Israeli citizens by allowing them to keep their former nationality."<sup>74</sup>

Some countries have policies that can be either considered creative or controversial, such as using citizenship to attract human capital and financial investment. Examples include achievement-based admissions or granting faster access to citizenship if one is a foreign investor.

### ***Status Example: Austria***

Article 10 (6) of the Austrian Citizenship Act reads, "The conditions pursuant to (1) (1) and (7) as well as (3) do not apply if the federal government confirms that the granting of citizenship to the applicant is in the interest of the Republic of Austria due to her/his extraordinary past or prospective achievements."<sup>75</sup> Thus, according to this act, if a person is said to meet the criteria of extraordinary past or prospective achievements, certain conditions for citizenship are waived. The Austrian government has made it clear that it does not grant this type of citizenship as "honorary citizenship," but rather as an investment into the services that are expected of the person in the interest of the Austrian state. The Austrian government mainly considers those in the fields of scientific achievements (such as to be employed in Austrian-based research institutions), economic services, sports performances, and artistic performances. However, this is extremely rare. An independent Guam could look further into this policy if it seeks to attract talent to the island for developing the workforce, knowledge economy, or the standing of the country.

### ***Status Example: Vanuatu***

Vanuatu serves as an interesting example of "citizenship by investment." In 2016-2017, the Vanuatu

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72 It should be noted that Israel is a controversial country due to the dispossession and displacement of the Palestinian people. Interested readers should research the Zionist movement, the creation of Israel in the late 1940s, and the ongoing conflict between the state of Israel and the Palestinian people.

73 Yossi Harpaz and Ben Herzog, "Report On Citizenship Law: Israel," *European University Institute*, June 2018, 2.

74 Harpaz and Herzog, "Report on Citizenship Law," 9.

75 Article 10 (6) of the Austrian Citizenship Act, accessed at <https://www.wien.gv.at/english/administration/civilstatus/citizenship/achievements.html>.

government launched citizenship by investment programs such as the Capital Investment Immigration Plan, Vanuatu Contribution Program and the Vanuatu Development Support Program to help support infrastructure and promote economic development. While there are differences among the programs, generally, if one invests, that person could become a citizen of Vanuatu within months. From a business standpoint, there are benefits related to taxation.<sup>76</sup> The program has seen some success. As reported in *The Guardian*, “Since the beginning of 2018, Vanuatu’s citizenship-by-investment programs have generated more than \$312M.”<sup>77</sup> An independent Guam may or may not want to implement a similar policy. If it does, however, the island’s people should also understand the risks. According to a report by the International Monetary Fund, “Ultimately the bestowal of citizenship is a government’s sovereign decision. However, the risks of selling citizenship can be high. Abuses are widely documented, including enabling corruption, money laundering, tax evasion, and other crimes. If the risks are not properly managed, countries that offer these programs can suffer reputational damage, affecting their economic and financial stability and worsening inequality.”<sup>78</sup> This is a multifaceted issue and would require further research as is the case with each status example in this study.

## Loss of Citizenship

In addition to acquisition, an independent or freely associated Guam, with its own citizenship, would need to develop its own criteria for loss of citizenship. Some common grounds for losing nationality and citizenship include:

- Voluntary acquisition of another citizenship
- Permanent residence abroad
- Fraud or non-renunciation of another citizenship
- Voluntary military service and foreign non-military public service
- Seriously prejudicial behavior
- Loss of conditional citizenship
- Voluntary renunciation<sup>79</sup>

In developing its own criteria, an independent Guam would most likely comply with international law and the multiple legal mechanisms dealing with issues of nationality and statelessness. According to international law, the right to a nationality (to acquire, change, and retain nationality) is a human right

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<sup>76</sup> Citizenship Vanuatu, “Benefits of Vanuatu Citizenship,” Global Immigration Consultant, accessed at <http://citizenshipvanuatu.com/vanuatu-citizenship-benefits/>.

<sup>77</sup> Ben Doherty, “Migration firm investigated over ads promising Vanuatu passports,” *The Guardian*, February 3, 2021, accessed at <https://www.theguardian.com/world/2021/feb/04/migration-firm-investigated-over-ads-promising-vanuatu-passports>.

<sup>78</sup> Francisca Fernando, Jonathan Pampolina and Robin Sykes, “Citizenship For Sale,” *International Monetary Fund*, Summer 2021, accessed at <https://www.imf.org/external/pubs/ft/fandd/2021/06/citizenship-for-sale-fernando-pampolina-sykes.htm>.

<sup>79</sup> Gerard Rene de Groot, Maarten Vink and Iseult Honohan, “Loss of Citizenship,” *European Union Democracy Observatory on Citizenship*, 2010, 2-3.

and that the right of countries to decide who their nationals are “is not absolute and, in particular, states must comply with their human rights obligations concerning the granting and loss of nationality.”<sup>80</sup> Citizenship policies related to loss of citizenship should be in line with the 1954 Convention relating to the Status of Stateless Persons and of primary importance, the 1961 UN Convention on the Reduction of Statelessness. The 1961 Convention sets rules for the conferral and non-withdrawal of citizenship to prevent cases of statelessness, in line with Article 15 of the Universal Declaration of Human Rights, which recognizes that “everyone has the right to a nationality.”<sup>81</sup> One major focus of the Convention is the “prevention of statelessness at birth by requiring States to grant citizenship to children born on their territory, or born to their nationals abroad, who would otherwise be stateless.”<sup>82</sup>

Guam may be inclined to ratify the Convention because, as a new country, it should do its best to be in line with international law. These are all aspects an independent Guam should examine when deciding its citizenship policies and the many ways it can craft these policies.

## Free Association

Similar to independence, if Guam were to become a freely associated state, it is not absolutely certain that current US citizens in the island would lose US citizenship just by virtue of Guam declaring its intent to become a freely associated state. In the negotiations between Guam and the United States, Guam’s negotiators could negotiate for the retention of US citizenship. Once again, this would be dependent on the negotiations that would form the basis of the freely associated relationship between Guam and the United States. Under US citizenship law, there is no explicit prohibition against dual nationality. According to the US Department of State, “US law does not mention dual nationality or require a person to choose one nationality or another. A US citizen may naturalize in a foreign state without any risk to his or her US citizenship.”<sup>83</sup> Although the United States does not expressly prohibit dual nationality, it also does not endorse or encourage dual nationality because of the possible conflicts it can cause legally. Guam must have a strong negotiation team during the transition period to help ensure dual citizenship or the retention of US citizenship, if that is something the people of Guam desire.

Of the three models of countries in free association with the United States, only Palau allows for dual citizenship. Neither the Marshall Islands nor the Federated States of Micronesia expressly allow for dual citizenship (with some exceptions). Section 3 of Article III of the Constitution of the Federated States of Micronesia requires that a citizen of the FSM who is also a citizen of another country should “register his intent to remain a citizen” of the FSM and “renounce his citizenship of another nation” within three

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80 United Nations Human Rights Office of the High Commissioner, “Right to a Nationality and Statelessness,” accessed at <https://www.ohchr.org/EN/Issues/Pages/Nationality.aspx>.

81 Article 15 of the Universal Declaration of Human Rights, accessed at <https://www.un.org/en/universal-declaration-human-rights/>.

82 Convention on the Reduction of Statelessness, UNHCR: The UN Refugee Agency, 1961, pg. 3.

83 US Department of State, “Dual Nationality,” accessed at <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/Advice-about-Possible-Loss-of-US-Nationality-Dual-Nationality/Dual-Nationality.html>.

years of his 18th birthday.<sup>84</sup> Former FSM President John R. Haglelgam provides an argument against dual citizenship. In a letter to the editor of *Kaselehlie Press*, he writes,

The development of nationalism in our country is still in its infancy, like a Micronesian baby rolling around in its small baby mat. If we allow dual citizenship, it will be one more barrier to our country's development of full nationalism and the achievement of a strong robust national sovereignty. Our national politicians treat our nation's political development like the weather... This so-called dual citizenship amendment proposal is an example of contradictory political development that would weaken the essence of our country's national sovereignty.<sup>85</sup>

Haglelgam is arguing that opening the doors for dual citizenship will potentially weaken the national pride and sovereignty of the FSM due to the loyalty that will be pledged to another country. Taking into consideration that the FSM is in free association with the United States, the fear of its population prioritizing potential US citizenship over their FSM citizenship can be strong, and this is something the freely associated state of Guam would have to consider. Another concern is that individuals who are citizens of other countries but do not belong to one of the ethnic groups in the FSM may obtain dual citizenship and thus, become entitled to land ownership in the FSM, a right reserved only for FSM citizens. In matters of land tenure, the freely associated state of Guam will need to determine parameters for eligibility.

Under free association (if following existing FAS models) or independence, it is likely the island will no longer be a place for the birth of new US citizens as the island would no longer be under US sovereignty. Guam could enter into free association with the United States while maintaining US citizenship, if this is negotiated. However, this is not currently the case in any of the current freely associated states. But they were not US citizens to begin with, and this is a crucial distinction. Guam's history of being under US sovereignty and having US citizenship may allow for Guam's negotiations of free association to be different than the existing FAS.

### ***Status Example: The Republic of Palau***

The Republic of Palau offers an interesting example of citizenship acquisition in the countries of Micronesia, and an independent or a freely associated Guam (if establishing its own citizenship) can learn from this model. According to Article III of the Constitution of Palau, there were originally four paths to obtaining Palauan citizenship (with the Constitution subsequently amended).

Section 1: A person who is a citizen of the Trust Territory of the Pacific Islands immediately prior to this effective date of this Constitution and who has at least one parent of recognized Palauan

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84 Section 3, Article III of the Constitution of the Federated States of Micronesia.

85 John R. Haglelgam, "Letter to the Editor: Former FSM President on Dual Citizenship Act," *Kaselehlie Press*, February 8, 2017, [http://www.kpress.info/index.php?option=com\\_content&view=article&id=529:letter-to-the-editor-former-fsm-president-on-dual-citizenship-act&catid=10&Itemid=119](http://www.kpress.info/index.php?option=com_content&view=article&id=529:letter-to-the-editor-former-fsm-president-on-dual-citizenship-act&catid=10&Itemid=119).

ancestry is a citizen of Palau.

Section 2: A person born of parents, one or both of whom are citizens of Palau is a citizen of Palau by birth, and shall remain a citizen of Palau so long as the person is not or does not become a citizen of any other nation.

Section 3: A citizen of Palau who is a citizen of another nation shall, within three (3) years after his eighteenth (18) birthday, or within three (3) years after the effective date of this Constitution, whichever is later, renounce his citizenship of the other nation and register his intent to remain a citizen of Palau. If he fails to comply with this requirement, he shall be deprived of Palauan citizenship.

Section 4: A person born of parents, one or both whom are recognized Palauan ancestry, shall have the right to enter and reside in Palau and to enjoy other rights and privileges as provided by law, which shall include the right to petition to become a naturalized citizen of Palau; provided, that prior to becoming a naturalized citizen, a person must renounce his citizenship of another nation. There shall be no citizenship by naturalization except pursuant to this section.

The citizenship policies of Palau were subsequently amended via constitutional referendums. For example, Section 4 of Article III, was amended so that any person born of at least one parent who is a citizen of Palau or “of recognized Palauan ancestry” is a citizen of Palau. At the same time, the citizens of Palau repealed Sections 2 and 3 of Article III by permitting dual citizenship, stating, “citizenship of other foreign nations shall not affect a person’s Palauan citizenship.” Thus, in Palau, holding US citizenship has no effect on Palauan citizenship. Section 4 of the original Constitution of Palau offers some analytical insight for an independent Guam to consider or reject. As outlined in the original constitution, for Palauan citizenship to be granted to a person after birth, that person had to have Palauan ancestry and beyond this, there was no path for naturalization. However, in Palau, only Palauan citizens who are not also citizens of other countries can be eligible to hold the office of president or vice president. Furthermore, to be eligible to hold office in their legislative body, the *Olbiil Era Kelulau*, one has to be a citizen of Palau *only*.

CITIZENSHIP	
STATUS	EFFECTS
<i>Statehood</i>	<ul style="list-style-type: none"> <li>Continued US citizenship</li> <li>Constitutional citizenship for those born in the state of Guam</li> <li>Reputation of citizenship contingent on world perception of United States</li> </ul>
<i>Independence</i>	<ul style="list-style-type: none"> <li>Ability to craft own citizenship laws</li> <li>High probability of discontinued US citizenship for future generations</li> <li>Possibility of dual citizenship with other countries</li> <li>Possibility of CHamoru diaspora and older generations who have taken up residence in the continental US to return and hold Guam citizenship (contingent on the laws of an independent Guam)</li> <li>Revoking citizenship from statutory citizens is uncertain</li> </ul>
<i>Free Association</i>	<ul style="list-style-type: none"> <li>Ability to craft one's own citizenship laws (if following current FAS models)</li> <li>Possibility of continued US citizenship dependent on negotiations with the US</li> <li>Possibility of discontinued US citizenship for future generations</li> </ul>

# Constitution

A constitution is not always a singular legal and political document. The constitution of a country generally refers to the set of rules by which power is distributed among the members of a country. Although generally this can be found in a constitution, laws or other rules can also be formally found collectively in other statutes and documents. At its core, constitutions outline the powers of a government as well as its limitations. In a more detailed fashion,

A constitution is the basis for the organization of the state. The state is the mechanism through which a society provides for the exercise of political, administrative, and judicial powers in order to ensure law and order, the protection of the rights of the people, and the promotion and regulation of the economy. As the notion of the sovereignty of people has superseded other beliefs about the source of ultimate authority, the constitution has come to be regarded as a contract among the people on how they would like to be governed.<sup>86</sup>

Issues addressed in a constitution typically include the major functions of politics, how people holding those positions are to be chosen, who is in charge during an emergency, what their powers are, the procedures for amending the constitution, and in a democracy, the rights of individuals and how these rights are protected.

## Political Status and Constitutions

Before diving into the possibilities under statehood, free association, or independence, a discussion on constitutions, organic acts, and unincorporated territory status is helpful. There are some in Guam today who argue that the people of the island should get together to form a constitution. This begs the

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86 Michelle Brandt, Jill Cottrell, et. al, "Constitution-Making and Reform: Options For The Process," *Interpeace* (2011) 15.

question, “What is the difference between a constitution and an organic act?” One large difference is the degree of involvement of the people. Simply defined, an organic act is an act of the US Congress which confers power of government upon a territory. In Guam’s instance, this was provided via the Organic Act of Guam in 1950, which is a piece of federal legislation. While those in Guam advocated for a civilian government, the details of this civilian government as provided by the Organic Act were not created by the people of Guam. Thus, the government of Guam was created via federal legislation and is “an instrumentality of the federal government.”<sup>87</sup>

Unlike an organic act, the source of the constitution is supposed to come from the people of that respective political entity. When many think about the US Constitution, they envision the founding fathers eloquently articulating the foundations of the government they wanted to create after being freed from the yoke of British oppression. For many countries, the creation of a constitution saw representatives gather to craft the parameters of their new government. This differs from an organic act, which had no official representatives from Guam involved in the creation of this civilian government.

There have been attempts at crafting a constitution in Guam. In 1968, Senator Richard Taitano introduced what became P.L. 9-244. This legislation created the First Constitutional Convention, which was to examine and propose amendments to the Organic Act of Guam.<sup>88</sup> These recommendations for amendments to the Organic Act were sent to the US Congress, and while there was a response acknowledging receipt of the recommendations, there were no efforts to actually address them. Roughly 10 years later, a second Constitutional Convention was held. Unlike the first ConCon, the second ConCon was sanctioned by federal legislation. Through the work of Delegate Antonio Won Pat and others, a bill calling for a Guam Constitutional Convention was passed and signed. However, there were concerns by officials in the US federal government that the Constitutional Convention would be too far-reaching and thus, Fred Zeder, the director of the Department of the Interior’s Office of Territories, recommended amending the bill to protect federal interests in the island. As articulated in the Department of the Interior’s objection to the bill’s passage in the House of Representatives,

These bills would set in motion processes which would result in a fundamental reordering of the relations between the federal government and the territories of Guam and the Virgin Islands. We believe that the enactment of these bills would be premature at this time because the administration has not had sufficient time to consider the broad issues surrounding such changes and to develop its position on them.<sup>89</sup>

Thus, the enabling act for the Second Constitutional Convention would not have fundamentally changed the power hierarchy between Guam and the United States. The constitution would have had

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87 Sakamoto v. Duty Free Shoppers 764 F.2d 1285 (9th Cir. 1985).

88 Political Status Coordinating Commission, *Kinalamten Pulitikat: Sinenten I Chamorro: Issues in Guam’s Political Development* (Guam, 1996), 133.

89 Letter from Asst. Secy. Of the Interior, Sept. 17, 1975, in H.R. Rep. No. 94-508, 94th Cong. 1st Sess. (1976), 7.



to follow the blueprint of federal-territorial relations. Dr. Robert Underwood summarizes this, writing,

The enabling act, as amended, clearly limited the subject matter which the convention was to consider. In part, the bill authorized the Guam legislature to call a constitutional convention to draft, within the existing federal-territorial relationship, a constitution which should: first, recognize and be consistent with the sovereignty of the United States over Guam, and the supremacy of the provisions of the Constitution, treaties and laws of the United States applicable to Guam... The Guam Legislature accepted the enabling act as it was, and ordered the establishment of a Constitutional Convention.<sup>90</sup>

Ultimately, the final legislation (P.L. 94-584 as amended by P.L. 96-597) required congressional approval for the constitution, a vote on the constitution, and congressional review of any constitutional clashing with the Organic Act of Guam. Carl Gutierrez, who later became governor of Guam, was elected by the delegates of the ConCon to serve as the president of the convention. Their work convened on July 1st, 1977, with various proposals put on the table for the crafting of this new constitution. The draft constitution was eventually approved by Congress but was ultimately defeated in an election. One reason for the constitution's defeat was that it failed to address the issue of US sovereignty over the island, with one argument being that political status should be resolved first. Other underlying issues that may have also contributed to this defeat include contentment with the status quo as well as a lack of education on the matter.

Many opponents of the drafting of a constitution today argue, like those before, that the issue of Guam's political status should be resolved first before crafting a constitution. There is an argument that creating a constitution within an unincorporated territory that is supposed to adhere to federal-territorial relations is too limiting in scope. As Dr. Laura Souder writes, "The effect of this continuation of federal authority and federal bureaucratic presence is to limit Guam and its local government institutions and prevent them from developing normally and expanding to their fullest."<sup>91</sup> Furthermore, according to former Governor Joseph Ada and Leland Bettis,

This was the only time the US allowed a UN mission to Guam and is an indication that the US government considered the constitutional process to be the resolution of Guam's political status as a colony. In the US government's view, a non-self-governing territory becomes "self-governing" once it adopts a constitution and therefore should be considered "decolonized..." The invited presence of the UN visiting mission in Guam in 1979 was clearly in line with the US view that

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90 Penelope Bordallo Hofschneider, *A Campaign for Political Rights on the Island of Guam 1899-1950* (Saipan: CNMI Division of Historic Preservation, 2001), 177.

91 Laura Torres Souder and Robert A. Underwood, *Chamorro Self-Determination: Right of a People* (Guam: Chamorro Studies Association and Micronesian Area Research Center, 1987), 15.

the adoption of a constitution and political status went hand in hand.<sup>92</sup>

For this reason, some argue that resolving the political status before a constitution is adopted ensures the integrity of both the process and the document itself. Additionally, if the constitution is supposed to outline the distribution of power, how can this be accomplished without first knowing what kind of government is to be established? However, some support adopting a constitution as an unincorporated territory, arguing that the document would be an important step for the island due to beneficial incremental changes. They do not see this as antithetical to political status change.

With this preliminary information on constitutions complete, this section of the study now focuses on the possible content of a Guam constitution for each respective political status. This section will also focus on the potential process of creating a written constitution.

## Statehood

The history of constitutions among the 50 states shows commonalities in their creation. To explore this, it is helpful to trace the process of state creation within the United States. Article IV, Section III, Clause I of the US Constitution reads, “New states may be admitted by the Congress into this union; but no new states shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, of parts of states, without the consent of the legislatures of the states concerned as well as of Congress.”<sup>93</sup> Put another way, Congress decides whether or not to admit new states into the union, with the president signing the law. The process of becoming a state can be a lengthy process. For unincorporated territories, becoming a state may be even more complicated and is not guaranteed. Unincorporated territories may have to first be incorporated before they can follow the same path as other states. Other barriers are that Guam is also geographically separate as well as historically, ethnically, and culturally distinct.

Regarding constitutions, it must be made clear that in the United States, the states themselves have their own constitutions which exist alongside the US Constitution. This is due to the political character of the US government federal system as opposed to a unitary system of government. A unitary system is a political system in which the central government, and no other political body, has a monopoly over government powers. Federal systems differ in that their constitutions outline the powers of the national government while reserving a number of government powers for state, provincial, or local governments. Some powers may also be shared across political divisions in a federal system.

If Congress decides to act on a petition for statehood, it can pass a law declaring the new state or pass an enabling act authorizing the territory to create a Constitutional Convention for creating a constitution for the proposed state as well as selecting the first state officers and congressional representatives. In this

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92 Joseph Ada and Leland Bettis, “The Quest for Commonwealth, the Quest for Change,” in *Kinalamten Pulitikåt: Siñenten I Chamorro, Issues in Guam’s Political Development* (Hagåtña, Guam: Political Status Education Coordinating Commission, 1996), pg. 150.

93 Article IV, Section III, Clause I of the US Constitution.

enabling act, Congress may outline conditions that it expects the new state to meet. These conditions are expected to be drafted and interwoven into the state's constitution. It is important to remember, however, that Congress will ultimately need to determine whether Guam's current status as an unincorporated territory is an impediment. After the constitution has been drafted, it is sent to Congress, which reviews and decides whether to pass an act or resolution of admission, which then would have to be signed into law by the president of the United States. Of the 37 states admitted after the adoption of the US Constitution, many have had a condition imposed on them upon admittance. "Congress has imposed conditions on the admission of states where it has concerns about whether the citizenry of the new state can be assimilated as a loyal, democratic unit of government within the United States, sometimes because that citizenry has been perceived as fundamentally different from mainstream American politics and society."<sup>94</sup> Examples of these conditions include: restrictions on how the soon-to-be state can use public lands; requiring that a state ban slavery; or prohibiting polygamy, in the case of Utah.

There are frequently required provisions of state constitutions, including, but not limited to:

- An express clause stipulating that a republican form of government be established
- A standard provision stating that the new state constitution must be consistent with the federal constitution
- Specific clauses guaranteeing the fundamental principles of civil and religious liberty
- Provisions requiring the new state constitution to be submitted to the people for ratification or rejection
- A clause specifying that the constitution can make no distinction in civil or political rights based on race or color

State constitutions should not be overlooked, as they are important to understanding domestic US politics. As explained by G.A. Tarr,

The disdain for state constitutions is unfortunate; for one cannot make sense of American state government or state politics without understanding state constitutions. After all, it is state constitution — and not the federal constitution — that creates the state government, largely determines the scope of its powers, and distributes those powers among the branches of the state government and between state and locality.<sup>95</sup>

At its core, state constitutions should contain a preamble, a bill of rights, articles detailing the separation of powers between the three branches of government, and a framework for setting up local governments. States take responsibility for powers such as: ownership of property; education of inhabitants;

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94 Eric Biber, "The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union," *The American Journal of Legal History*, Vol. XLVI, 2004, 120.

95 G.A. Tarr, *Understanding State Constitutions* (Princeton, NJ: Princeton University Press, 1998), 3.

implementation of welfare and other benefits programs; protecting people from local threats; maintaining a justice system; setting up local governments such as counties and municipalities; maintaining state highways and setting up the means of administering local roads; regulating industry; and raising funds to support their activities. States and the federal government share the following responsibilities: collecting taxes; borrowing money; establishing courts; making and enforcing laws; chartering banks and corporations; spending money for the general welfare; and taking private property for public purposes. Taking all of this into account, the main purposes of state constitutions (within the limitations placed on states by the US Constitution) are to “establish procedures for policy-making, define the structure of state and local government, set the conditions for inter-state and multi-state compacts, set forth requirements of public office, specify state obligations to citizens, enshrine principles of governance, determine the responsibilities of local governments, establish voting rights and determine how elections are to be conducted, and specify processes for constitutional change.”<sup>96</sup>

State constitutions vary in length and scope, and unlike the US Constitution, they are broader in scope and are amended more frequently to fit the unique needs of the state. “While all state governments follow the general pattern established by the original states and the federal government, they vary widely in the details of structure and operation.”<sup>97</sup> One example is Alabama, whose constitution is around 340,000 words, as compared to Virginia’s constitution, which is only 8,295 words. Each state constitution is longer than the US Constitution. State constitutions can be very different. For example, some states mandate balanced budgets, thirty-eight states have term limits for governors, sixteen states have set terms for any state legislator, and ten states guarantee the right to privacy (financial and medical records for example). The state of Guam would have flexibility under this framework to create a constitution for the state that fits the island’s experiences, provided that it operates under US sovereignty and the supremacy of the US Constitution.

## Independence

If independence is the chosen status, the people of Guam could engage in a “participatory” constitution-making process. At its core, participatory constitution-making revolves around the principles of public participation, inclusiveness (gender equity), representation, and transparency.<sup>98</sup> In making the process more participatory, the public needs to be informed about the modes of appointment and election of their representatives, the adoption process in the crafting of the constitution, the public’s role in the process, and feedback on how public input will be used in the deliberation. Guam could also begin a civic education campaign to accompany the constitution-making process. This educational campaign could address the following: the purpose of constitutions; arguments on what should and what should not go

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96 Christopher A. Simon, Brent S. Steel and Nicholas P. Lovrich, “State and Local Government and Politics: Prospects for Sustainability,” 1, accessed at <https://open.oregonstate.edu/government/chapter/chapter-5/#5-2>.

97 Gordon Harrison, “Alaska’s Constitution: A Citizen’s Guide,” Alaska Legislative Affairs Agency, 2018, 1, accessed at [http://w3.legis.state.ak.us/docs/pdf/citizens\\_guide.pdf](http://w3.legis.state.ak.us/docs/pdf/citizens_guide.pdf).

98 Brandt and Cottrell, “Constitution-Making and Reform: Options For The Process,” 9.

into a constitution; how they are used; defining the language that will be used in the constitution; and the main elements of constitutions. This will be important, considering that many may ask what happened to Guam's previous attempts to craft a constitution or are unaware of these previous attempts.

An independent Guam will need to not only take into account that the constitution sets the "supreme law of the land," but also that the process of crafting a constitution is a pivotal moment in creating either unity or division among the citizenry. As a newly minted country, Guam would be better served with a united citizenry. Constitutions can act as a social contract between the people of the country. Depending on how Guam achieves its independence, this may be important. As a constitution outlines the distribution of power in the new country, notions of who belongs and whose voice counts will be determined in the constitution-making process.

In addition to the participatory aspect of the constitution, there are other important issues and questions to be addressed in the formulation of the constitution in an independent Guam. According to constitutional scholars, the following is a list of things to consider in crafting a constitution:

- Funding: How much will it cost? Where will the money come from and who will be accountable?
- Timing: Will there be a timetable, and if so, will it be rigid or open to change? Will it be tight or allow a lot of time?
- Adoption: How will the new constitution be passed into law? By the body that discusses and decides, by the president who usually signs laws, or by the approval of the people through a referendum? Will there be any prerequisites?
- Technical quality: How is the technical quality of the document to be assured?
- Draft: Who will draft the constitution? One or more political parties, a commission or committee, or from a single expert?<sup>99</sup>

The crafters of the constitution may also want to follow some common elements of a constitution:

- Preamble: Overarching motives and goals of the constitution. Sometimes refers to important historical events, national identity, or values
- Preliminaries: Declaration of sovereignty, national characteristics such as language, religion, and symbols, citizenship, state ideology, value and objectives
- Bill of rights: List of fundamental social and economic rights and their applicability, enforcement, and limitations
- Legislative branch: Structure, membership, terms of office, responsibilities and powers
- Executive branch: Structure, membership, terms of office, responsibilities and powers
- Judicial branch: Court system, appointments, independence, public prosecutors<sup>100</sup>
- Sub-national government: Structure, membership, responsibilities/powers in relation to the

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99 Brandt and Cottrell, "Constitution-Making and Reform: Options For The Process," 9.

100 This is predicated upon the country of Guam wanting to adopt a similar 3 branch of government political system.

- national government
- Additional institutions: Public service, electoral commission, ombudsman, armed forces, human rights bodies
- Amendment procedures and transitional provisions: Rules and procedures for amending constitutional provisions, procedures for making the constitution effective, and what rules will apply in the interim.<sup>101</sup>

Three perspectives on the country’s constitutional design can be helpful if independence or free association is chosen. First, the constitution should not be too specific as to not be useful in unexpected scenarios and events within a country. Secondly, the framers of the Guam constitution may not want to completely break with long-standing traditions of government as this could cause consternation among a country’s citizenry. This is not to say that a constitution cannot be completely reimaged, but rather that if it completely breaks from long-standing traditions of governance, it may be difficult (although not impossible) to reorient society to these new principles of governance. Through the development of political culture and various agents of political socialization, any constitution designed in an independent country or freely associated state of Guam would benefit from taking this into account. Thirdly, it is helpful for the document to be amendable, to ensure that it is able to responsibly govern politics in Guam with changing times, situations, and technology.

Overall, independence offers the greatest latitude in crafting a constitution. It requires the crafting of policies and governmental principles most in line with Guam’s historical experiences, social fabric, and expressed political desires. Many important decisions will be made during the deliberation process for the constitution, and it must be pointed out that what is considered “constitutional” will have lasting ramifications in the country. The people of Guam in an independent country will receive both the opportunity and the responsibility to determine this and conduct the process for making these decisions.

### ***Status Example: South Africa***

South Africa emerged out of a history of apartheid, a policy of segregation in which non-whites were oppressed and discriminated against by white South Africans. The policy of apartheid began in 1948. Non-white South Africans were forced to live in segregated areas away from white South Africans and had to use separate public facilities. Non-whites were required to carry documents in order to pass through certain areas. This also affected access to land, as eighty-seven percent of the land belonged to white South Africans during apartheid, and sixty percent of citizens today continue to have no registered real estate rights. After a long history of resistance, UN pressure, and economic sanctions by the US and UK, a new constitution came into effect in 1997 which ended the apartheid system in South Africa.

During the negotiating process to end apartheid, it was agreed that a new constitution should be

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101 Nanako Tamaru and Marie O’Reilly, “A Women’s Guide to Constitution Making,” *Inclusive Security* (2018): 3.

created. The framers of the new South African constitution crafted the preamble to read,

We, the people of South Africa, recognise the injustices of our past; honour those who suffered for justice and freedom in our land; respect those who have worked to build and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this constitution as the supreme law of the republic as to—heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; improve the quality of life of all citizens and free the potential of each person; and build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.<sup>102</sup>

The preamble clearly demonstrates a desire to start over and shows a citizenry that has learned from its past mistakes and aims to not repeat them. In addition to the preamble, this desire can also be found in various other parts of their constitution. One primary example is Chapter 1, which reads:

1. The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a). Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b). Non-racialism and non-sexism. (c). Supremacy of the constitution and the rule of law. (d). Universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness, and openness.<sup>103</sup>

Furthermore, the constitution references the past harms in the section on property, particularly Chapter 2, Section 25, parts 6, 7, and 8:

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures

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102 Preamble of the Constitution of South Africa, accessed at <https://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf>.

103 Chapter 1 of the Constitution of South Africa.



to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).<sup>104</sup>

These particular sections show how South Africa, in attempting to right the wrongs of the past, understood that righting these wrongs may negatively affect others who benefited from them. However, some South African leaders are pushing for a change in the constitution to make it easier for the government to expropriate land without payment, which will affect white farmers. This issue is still ongoing, but what is important is that despite Guam's best intentions in crafting the constitution, it will require strong constitutional design and political leadership to ensure the spirit of the constitution is upheld with the changing of time and government.

Overall, the South African constitution helps to show that an independent or freely associated Guam could use its constitution to address long-standing issues. This will matter, depending on the manner and process in which Guam achieves its independence. As a constitution refers to the set of rules which order the distribution of power within a country, constitution making is an inherently political process. Thus, the people of Guam, in crafting their constitution for an independent country or freely associated state, should use it to ensure the most equitable and just situation for its citizens.

Looking at these examples, it is advised that the crafters of the new constitution in an independent Guam adequately study constitutions from countries around the world as well as refer to the principles of constitution-making outlined above as best practice.

## Free Association

In the case of free association, a similar process will likely be followed as with independence, but certain provisions of the constitution could reflect areas of the free association agreement, particularly related to geo-strategic considerations such as the use of land and sea for US defense interests. On one hand, Guam could ask the US for help and resources in the constitutional crafting process. However, more-than-adequate constitution-drafting capacity exists in Guam to render such assistance potentially unnecessary. In any case, the US may try to influence elements of the crafting of this monumental document. Furthermore, in the existing models of free association with the US, the Compacts of Free Association and the constitutions of these associated states are generally in alignment.

### *Status Example: Micronesian Constitutional Convention*

On July 12, 1975, the Micronesian Constitutional Convention assembled to draft a Micronesian constitution. At the time, most of the Micronesia sub-region, with the exception of Guam, Nauru, and

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104 Chapter 2, Section 25 of the Constitution of South Africa.



Kiribati, formed part of the Trust Territory of the Pacific Islands under the UN. The convention received enabling legislation in the US Congress. However, the areas of disagreements between the United States and the representatives of the convention regarding the drafts of the constitution are of core importance to this discussion. When presented with the draft constitution, US negotiators pushed back against provisions prohibiting indefinite land leases as well as the handling of certain hazardous materials (including nuclear weapons and other materials for warfare), regarding those provisions as inconsistent with the defense provisions of the compact.<sup>105</sup>

### ***Status Example: The Republic of Palau (Belau)***

Palau's constitutional history serves as a powerful example of how US security interests can potentially impact the content of a constitution. There were two main provisions in Palau's constitution that caused controversy in the approval of the Compact of Free Association with the US: Article II, Section 3 and Article XIII, Section 6. Article II, Section 3 reads,

Major governmental powers including but not limited to defense, security, or foreign affairs may be delegated by treaty, compact, or other agreement between the sovereign Republic of Palau and another sovereign nation or international organization, provided such treaty, compact or agreement shall be approved by not less than two-thirds of the members of each house of the Olbiil Era Kelulau and by a majority of the votes cast in a nationwide referendum conducted for such purpose, provided, that any such agreement which authorizes use, testing, storage, or disposal of nuclear, toxic chemical, gas or biological weapons intended for in warfare shall require approval of not less than three-fourths of the votes cast in such referendum.<sup>106</sup>

Reinforcing this, Article XIII, Section 6 of Palau's constitution originally read, "Harmful substances such as nuclear, chemical, gas, or biological weapons intended for use in warfare, nuclear power plants, and waste materials therefrom, shall not be used, tested, stored, or disposed of within the territorial jurisdiction of Palau without the express approval of not less than three-fourths (3/4) of the votes cast in a referendum submitted on this specific question."<sup>107</sup> The United States, however, refused to negotiate any change in its relationship with Palau that would restrict the transit of US nuclear-powered vessels. During Palau's constitution drafting, US government officials commented on drafts, arguing against provisions that were against US interests. In response, "The Palau Constitutional Drafting Commission consequently redrafted the Palau Constitution with the 'expressed intent of accommodating US interests'... The revised

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105 Norman Meller, *Constitutionalism in Micronesia*, La'ie: Institute for Polynesian Studies, Brigham Young University, 1985, 319.

106 Article III, Section 3 of the Compact of Free Association between the United States and the Republic of Palau, accessed at [https://pw.usembassy.gov/wp-content/uploads/sites/282/2017/05/rop\\_cofa.pdf](https://pw.usembassy.gov/wp-content/uploads/sites/282/2017/05/rop_cofa.pdf).

107 Constitution of the Republic of Palau, accessed at <http://www.unesco.org/education/edurights/media/docs/c4679995d1bdd-3ef509ddc66c3cb38e80d492fe.pdf>.

constitution, deleted the nuclear prohibition language from article II.”<sup>108</sup> Even so, this revised constitution was rejected, and the provisions were restored for a third election, with 79% approving the “nuclear-free” constitution in 1981.

The next step in Palau’s political development was in ratifying the Compact of Free Association with the United States. The first plebiscite, in 1983, presented Palauan voters with the questions: 1) Do you approve of free association as set forth in the Compact of Free Association?; 2) Do you approve of the agreement concerning radioactive, chemical, and biological materials concluded pursuant to section 314 of the Compact of Free Association? The results of the vote were 61% for the first question and 51% for the second question. This did not pass the 75% margin required under the approved constitution, which led to a bloody period in Palauan history, including the assassination of a president and a subsequent leader’s suicide (although direct connection to the nuclear-free constitution remains open to question). As a result of the violence and political stagnation regarding the compact, voters were asked to vote on a new referendum to amend the constitution to allow for a simple majority approval of the compact. This vote received 73.3% in favor. This also was challenged in Palau’s courts, for not meeting the 75% requirement for approving the compact, even though the Palau constitution itself can be amended by a simple majority vote. After internal division on whether to approve the compact, including a lawsuit by prominent Palauan women, President Ngiratkel Etpison made an initiative to amend the Palauan constitution via popular initiative at the Nov. 4, 1992 general election.

As J. Roman Bedor describes in his book, *Palau: From the Colonial Outpost to Independent Nation*, “The popular initiative petition to amend Article II, Section 3 and Article XIII, Section 6 to reduce seventy-five percent (75%) to simple majority was signed by more than 25% of the voters required to place the constitutional amendments in the general election on November 4, 1992.”<sup>109</sup> The vote received sixty-two percent approval and thus Article II, Section III, and Article XIII, Section 6 of the constitution were amended from requiring seventy-five percent of the vote to a simple majority vote. Following this constitutional amendment, on November 6, 1993, another referendum was held regarding the Compact of Free Association. This time, it received sixty-two percent approval, and the compact was approved. Altogether, there were thirteen referenda and plebiscites regarding either the constitution or the Compact of Free Association. One can see from Palau’s example that Palauans ultimately altered their constitution to be more in line with US geo-strategic and security interests, which was a lengthy and violent process.

If free association is the chosen status, the people of Guam can learn from these two examples regarding negotiations with the US government and the challenges associated with the harmonization of the provisions of the COFA with the internal constitution. It has been demonstrated that compact negotiations have the potential to influence the drafting of the provisions of a country’s constitution. As the primary US objective in Micronesia is strategic and geopolitical, it is highly expected that any constitution drafted in a freely associated state of Guam would require a significant degree of consistency with the defense

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108 Jon Hinck, “The Republic of Palau and the United States: Self-Determination Becomes the Price of Free Association,” *California Law Review*, 78 (1990): 926.

109 J. Roman Bedor, *Palau: From the Colonial Outpost to Independent Nation*, 2015, 299.

provisions of the Compact of Free Association agreement.

None of this means the overall integrity of the constitution in a freely associated Guam will be compromised. Similar attempts at securing US interests could also be seen when creating a constitution under statehood or independence. In the case of free association, the officials of the island must be equipped to strategically negotiate with the US federal government to ensure that the interests of the people of Guam are included in the constitution, which will set the parameters of the future government. Guam would do well to begin a process of training diplomats and negotiators in order to ensure that the capacity is created to negotiate for a modern political status providing for the full measure of self-government.

<b>CONSTITUTION</b>	
<b>STATUS</b>	<b>EFFECTS</b>
<b><i>Statehood</i></b>	<ul style="list-style-type: none"> <li>• Protection of liberal values such as freedom of speech and religion aligned with the US Constitution.</li> <li>• All articles and further amendments in state constitution to align with the US Constitution.</li> <li>• Due to states' powers, there is some flexibility in crafting state constitution.</li> </ul>
<b><i>Independence</i></b>	<ul style="list-style-type: none"> <li>• Ability to create the law of the land in line with the island's unique history, culture and particularities.</li> <li>• Since no longer under US umbrella, Guam would have to create its own enforcement mechanisms for the constitution, which could be difficult at first.</li> <li>• A botched constitutional-making process may create divisions and cause difficulties in the beginning phases of the new country.</li> </ul>

***Free Association***

- Ability to craft one’s own constitution according to the island’s particularities, needs, and wants.
- Possible assistance from the United States in the constitution-making process, if needed.
- Highly expected that any constitution drafted in a freely associated state of Guam would require a significant degree of consistency with the defense provisions of the Compact of Free Association agreement.

# Individual Rights

There are two ways to understand what constitutes the rights of citizens. The first approach is to establish individual rights that a community or country feels its “citizens ought to acknowledge if they are to treat each other as free individuals worthy of equal concern and respect.”<sup>110</sup> These rights normally address the fundamental freedoms a country considers important for its citizens, such as protection from torture or cruel and unusual punishment. The second approach refers to “identifying the rights that are necessary if citizens are to participate in democratic decision-making on free and equal terms.”<sup>111</sup> This includes structuring rights so that all eligible citizens can vote for the legislators and laws or even participate in their governments without feeling influenced to vote or act in certain ways.

For this section, it is helpful to distinguish between collective rights and individual rights. Collective rights are rights held by a group or members who make up that specific group (i.e. ethnic groups, religious groups, etc.). Whereas, individual rights are ones that are given to individual members of a country, community, or society.<sup>112</sup> Additionally, there is a distinction between human rights and individual rights. Human rights are “rights one acquires by being alive.”<sup>113</sup> whereas, individual rights, sometimes called civil rights, are “rights one obtains by being a legal member of a certain political state.”<sup>114</sup>

Individual rights are usually outlined in a country’s constitution. However, they are connected as the individual rights affirmed in many constitutions include recognized human rights, such as the right to education and protection from torture. This section will examine: Under each political status, what individual rights may citizens of Guam have?; What are the possibilities and limitations?; and What is the procedure for establishing individual rights for Guam’s residents?

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110 Richard Bellamy, *Citizenship: A Very Short Introduction*, (New York: Oxford University Press, Inc., 2008), 14.

111 Bellamy, “Citizenship,” 14.

112 Stanford University Center for the Study of Language and Information, “Group Rights,” accessed at <https://plato.stanford.edu/entries/rights-group/>.

113 Georgetown Law Library, “A Brief History of Civil Rights in the United States,” accessed at <https://guides.ll.georgetown.edu/civil-rights>.

114 Georgetown Law Library, “A Brief History of Civil Rights.”

As citizens in the unincorporated territory of Guam, it is important to note that there are differences when it comes to rights applicable to the territories as opposed to states of the union. In *Dorr v. United States*, it was stated that “under the Insular framework, the designation of fundamental extends only to the narrow category of rights and principles which are the basis of all free government.”<sup>115</sup> Even the idea of what constitutes fundamental rights is inconsistent across the US territories because the applicability of these rights is “a determination the [US] Court would make on a case-by-case basis.”<sup>116</sup>

US citizens in Guam would have to leave Guam and reside in one of the 50 states to have the exact same individual rights as US citizens living in those states. These rulings solidified that, in the case of the US territories, many rights in the US Constitution only apply to residents in these places at the discretion of the US Congress. Examples of rights that have been extended to Guam by federal laws or court cases are: trial by jury in the Sixth and Seventh Amendments; equal protection in the Fourteenth Amendment; and voting rights in the Fifteenth and Nineteenth amendments. These same rights, however, are not applied to all territories equally. For example, the Ninth Circuit Court of Appeals has referenced the Covenant establishing the Commonwealth of the Northern Mariana Islands and the Insular Cases when it comes to scrutinizing aspects of the CNMI such as right to trial by jury or land tenure laws.<sup>117</sup>

## Statehood

If Guam were to be integrated into the United States, the full extent of the US Constitution would apply to the island. Thus, all individual rights afforded to US citizens in other states would apply to US citizens in the island.

## Rights of American Citizens

According to the US Constitution, the following is a list of rights granted to citizens of the United States, (not inclusive of all):

Amendment I: Freedoms of religion, speech, assembly, and press

Amendment II: Right to bear and keep arms

Amendment IV: Right to be secure against unreasonable searches and seizures

Amendment VI: Right to a speedy and public trial

Amendment VII: Right to trial by jury in civil cases<sup>118</sup>

Amendment VIII: Excessive bail and fines cannot be imposed or cruel and unusual punishments

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115 *Dorr v. United States*, 195 US 138, 147 (1904).

116 Juan Torruella, “Ruling America’s Colonies: The Insular Cases,” Yale Law & Policy Review, accessed at <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1652&context=ylpr>.

117 United States General Accounting Office, “US Insular Areas: Applicability of Relevant Provisions of the US Constitution,” 1991, accessed at <https://www.gao.gov/assets/220/214357.pdf>.

118 This right applies to federal civil cases.

inflicted.

Amendments XV, XIX, and XXVI: Right to vote (amendment XIX gave American women the right to vote)<sup>119</sup>

These rights will be guaranteed if Guam were to be admitted as a state with the full applicability of the Constitution. However, it is important to note that certain rights in the US Constitution are applicable at the federal level but not at the state level unless specifically included by federal law in state constitutions.

The rights outlined in the US Constitution for the most part extend to everyone residing in the United States (citizen or non-citizen). However, there are a few rights that are reserved only for US citizens. The US Citizenship and Immigration Services agency explains that these rights include, the right to vote in elections for public officials, the right to run in elected office, and the right to apply for federal employment requiring US citizenship.<sup>120</sup>

As a US citizen, there are also responsibilities that are expected from every individual. These responsibilities include, but are not limited to:

Supporting and defending the constitution; participating in the democratic process; respecting and obeying federal, state, and local laws; paying income and other taxes honestly, and on time, to federal, state, and local authorities; serving on a jury when called upon; defending the country if the need should arise.<sup>121</sup>

Individuals are expected to adhere to these responsibilities, otherwise they may face legal penalties in some instances.

Aside from rights given by the federal government, all states have the ability to create a bill of rights in their state constitution for the citizens of the state. Attorney General of Guam Leevin Camacho said states have the power to broaden individual rights beyond what is included in the US Constitution. He stated that:

States can have a broader, equal protection as an example, interpretation of what their clause does. Whereas Guam can never interpret, religious freedom as an example, more expansively than what the federal courts have done. States can interpret their constitutions more expansively than the US Constitution but we [Guam] cannot do that.<sup>122</sup>

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119 Bill of Rights Institute, "The United States Constitution Resource Guide," accessed at <https://billofrights.org/founding-documents/constitution/>.

120 United States Citizenship and Immigration Services, "What are the Benefits and Responsibilities of Citizenship?," accessed at <https://www.uscis.gov/sites/default/files/document/guides/chapter2.pdf>.

121 United States Citizenship and Immigration Services, "Citizenship Rights and Responsibilities," accessed at <https://www.uscis.gov/citizenship-resource-center/learn-about-citizenship/citizenship-and-naturalization/citizenship-rights-and-responsibilities>.

122 Personal Communication with the Attorney General of Guam, Leevin Camacho, July 2020.

As a state, Guam will have the power to include more individual rights for residents in the state than what is currently allowed in the US Constitution or under federal law. However, these rights cannot contradict the rights outlined by the Constitution. The state of Guam can use its constitution to incorporate individual rights that are fundamental to the island community.

### ***Status Example: California***

The state of California drafted its first constitution on Nov. 13, 1849, prior to it becoming part of the United States in 1850. The first document lasted only 30 years before it was replaced with the current state constitution. Since its creation on May 7, 1879, the second California Constitution has been amended more than 450 times.<sup>123</sup> Written into Article I Declaration of Rights, the state constitution incorporates recognized rights from the US Bill of Rights. However, there are several sections included that detail further rights:

*Section 2:* A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication

*Section 25:* The people shall have the right to fish upon and from the public lands of the state and in the waters thereof, excepting upon lands set aside for fish hatcheries, and no land owned by the state shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon; and no law shall ever be passed making it a crime for the people to enter upon the public lands within this state for the purpose of fishing in any water containing fish that have been planted therein by the state; provided, that the legislature may by statute, provide for the season when and the conditions under which the different species of fish may be taken.<sup>124</sup>

The state of Guam can use its constitution to incorporate similar rights that are fundamental to the island community.

As a state, the full extent of the US Constitution will be applicable to all US citizens in Guam. This will expand the definition of what fundamental rights are for US citizens in Guam. The state of Guam will have the opportunity to include additional individual rights in its constitution in ways that are specific to the needs of the community. On the other hand, it is important to acknowledge that the US Constitution

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123 Georgetown Law Library, "Constitution," accessed at <https://guides.ll.georgetown.edu/california-in-depth/constitution>.

124 California Legislative Information, "California Constitution Cons," accessed at [https://leginfo.ca.gov/faces/codes\\_displayText.xhtml?lawCode=CONS&division=&title=&part=&chapter=&article=l](https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=CONS&division=&title=&part=&chapter=&article=l).



will supersede Guam’s state constitution in the same way federal interests may at times supersede state interests. However, states do have room to implement individual rights that are not explicitly stated in the US Constitution.

## Independence

Individual rights in the independent country of Guam would be initially outlined in the constitution of the new country. It is anticipated that in an independent Guam, the new country would provide its citizens some rights modeled from the US Constitution, including the right to free speech and the right of assembly. Beyond the US Constitution, the country of Guam can also reaffirm rights for its citizens by referencing the United Nations Universal Declaration of Human Rights (UDHR). The UDHR was created post-World War II as a way for countries to ensure that the atrocities and severe human rights violations committed during WWII would not be repeated.

After two years of intense deliberation, the document was formally adopted on Dec. 10, 1948, when 48 countries voted in favor of the UDHR.<sup>125</sup> The document was created with the intention that it “acts like a global road map for freedom and equality – protecting the rights of every individual, everywhere.”

<sup>126</sup>Some of the rights enumerated in the declaration include, but are not limited to:

1. The right to life, liberty, and security of person
2. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or Punishment
3. No one shall be subjected to arbitrary arrest, detention or exile
4. Everyone has the right to leave any country, including his own, and to return to his Country
5. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory.<sup>127</sup>

Overall, the UDHR has thirty rights each member state should give to its citizens, outlined in Articles 1-30. The document is recognized as the “common standard of achievements for all peoples and all nations”<sup>128</sup> After the passage of the UDHR, more than 80 former colonies incorporated several rights outlined in the UDHR into the constitutions of their newly independent countries.<sup>129</sup>

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125 United Nations, “Drafting of the Universal Declaration of Human Rights,” accessed at <https://research.un.org/en/undhr/ga/plenary>.

126 Amnesty International, “What is the Universal Declaration of Human Rights and why was it created?,” accessed at <https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/>.

127 Amnesty International, “What is the Universal Declaration of Human Rights?”

128 Amnesty International, “What is the Universal Declaration of Human Rights?”

129 United Nations, “List of former Trust and Non-Self-Governing Territories,” accessed at <https://www.un.org/dppa/decolonization/en/history/former-trust-and-nsgts>.

### *Status Example: Democratic Republic of East Timor*<sup>130</sup>

The country of East Timor was a former colony of Portugal from the 16th century until 1975 with the overthrow of the sitting Portuguese government. Recognized as a non-self-governing territory, the United Nations supported East Timor to exercise its right to self-determination.<sup>131</sup> In October 1999, the global community sent peacekeeping troops to East Timor to ensure self-determination was exercised. The UN Security Council created the United Nations Transitional Administration in Timor-Leste (UNTAET) to act as “an integrated, multidimensional peacekeeping operation responsible for the administration of Timor-Leste during its transition to independence.”<sup>132</sup> In 1999, over 79% of voters chose independence. After a brief three-year transition aided by the UN, the country gained independence in 2002.<sup>133</sup>

East Timor’s constitution incorporates aspects of the UDHR, with a majority of the constitution dedicated to outlining the rights afforded to each Timorese citizen. It also added a few rights that reflect the country’s character. Recognizing their nation’s tumultuous history, the Timorese people adopted a constitution that reflects their views of individual rights. They included an article that protects individual privacy and one that protects individuals in unique circumstances:

#### *Article 38: Protection of Personal Data*

1. All citizens have the right to access personal data stored in a computer system or entered into mechanical or manual records regarding them, and may require their rectification and actualization, and have the right to know their purpose.
3. The processing of personal data on private life, political and philosophical convictions, religious faith, party or trade union membership and ethnical origin, without the consent of the interested person, is prohibited.

#### *Article 39: Family, Marriage, and Maternity*

4. Maternity is dignified and protected, and special protection shall be guaranteed to all women during pregnancy and after delivery and working women shall have the right to be exempted from the workplace for an adequate period before and after delivery, without loss of remuneration or

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130 The country is often also referred to as either Timor Leste, the Democratic Republic of East Timor or its shortened version of East Timor. Different organizations and official documents use any of these three variations. For the purpose of this study, we will refer to the country as East Timor.

131 Government of Timor-Leste, “History,” accessed at <http://timor-leste.gov.tl/?p=29&lang=en>.

132 Ministry of Tourism Timor-Leste, “History,” accessed at <https://www.timorleste.tl/east-timor/about/history/>.

133 Ali MC, “East Timor: Between hope and unease 20 years after referendum,” Aljazeera, August 30, 2019, accessed at <https://www.aljazeera.com/news/2019/08/timor-leste-hope-unease-20-years-referendum-190829230741706.html>.

any other benefits, in accordance with the law.<sup>134</sup>

Initially, it may be challenging for the people of Guam to agree on what individual rights should look like, even if the island has absolute flexibility to protect any rights that it chooses. An independent Guam will have to establish its own law enforcement agencies and structure its legal system so that it can carry out the agreed-upon individual rights. Overall, however, as illustrated with East Timor, an independent Guam would have the opportunity to create individual rights policies that are applicable for the people of Guam.

## Free Association

Individual rights in the freely associated state of Guam would likely be outlined in the constitution of the country. It is fully anticipated that the form of government in the freely associated state of Guam would be a republic, with sovereignty ultimately resting with the people of the island. The FAS of Guam may offer its citizens rights such as freedom of speech and freedom of assembly as well as other rights associated with liberal democracies, such as freedom of religion and freedom of expression. If the FAS of Guam is recognized as a sovereign state by the international community, it is anticipated that the FAS would follow the norms of international law, providing for its citizens' basic human rights as outlined in the Universal Declaration of Human Rights and broader international human rights law, especially if it becomes a member of the United Nations.

### *Status Example: The Republic of Palau*

After a three-month long constitutional convention, the final version of the Palauan Constitution was decided on April 2, 1979. Articles IV and V of the constitution address fundamental and traditional rights respectively. In Article IV, the fundamental right of Palauan citizens mirror those of the United States, with the following exceptions:

*Section 9.* A citizen of Palau may enter and leave Palau and may migrate within Palau.

*Section 10.* Torture, cruel, inhumane or degrading treatment or punishment, and excessive fines are prohibited.

*Section 12.* A citizen has the right to examine any government document and to observe the official deliberations of any agency of government.

*Section 13.* The government shall provide for marital and related parental rights, privileges and

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<sup>134</sup> Constitution of Timor-Leste, "Timor-Leste's Constitution of 2002," Constitute Project, accessed at [https://www.constituteproject.org/constitution/East\\_Timor\\_2002.pdf?lang=en](https://www.constituteproject.org/constitution/East_Timor_2002.pdf?lang=en).

responsibilities on the basis of equality between men and women, mutual consent and cooperation. Parents and individuals acting in the capacity shall be legally responsible for the support and for the unlawful conduct of their minor children as prescribed by law.<sup>135</sup>

As shown with Palau, a freely associated Guam could adopt individual rights like those in the United States while also establishing other rights that directly benefit its citizens.

135 Article IV of the Constitution of the Republic of Palau, accessed at <http://www.unesco.org/education/edurights/media/docs/c4679995d1bddd3ef509ddc66c3cb38e80d492fe.pdf>.

INDIVIDUAL RIGHTS	
STATUS	EFFECTS
<i>Statehood</i>	<ul style="list-style-type: none"> <li>• The full extent of the United States Constitution would apply to Guam.</li> <li>• Federal laws and the US Constitution can supersede state interests, unless they are challenged by the state in the US courts.</li> <li>• States can establish laws that expand individual rights given to US citizens by the federal government and the US Constitution as long as they do not conflict with the US Constitution.</li> </ul>
<i>Independence</i>	<ul style="list-style-type: none"> <li>• Guam will have to come to a consensus about the individual rights that should be guaranteed and protected.</li> <li>• The island will have the flexibility and freedom to include and recognize fundamental individual rights that the community wants.</li> </ul>

	<ul style="list-style-type: none"> <li>• Guam will have to establish institutions and agencies to protect individual rights.</li> <li>• Guam can affirm the Universal Declaration of Human Rights and apply its enumerated rights to its citizens.</li> </ul>
<p style="text-align: center;"><b><i>Free Association</i></b></p>	<ul style="list-style-type: none"> <li>• Guam will have to come to a consensus about the individual rights that should be guaranteed and protected.</li> <li>• The island will have the flexibility and freedom to include and recognize any fundamental human rights that the community decides upon.</li> <li>• Guam may have to restructure its institutions and agencies to protect individual rights.</li> <li>• Guam can affirm the Universal Declaration of Human Rights and apply its enumerated rights to its citizens.</li> </ul>

# Legal/Judicial Processes

Currently, Guam has a difficult time enacting meaningful legal reform unless it has the explicit support of the US Congress. Despite the signing of the Organic Act of Guam on August 1, 1950, it took decades before Guam’s contemporary legal system was established. The Organic Act created the District Court of Guam, which was given original and appellate jurisdiction, meaning that it had the power to hear a case for the first time and can also hear appeals for cases that went through the lower courts.<sup>136</sup> The Guam Legislature also passed the “Judiciary Act” which “gave the Island Court of Guam jurisdiction over misdemeanors and civil cases having a value of less than \$2,000, and created a Police Court with jurisdiction over certain misdemeanor crimes.”<sup>137</sup> The District Court received jurisdiction for other cases, and could also hear appeals from the Island Court. With this legal system, appeals from the Guam District Court went to the United States’ Ninth Circuit Court of Appeals and then, if necessary, to the Supreme Court of the United States.<sup>138</sup>

In 1974, lawmakers in Guam decided to expand the island’s court system by creating the Superior Court of Guam, which was given jurisdiction over cases arising out of Guam law. The Island Court and the Police Court were dissolved and absorbed into the newly created Superior Court of Guam. The Court Reorganization act of 1974 also established the Supreme Court of Guam. However, because of Guam’s status as an unincorporated territory, the Supreme Court only lasted three short years. In the case of *Territory of Guam v. Olsen*, the US Supreme Court found that “the Organic Act did not authorize the transfer of appellate jurisdiction from the District Court of Guam, and the locally established Supreme Court of Guam was abolished.”<sup>139</sup>

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136 Guam Supreme Court, “Judiciary History- Historical Review: ‘Justicia para todo,’” Guam Supreme Court, accessed at <http://www.guamsupremecourt.com/Judicial-History/Judiciary%20History.pdf>.

137 Guam Supreme Court, “Judicial History,” Guam Supreme Court, accessed at <http://www.guamsupremecourt.com/Judicial-History/Judicial-History.html>.

138 Guam Supreme Court, “Judicial History,” Guam Supreme Court, accessed at <http://www.guamsupremecourt.com/Judicial-History/Judicial-History.html>.

139 Guam Supreme Court, “Judicial History.”

Additionally, the Organic Act supersedes local legislation. Attorney General of Guam Leevin Camacho, pointed out that, “If there is something that is inconsistent with the Organic Act, they call it inorganic.”<sup>140</sup> As an example, he cited the predicament with the number of senators in the Guam Legislature who must be present in order to pass a bill. Camacho explained that the Organic Act calls for a “Senate majority to be present” and local law and rules state a specific number is necessary for quorum. The local law required that more senators must vote in favor of a bill for it to pass, whereas the Organic Act called for a smaller number.<sup>141</sup> Since local law contradicted the Organic Act it was deemed inorganic and “unconstitutional.”

Before noting some of Guam’s critical moments of legal reform, it is significant to note that, even though legal reform can happen on a local or federal level, the US Congress has power over these decisions. As articulated by retired Guam Supreme Court Chief Justice and current Public Auditor of Guam Benjamin “BJ” Cruz, “we are a creature of Congress, so everything has to be amended [for the Organic Act] if we want something.” He continues that these amendments are then “contingent on US Congress to not change these. Everything is within their power.”<sup>142</sup> Local legislators can introduce bills for legal reform in Guam, but the US Congress has the authority to revoke these laws. The Court Reorganization Act of 1974 was not the end of Guam’s path for legal reform. In 1992, the Supreme Court of Guam was re-established by the Guam Legislature, but suffered from local politics, with many powers for the new court being removed. From the 1990s-2000s, former Congressman Robert A. Underwood and former Congresswoman Madeleine Z. Bordallo introduced legislation in the US House of Representatives to amend the Organic Act and enable the authority of the Guam Supreme Court and establish Guam’s judiciary as an independent branch of government, separate from the island’s executive and legislative branches.<sup>143</sup> On Oct. 30, 2004, the Judiciary of Guam was finally made equal with the other two branches in Guam. According to the Guam Judiciary, “As an independent branch, the Judiciary would be more capable of safeguarding individual rights and liberties, which history instructs must be immune from political instability.”<sup>144</sup>

## Statehood

As a state, Guam would have the flexibility to determine how to structure its court system, which is outlined in each state’s constitution. Article III of the Constitution begins with, “The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.”<sup>145</sup> Thus, the US Constitution established the judicial branch of the federal government, giving it exclusive jurisdiction only over certain types of cases. Thus, they are

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140 Personal Communication with Attorney General Leevin Camacho, August 2020.

141 Personal Communication with Attorney General Leevin Camacho, August 2020.

142 Personal Communication with Public Auditor BJ Cruz, July 2020.

143 Guam Supreme Court, “Judicial History.”

144 Guam Supreme Court, “Judicial History,” Guam Supreme Court, accessed at <http://www.guamsupremecourt.com/Judicial-History/Judicial-History.html>.

145 Article III of the US Constitution.

called courts of “limited jurisdiction.” States create their own courts with jurisdiction over state laws, and are courts of general jurisdiction, meaning that can try all cases (except those Congress specifically stated should be litigated only in federal courts).<sup>146</sup> In many ways, state courts are the core of the US judicial system, as they handle most crimes/criminal activity as well as civil matters such as personal injury, malpractice, divorce, juvenile, probate, and contract disputes.

If Guam is a state, it no longer will have to appeal to the US Congress to amend the Organic Act to establish legal reform. The state constitution will be the guiding document for the island’s legal structure.

Each of the fifty states has a court system that is unique to the respective state. They each have the power to construct a legal system that works for their respective communities. The structures of the state courts vary widely. Some states have simple court systems with only four levels whereas others have more complex systems with more than ten court levels. “No two states are exactly alike when it comes to the organization of courts. Each state is free to adopt any organizational scheme it chooses, create as many courts as it wishes, name those courts whatever it pleases, and establish their jurisdiction as it sees fit. Thus, the organization of state courts does not necessarily resemble the clear-cut, three-tier system found at the federal level.”<sup>147</sup> Therefore, the state of Guam could opt to have the system remain the same or the island could decide to restructure it. As stated by Attorney General of Guam Leevin Camacho, “For most purposes, we really are structured like a state when it comes to our legal system. There are not too many differences. The only difference might be is that in some places you might get three layers of review. You might have trial court, intermediary appeals, and then a supreme court. We don’t have that middle layer...we just have two levels.”<sup>148</sup>

Though there is great variation among the individual states, the US courts noted that all “state courts are the final arbiters of state laws and constitutions. Their interpretation of federal law or the US Constitution may be appealed to the US Supreme Court. The Supreme Court may choose to hear or not to hear such cases.”<sup>149</sup> The constitution and laws of each state establish the state courts. A court of last resort, often known as the state’s supreme court, is usually the highest court. Therefore, like in current practice, the Supreme Court of Guam will likely remain the final court and its appeals may be given to the US Supreme Court. Some states also have an intermediate court of appeals. Below these appeals courts are the state trial courts. Some are referred to as circuit or district courts.

On the federal side, the state of Guam will remain connected with the US federal court system. The federal court structure will remain intact, where the US Supreme Court will continue to act as the court of last resort. Guam could also have an intermediate court of appeals, of which Guam may remain within the jurisdiction of the Ninth Circuit Court of Appeals, unless otherwise decided by the federal government. On the lowest rung, will be the US District Court (see figure below).

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146 United States Courts, “Comparing Federal & State Courts,” accessed at <https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts>.

147 Bureau of International Information Programs, “Outline of the US Legal System,” *US Department of State*, 2004, pg. 46.

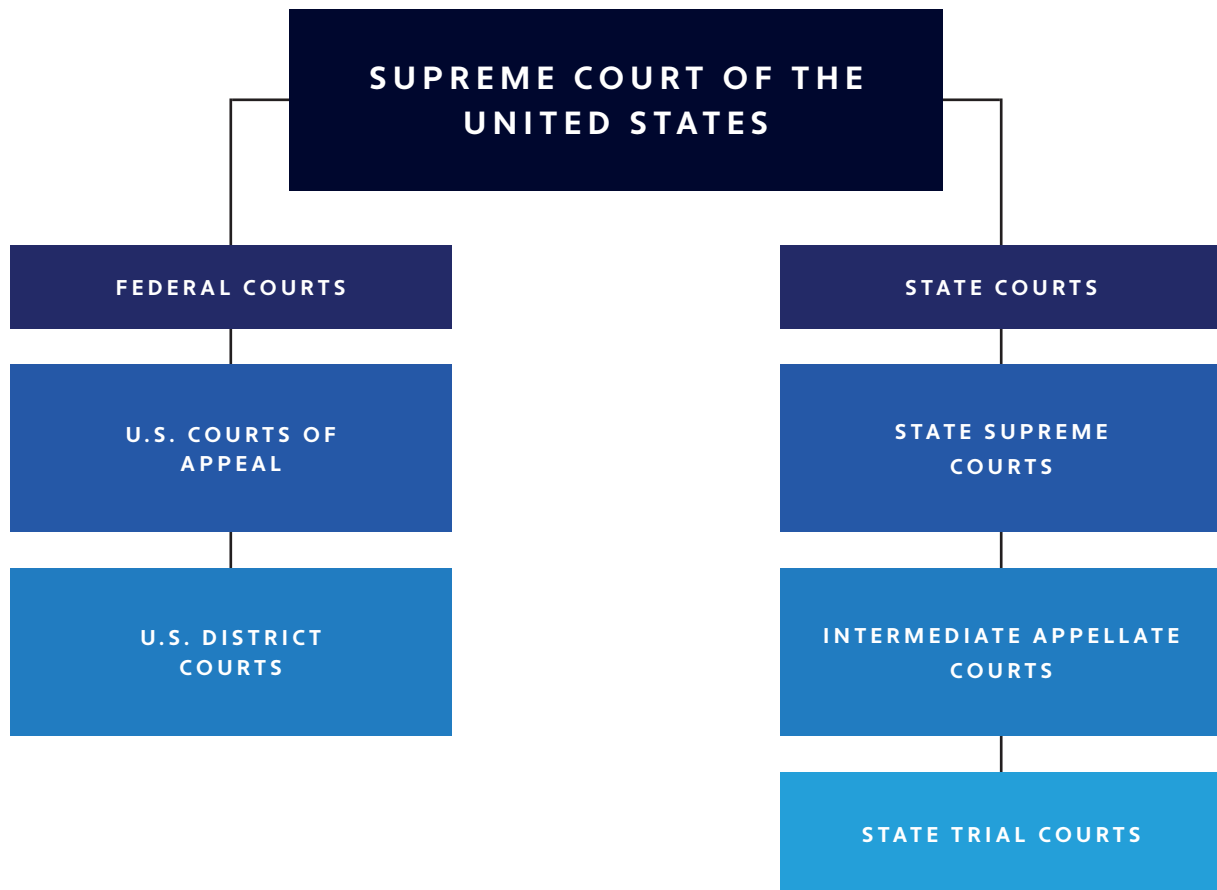
148 Personal Communication with Attorney General Leevin Camacho, August 2020.

149 United States Courts, “Comparing Federal & State Courts,” accessed at <https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts>.



## Relationship between the Federal and State Courts in the United States<sup>150</sup>

150 Terence Lau and Lisa Johnson, "Trial and Appellate Courts," *Business and Legal and Ethical Environment* (2011): accessed at <https://2012books.lardbucket.org/books/business-and-the-legal-and-ethical-environment/s05-03-trial-and-appellate-courts.html>



The Guam state courts will use Guam's established constitution or other enabling authority (to be decided by the state of Guam) to provide the framework of laws for cases heard by the state courts. The state of Guam, through its constitution or legislative action, can create specialized courts to handle matters important to the state.

Overall, as a state, Guam will have flexibility in creating its judicial system. The state of Guam may have specialized courts, like adult and juvenile drug courts, and can choose to add others. The state of Guam can also choose to add a third level or intermediary courts, like a court of appeals for criminal and civil cases, to its existing system. Forty-one of fifty states have intermediary courts. Guam's legal institutions are already considered an independent branch of government, there is an established hierarchy within the court structure, and the relationship between the local and federal courts is defined. Additionally, the state of Guam, in its constitution, will need to formally outline the structure of the judicial system and its corresponding functions.

## Independence

Many countries tend to structure their legal systems around one of four models: civil law; common law; religious law; and customary law. Below is a brief explanation of the four models. It should also be noted that some countries have mixed legal systems.

### Legal Systems<sup>151</sup>

<sup>151</sup> University of South Carolina Law Library, "A Quick Primer on the World's Legal Systems," accessed at <https://guides.law.sc.edu/c.php?g=315476&p=2108388>.

LEGAL SYSTEM MODEL	DESCRIPTION
<b>Civil Law</b>	<p>Legal systems make judicial decisions based on legal statutes and codes that are often updated that specify the matters capable of being brought before a court, the procedure to follow, and the appropriate punishment. Civil law systems rely less on judges and more on legal experts to make legal interpretations.</p> <p>Basic characteristics:</p> <ul style="list-style-type: none"><li>• Most of the law is statutory law created by legislatures and not by judges following precedent</li><li>• Judge actively involved in investigation of facts of case</li><li>• Juries are rarely used; a judge or panel of judges will decide the facts and the law to be applied</li><li>• Prosecutors and defense attorney may play a more limited role</li></ul>
<b>Common Law</b>	<p>Legal systems use case law or already established statutes and judicial determinations to make legal decisions. In this model, judges can have great influence on laws.</p> <p>Basic characteristics:</p> <ul style="list-style-type: none"><li>• The laws governing a case are based on legal precedent and statutory law</li><li>• Judge acts as impartial referee between opposing parties</li><li>• Jury may determine facts, and judge decides which law to apply</li><li>• Active role for prosecutors and defense attorneys</li></ul>
<b>Religious Law</b>	<p>Legal systems function according to laws that come from religious texts or traditions.</p>
<b>Customary Law</b>	<p>Legal systems use laws based on behavioral patterns which are understood as the "rules of conduct." These laws are often unwritten and transmitted through generations. This system is often mixed with either civil or common law.</p>

Legal systems in some countries mix these various forms. For example, Pakistan’s legal system combines common law and Islamic law, Sri Lanka’s legal system combines civil law, common law, and customary law, and in some African countries, customary law and local values play a role in the justice system.

In crafting its own legal system, an independent Guam could first decide which model(s) to pattern its legal system around. Many independent countries follow the models established by their former administering power and reform them as needed. As an unincorporated territory of the United States, Guam’s legal system is patterned according to a common law legal structure. However, as an independent country, Guam would be free to either keep or reconstruct its current legal system. After this initial decision is made, many other decisions will need to be made, including the makeup of the court system, appellate power, judicial terms, and others. These multiple decisions will help ensure the success of the constitutional system of the independent country of Guam as “a better measure of the success of a constitutional system is the willingness of government to stay within the limits on governmental power set by the constitution, and the ability of courts and the people to keep government within these limits.”<sup>152</sup> It is highly recommend that upon transition to independence, Guam’s attorneys, judges, and legal scholars be advised and actively involved in the crafting of the new legal system.

### ***Status Example: New Zealand***

New Zealand has four levels of courts.<sup>153</sup> Within these four levels, the legal system of New Zealand has specialized courts, which sit below the district court. For example, with a recognized indigenous population, New Zealand has a specialized court for cases regarding Māori land matters. New Zealand was colonized by Great Britain from 1840, with the signing of the Treaty of Waitangi, until 1907, when it was granted its independence. However, even after gaining its independence, the indigenous people of New Zealand, the Māori, still have many issues to resolve with Great Britain. To ensure the integrity of the court, in the Te Ture Whenua Maori Act 1993 (Maori Land Act 1993) under part 1, section 7, 2A, judges can only be appointed to the Māori Land Court if they have a knowledge of Māori language, customs, and the Treaty of Waitangi, the document which sought to establish laws to formalize the relationship between the Māori and the colonial British government.<sup>154</sup>

New Zealand also has a variety of tribunals that oversee conflicts. Each tribunal handles and resolves claims in specific sections of the New Zealand government. For example, the country has a Copyright Tribunal which oversees “copyright licensing agreements under the Copyright Act 1994” and “applications about illegal uploading and downloading of copyrighted work.”<sup>155</sup> New Zealand also has a Social Security Appeal Authority which is responsible for hearing appeals against decisions made by the Ministry

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152 Michael A. Ntuny, *South Pacific Islands Legal Systems*, (Honolulu: University of Hawaii Press, 1993), pg. xix.

153 University of South Carolina Law Library, “A Quick Primer.”

154 New Zealand History, “The Treaty in Brief,” accessed at <https://nzhistory.govt.nz/politics/treaty/the-treaty-in-brief>.

155 Ministry of Justice, “Copyright,” accessed at <https://www.justice.govt.nz/tribunals/copyright/>.

of Social Development and the Secretary for War Pensions regarding individuals' benefits or pensions.<sup>156</sup>

As illustrated with New Zealand, an independent Guam will have the ability to structure its legal system as it sees fit. There is a significant amount of freedom when creating the island's legal infrastructure. For example, Guam could set up legal processes that help rehabilitate those who commit crimes and give victims a chance to more actively participate in the legal process if they wish. Additionally, as an independent country, the island will have the opportunity to follow the legal system model of its choosing.

## Free Association

Many freely associated states tend to model their legal systems after their former administering powers because it is the most familiar legal model, and the transition would be relatively simple. For example, in the case of Palau and the Marshall Islands, each country has similar court levels to the US federal structure. Their court systems include a supreme court as the highest court which oversees the lower courts, known by different names in each country. RMI has district and community courts, whereas Palau has the court of common pleas. However, each island country mirrors the creation of specialized courts as done in individual US state court systems. For example, the RMI has a Traditional Rights Court and Palau has a Land Court.

It is important to note that as a freely associated state, Guam would be free to create its judicial system. For example, in the case of the freely associated states throughout Micronesia, their Compacts of Free Association (COFA) with the United States do not have provisions that affect the structure of each country's judiciary. In the original COFA agreement between the Republic of Palau and the United States, in General Legal Provisions, Article VII, Section 174, it states that, outside the exceptions laid out in the compact, "the Government of Palau shall be immune from the jurisdiction of the courts of the United States, and the Government of the United States shall be immune from the jurisdiction of the courts of Palau."<sup>157</sup> Therefore, each judiciary does not interfere or supersede the other. For the most part, they remain independent of each other. There are, however, cases where claims can be made against the other. In one instance, "action is brought, or in a case in which damages are sought for personal injury or death or damage to or loss of property occurring where the action is brought" during commercial activities made by the defendant government.<sup>158</sup> Another example is found in Section 174(c) of the Compact between Palau and the United States, which states that a claim may be referred to a US federal court for issues stemming from the Trust Territory era. Additionally, the Compacts of the FSM and RMI also allow their governments to seek judicial review in US federal courts for actions taken by the US federal government, especially related to the environment.<sup>159</sup>

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156 Ministry of Justice, "Tribunals," accessed at <https://www.justice.govt.nz/tribunals/>.

157 Republic of Palau Compact of Free Association, 1986: 1-33.

158 Republic of Palau Compact of Free Association, 1986: 1-33.

159 See Section 162 of the Compact of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands.

### *Status Example: The Republic of the Marshall Islands*

The Republic of the Marshall Islands (RMI) formally instituted its judiciary branch on March 3, 1982 after outlining its operations and functions in Article VI of its constitution.<sup>160</sup> Prior to the creation of the country's judicial branch, RMI's judicial processes went through courts established for the United Nations Trust Territory of the Pacific Islands. As outlined in RMI's constitution, the judiciary is considered independent of other branches of government.

Currently, the Judiciary of the Republic of the Marshall Islands has four levels of courts. The lowest level court is the Community Court, operating directly under the District Court, this set of courts oversees limited cases. On the second level, one will find the District Court and the Traditional Rights Court. The higher courts, called the High Court and the Supreme Court, are both considered a "superior constitutional court of record."<sup>161</sup>

In RMI, the lower courts play a unique role because of the geographical limitations of the country. Pacific scholar Kristina Stege, in her book chapter, "Marshall Islands," explains that in the RMI constitution, along with a central government, "the people of every inhabited atoll are guaranteed the right to a system of local government. Each district has its own constitution describing the manner in which a council, mayor, officials, and a local police force may be elected or appointed."<sup>162</sup> Therefore, the inhabited atolls are given what Stege refers to as a "de facto independence."<sup>163</sup> Recognizing these unique legal aspects, the higher courts in RMI are there to ensure that the lower courts do not abuse their relatively wide jurisdictions. For the higher courts, the High Court of the Republic of the Marshall Islands has general jurisdiction, meaning that it can hear any case for the first time that is brought to them. The High Court also has appellate jurisdiction and the ability to review the legalities of any decisions made by a RMI government agency.<sup>164</sup> The highest and most powerful court in RMI is the Supreme Court. The Supreme Court has appellate jurisdiction, in that it has final authority in all cases that are brought to it on appeal.<sup>165</sup> All processes of review allow for an intricate system of checks and balances.

Unlike the other courts, the Traditional Rights Court has special jurisdiction. Stege explains that the Traditional Rights Court "is the only court without original jurisdiction, advising on cases involving customary law and practices that are referred to it by other courts."<sup>166</sup> Judges in this court are selected to ensure that "a fair representation of all classes of land rights: Irojlaplap (high chief); where applicable, Irojjedrik (lower chief); Alap (head of commoner/worker clan); and Dri Jerbal (commoner/worker)."<sup>167</sup>

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160 Pacific Islands Legal Information Institute, "Marshall Islands Courts System Information," accessed at <http://www.pacilii.org/mh/courts.html>.

161 Pacific Islands Legal Information Institute, "Marshall Islands Courts."

162 Kristina Stege, "Marshall Islands," in *Pacific Ways: Government and Politics in the Pacific Islands*, ed. Stephen Levine (Wellington: Victoria University Press, 2009), 117.

163 Stege, "Marshall Islands," 118.

164 Republic of the Marshall Islands Judiciary, "The Judiciary's Courts and Personnel."

165 Pacific Islands Legal Information Institute, "Marshall Islands."

166 Stege, "Marshall Islands," 117.

167 Republic of the Marshall Islands Judiciary, "The Judiciary's Courts and Personnel."

In an independent Guam, the island would not have to appoint judges in this manner since we do not have an intact chiefly system. However, the Traditional Rights Court could be used for Guam to oversee cases pertaining to rights in various areas such as land, water, or for Guam’s indigenous people, especially if programs and policies like the CHamoru Land Trust remain intact.

As a freely associated state, Guam could have the ability to structure its court system in a way that best fits the values of the island’s judicial system. Neither the Republic of the Marshall Islands nor the Republic of Palau have judicial systems that are exact duplicates of those of the United States or any other existing country. They are free to keep the aspects of the US judicial system they like and can reshape the pieces that do not fit their countries. Therefore, as a freely associated state, Guam can decide how many court levels will fit its legal needs and how the judicial system will run in relation to other areas of Guam’s government. The island will also get to decide how to appoint and retain its legal practitioners and how to go about applying Guam’s laws in ways that promote transparency, accuracy, and accountability. Like RMI and Palau, Guam would be able to create more specialized courts to adjudicate over specific types of cases. A freely associated Guam can choose to either consolidate or expand our existing specialized courts (i.e. Adult/Juvenile Drug Courts and the Veterans Treatment Courts).

LEGAL/JUDICIAL PROCESSES	
STATUS	EFFECTS
<i>Statehood</i>	<ul style="list-style-type: none"> <li>• Guam will have the flexibility to create the state legal system. Each individual state determines its court system.</li> <li>• Guam will need to outline its legal structure in the state constitution.</li> <li>• The federal court system would continue to have jurisdiction over the island</li> </ul>
<i>Independence</i>	<ul style="list-style-type: none"> <li>• Guam can create its legal system without interference from other countries.</li> <li>• No country’s judiciary can supersede Guam’s judiciary.</li> <li>• Establishing rule of law will be incredibly important to domestic functioning of the new country as well as its international reputation and interactions</li> </ul>

## *Free Association*

- Guam can create its legal system without interference from other countries.
- The United States' judiciary will not supersede Guam's judiciary.
- If a compact is established, it might be written that Guam's judiciary cannot interfere with the United States. Special legal exceptions may be made. The compact may determine if and when the jurisdiction of each country overlaps.

